





*John Quincy Adams*

JOHN Q. ADAMS











~~Fourth~~ A ~~Second~~  
~~Edition~~  
NEW ABRIDGMENT  
OF THE  
OF THE  
L A W.

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By a GENTLEMAN of the *Middle Temple*.

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V O L. III.

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# T A B L E

O F T H E

## Several TITLES,

W I T H T H E I R

### D I V I S I O N S.

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V O L. III.

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**Habeas Corpus.**    Page 1.

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  2. To what Places it may be granted.
  3. In what Cases it is to be granted, and where it is the proper Remedy.
  4. How far the Courts have a discretionary Power in granting or denying it; and therein of the *Habeas Corpus Act*.
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  7. By whom to be returned.
  8. Of the Manner of compelling a Return, and the Offence of a false Return.
  9. What Matters must be returned together with the Body of the Party.
  10. Where the Return shall be said to be sufficient, and to warrant the Commitment.

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- 12. Whether any Defect in the Return may be amended.
- 13. What is to be done with the Prisoner at the Return; and therein of bailing, discharging or remanding him.
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  - 2. Of the Heirs General, or Heir at Common Law.
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- (C) *Of what Conditions, Covenants, &c. of the Ancestor's shall the Heir take Advantage.*
- (D) *What Conditions, Covenants, &c. shall extend to him, so as to bind him.*
- (E) *What Actions may be commence and prosecute in Right of his Ancestor.*
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- (G) *How to be proceeded against where he is bound.*
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    - 5. How far a Person is punishable for suffering such Absence in others.



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9. What

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- (D) *How a Jointenancy is created.*
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- (F) *What Words create a Jointenancy, and not a Tenancy in Common, &c. Converso.*
- (G) *Of the Duration and Continuance of the Estate, whether given jointly, or in Common; and therein where the Inheritance shall be said to be joint or several.*
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7. Of Severance by Compulsion of Law; and therein of the Writ de *Partitione faciendi*.

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3. That it must be made to herself, and not to others in Trust for her.

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3. By whom such Processes are to be executed, and the Jury convened.

4. In what Time such Processes are returnable.

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6. What Number are to be returned.

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2. Where

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3. Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge.
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7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.
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- (G) *How to be kept and discharged.*
- (H) *In what Cases and in what Manner to have a View.*
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- (L) *When and by whom to be paid.*
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- (B) *Of the first Institution, and general Statutes which give Justices of Peace a Jurisdiction.*
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- (D) *Who are qualified for the Office.*
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- (A) *Of what Things Leases may be made for Years.*
- (B) *Of the Persons by whom Leases may be made; and therein, 1. Of Leases by Infants.*

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- (D) *Of Leafes by Tenant in Tail: And herein,*
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    - Rule 2. When such Leafes are to begin: *And herein,*
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    - Rule 5. Of what Things Leafes may be made to bind the Successor.
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- (G) *Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons: And herein,*
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  3. What Estates they who make such Confirmation are to have.
  4. At what Time such Confirmation is to be made.
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- (I) *Of Leases made by those who have but a particular Estate or Interest in the Lands leased: And herein,*
1. Of Leases made by Tenant in Dower or Curtesy.
  2. Of Leases made by Tenant for Life.
  3. Of derivative Leases, or by one who is but a Lessee for Years himself.
  4. Of Leases made by a Disseisor or Disseisee.
  5. Of Leases made by Jointenants or Tenants in Common.
  6. Of Leases made by Copyholders.
  7. Of Leases made by Executors or Administrators.
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- (K) *By what Form of Words Leases may be made.*
- (L) *What Certainty is requisite to Leases for Years as to their Beginning, Continuance and Ending: And herein,*
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  2. With Regard to other Circumstances taken Notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.
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- (M) *In what Cases and to what Respects an Entry by the Lessee is requisite to the Performance of his Lease.*
- (N) *Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.*
- (O) *Leases for Years by Estoppel, how far and against whom such Leases are good.*
- (P) *Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.*
- (Q) *How far and by what Means Leases for Years in Trust to attend an Inheritance may be barred or destroyed.*
- (R) *Leases for Years, when merged by Union with the Freehold or Fee.*
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3. Of Surrenders in Law, or implied Surrenders: *And therein,*

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(T) *Leases, when determined by Cancelling the Deed.*

### **Legacies.** Page 465.

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(B) *Where a Legacy shall be said to be well given: And herein,*

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2. What shall be sufficient Description of the Person to take.
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(D) *Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.*

(E) *Of Legacies vested or lapsed: And herein,*

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Life-time of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.
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(F) *Of conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.*

(G) *Of specifick and pecuniary Legacies, and the Difference between them.*

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(K) *Of the Payment of Legacies: And herein,*

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2. At what Time a Legacy is to be paid.
3. Where the Legatee shall have Interest, and Maintenance in the mean Time.

(L) *Of the Executor's Assent to a Legacy.*

(M) *Legacies, in what Court, and how properly recoverable.*

### **Libel.** Page 490.

(A) *What shall be said a Libel: And herein,*

1. How far it is necessary that it should be in Writing.
2. What Degree of Defamation will amount to a Libel.
3. What Certainty in the Matter and Application will make it a Libel.
4. Whether any Proceedings in a Court of Justice will amount to a Libel.
5. Whether any Thing of this Kind can be justified.

(B) *Who shall be said a Libeller: And herein,*

1. Who shall be said the Author or Composer of a Libel.
2. Who the Publisher.

(C) *The Offenders how punished.*

Limit-

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## A Table of the several TITLES,

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### **Limitation of Actions:** Page 499.

- (A) *Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8.*
- (B) *Of the Limitation of real Actions pursuant to 32 H. 8. and 21 Jac. 1.*
- (C) *Of the Limitation of Time in regard to Actions on Penal Statutes.*
- (D) *Of the Limitation of Time in regard to personal Actions, pursuant to 21 Jac. 1. And herein,*
  - 1. *Of Actions of Assault and Battery.*
  - 2. *Of Actions of Slander.*
  - 3. *Of Actions arising upon Contract and founded in Maleficio: And herein,*
    - 1. *Of what Nature or Degree the Action must be, so as to be barred by the Statute.*
    - 2. *Whether a Trust or equitable Demand be within the Statute.*
    - 3. *At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.*
    - 4. *In what Court the Demand must be made, or what Courts are bound by the Statute.*
- (E) *Of the Exceptions in the Statute 21 Jac. 1. cap. 16. and what will save a Bar thereof: And herein,*
  - 1. *What Actions are within the Savings of the Statutes.*
  - 2. *Of the Exception in relation to Infants, &c.*
  - 3. *Of the Exception in relation to Accounts between Merchants.*
  - 4. *Of the Exception in relation to Persons beyond Sea.*
  - 5. *Where no Executor or Administrator to sue or be sued.*
  - 6. *Where no Jurisdiction to sue on, or hindered by some Authority.*
  - 7. *Where the Suing out a Writ will save the Bar of the Statute.*
  - 8. *Where a Debt barred by the Statute shall be said to be revived.*
- (F) *Of the Manner of Pleading and taking Advantage of the Statute of Limitations.*

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- (A) *What it is.*
- (B) *How punished.*

### **Maintenance, and the Offence of Buying or Selling a pretended Title.** Page 520.

- (A) *What shall be said to amount to an Act of Maintenance.*
- (B) *In what Respects some such Acts may be justified: And herein;*
  - 1. *How far they are justifiable in Respect of an Interest in the Thing in Variance.*
  - 2. *How far in Respect of Kindred or Affinity.*
  - 3. *How far in Respect of other Relations; as that of Lord and Tenant, Master and Servant.*
  - 4. *How far in Respect of Charity.*
  - 5. *How far in Respect of the Profession of the Law.*
- (C) *How Maintenance is restrained and punished by the Common Law.*
- (D) *How restrained and punished by Statute.*
- (E) *Of the Offence of Buying or Selling a pretended Title.*

**Mandamus.** Page 527.

- (A) *Of the Nature of the Writ ; and herein of the Suggeſtion and Manner of awarding thereof.*
- (B) *Of the Form thereof, and for what Irregularities it may be quaſhed or ſuperſeded.*
- (C) *In what Caſes to be granted: And herein,*
  - 1. *Where it lies to reſtore or admit a Perſon to an Office, and what ſhall be ſaid ſuch a Publick Office for which a Mandamus will lie.*
  - 2. *Where the Party's having another Remedy is a ſufficient Foundation to deny it; and therein of granting Mandamus's to reſtore Members of Colleges, &c.*
  - 3. *What Removal or turning out of an Officer will intitle him to a Mandamus.*
- (D) *Where it lies to inferior Courts, and Magiſtrates, to oblige them to do that Juſtice, which the Publick Good requires and the Law enjoins.*
- (E) *Of the Authority by which it Iſſues; and therein of the diſcretionary Power in the Court of Granting or Refuſing it.*
- (F) *To whom to be directed.*
- (G) *By whom to be returned.*
- (H) *Of the Manner of enforcing Obedience to the Writ, and compelling a Return.*
- (I) *What ſhall be ſaid a good Return.*
- (K) *Of traversing the Return, and taking Iſſue thereon.*
- (L) *Of the Party's Remedy for a falſe Return.*
- (M) *Of awarding a peremptory Return.*

**Maſter and Servant.** Page 544.

- (A) *Of the Manner of Hiring and Binding a Perſon Servant or Apprentice.*
- (B) *Who may ſerve or are capable of binding themſelves Servants or Apprentices.*
- (C) *Of the Jurisdiction of Juſtices of Peace in binding out Apprentices, in obliging Maſters to provide for them, in compelling them to refund the Money had with them, and in diſcharging Apprentices from their Maſters.*
- (D) *Of the Neceſſity of ſerving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. And herein,*
  - 1. *What ſhall be ſaid a Trade, which a Perſon is prohibited to follow, within the Statute.*
  - 2. *What Manner of following or exerciſing a Trade ſhall be ſaid within the Statute.*
  - 3. *What Kind of Service will be a ſufficient Qualification within the Statute.*
  - 4. *By whom the Offence of following a Trade without a Qualification is cognizable.*
  - 5. *Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.*
- (E) *Of aſſigning and turning over Apprentices to other Maſters.*
- (F) *Of making Apprentices free.*
- (G) *How Apprentices are to be taken Care of when their Maſters happen to die.*
- (H) *Of Servants Wages, how recoverable.*
- (I) *What Acts of the Servant are deemed the Maſter's, of which the Maſter may take Advantage.*

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- (K) *What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.*
- (L) *For what Acts of his shall the Servant himself answer to others.*
- (M) *For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,*
  - 1. *Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.*
  - 2. *Where Servants and Apprentices shall be punished criminally, for Acts done in relation to their Masters.*
- (N) *Of the Master's Authority over his Servant, and how far he may correct and punish him.*
- (O) *Of the Master's Remedies against others for enticing away, and other Injuries done, in relation to his Servant.*
- (P) *What a Master or Servant may justify doing in each other's Defence.*

### Marriage and Divorce. Page 569.

- (A) *What Persons may marry within the Levitical Degrees.*
- (B) *Of Espousals and Marriage Contracts; and therein of the Difference between Contracts in præsentia and futuro, and the Remedies for the Violation thereof.*
- (C) *Of the Solemnization and Ceremonies requisite to a compleat Marriage; and therein of the Offence of performing the Ceremony without due Authority or Licence.*
- (D) *Of Offences against the Rights of Marriage: And herein,*
  - 1. *Of the Offence of a forcible Marriage.*
  - 2. *Of the Offence of marrying an Infant Female under the Age of sixteen, without Consent of Guardian.*
  - 3. *Of the Offence of procuring an improvident Marriage; and therein of Marriage-Broking Contracts and Agreements.*
- (E) *Marriage how long to continue; and therein of the several Kinds of Divorces: And herein,*
  - 1. *Of Elopement.*
  - 2. *Of the Offence of taking away a Wife, and of criminal Conversation.*
  - 3. *Of the several Kinds of Divorces.*

### Merchant and Merchandize. Page 583.

- (A) *Of Alien Merchants.*
- (B) *Of Principals and Factors.*
- (C) *Of Partners and joint Traders.*
- (D) *Of Owners and Masters of Ships.*
- (E) *Of Mariners.*
- (F) *Of Average.*
- (G) *Of Hypothecation.*
- (H) *Of Charter-Parties.*
- (I) *Of Policies of Insurance.*
- (K) *Of Bottomry Bonds.*
- (L) *Of Bills of Exchange: And herein,*
  - 1. *Of the Nature and different Kinds of Bills of Exchange and negotiable Notes: And herein,*
    - 1. *Of Foreign Bills.*
    - 2. *Of Inland Bills.*
    - 3. *Of promissory and negotiable Notes.*

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2. What shall be said a Bill of Exchange, or negotiable Note, within the Custom of Merchants.
3. Who shall be said liable to the Payment thereof, and therein of suing the Drawer, Indorfor, or Acceptor.
4. Who shall be said intituled to the Money.
5. Of the Indorsement.
6. Of the Acceptance: *And herein,*
  1. What shall be said a good Acceptance.
  2. Where Acceptance shall bind.
  3. Whether an Acceptance may be qualified.
7. Of the Protest: *And herein,*
  1. Of the Necessity and Validity of the Protest.
  2. At what Time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refusal, so as to intitle the Party to Principal, Interest and Costs.
8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

### Misnomer and Addition. Page 615.

- (A) *What Names are the same, and may or may not be mistaken.*
- (B) *What Names and Additions are required by Law, and must be truly inserted: And herein,*
1. Of the Difference between the Christian Name and Surname.
  2. Of the Addition of the Estate or Degree.
  3. Of the Addition of the Mystery.
  4. Of the Addition of the Town, Hamlet, Place or County.
  5. Of Additions which are only Conveyances to the Action.
- (C) *Where the Name is truly put at first, and afterwards varied from.*
- (D) *Of the Difference between a Mistake in Grants, Obligations, &c. and judicial Proceedings.*
- (E) *At what Time the Mistake must be taken Advantage of, and how the same is saved.*
- (F) *Of the Manner of taking Advantage of, and pleading a Misnomer, or Want of Addition.*
- (G) *Who may take Advantage thereof.*

### Monopoly. Page 626.

- (A) *Monopoly, what it is, and how restrained by the Common Law.*
- (B) *How restrained by Statute.*

### Mortgage. Page 630.

- (A) *Of the Original and several Kinds of Mortgages.*
- (B) *What shall be deemed a Mortgage, or Estate redeemable.*
- (C) *Of the Nature of a Mortgage as to the distinct Interests of the Mortgagor and Mortgagee.*
- (D) *Of the legal Performance of the Condition.*
- (E) *Of the Equity of Redemption and Foreclosure: And herein,*
1. Who may redeem, and by whom the Mortgage-money shall be paid.
  2. To whom the Mortgage-money shall be paid.
  3. Of

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3. Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers ; and therein of their Remedies against each other, as well as against the Mortgagor.
  4. How far the Purchasing in a precedent Mortgage or Incumbrance will protect such Purchaser, and intitle him to a Precedency of Redemption.
  5. Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed.
  6. At what Time the Redemption must be.
  7. Of the Manner of redeeming and foreclosing.
- (F) *Mortgagees and their Assignees, how to Account, and what Allowances to make.*

### **Murder and Homicide.**      Page 661.

- (A) *In what Cases a Man may be said to kill another.*
- (B) *Who are such Persons, by killing of whom a Person may be said to commit Murder.*
- (C) *What shall be deemed Murder : And herein,*
1. Where it shall be said to be express Murder, and of Malice prepense.
  2. Where the Malice shall be said to be implied, or by Presumption of Law : *And herein,*
    1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.
    2. When done on an Officer or Minister of Justice.
    3. When done by Persons in the Execution of some other unlawful Act.
- (D) *Of Manslaughter, and therein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1.*
- (E) *Of justifiable Homicide : And herein,*
1. As it happens in the due Execution and Advancement of publick Justice.
  2. As it happens in the Defence of a Man's Person, House or Goods.
- (F) *Of excusable Homicide : And herein,*
1. Of Homicide *per infortunium*, or Chance-medley.
  2. Of Homicide *se defendendo*.

### **Nonsuit.**      Page 678.

- (A) *Of the Nature thereof, and how it differs from a Retraxit.*
- (B) *Who may be nonsuit.*
- (C) *In what Actions there may be a Nonsuit.*
- (D) *At what Time a Nonsuit may be.*
- (E) *How far the Nonsuit of one shall be the Nonsuit of another.*
- (F) *How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the whole.*
- (G) *Of the Effect of a Nonsuit ; and therein of its being a peremptory Bar.*

### **Nuisances.**      Page 685.

- (A) *What shall be said a Nuisance.*
- (B) *How far the Indictment must charge it to be an Annoyance to all the King's Subjects.*

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- (C) *How a Nuisance is to be removed or abated.*
- (D) *How the Offence is punishable.*
  - For Nuisances relating to the Highways, *vide Title Highways.*
  - For those relating to Bridges, *Title Bridges.*
  - For those relating to Publick Houses, *Title Inns and Innkeepers.*

### Obligations. Page 689.

- (A) *Of the Nature of the Security, called a Bond or Obligation.*
- (B) *What Words create such a Security.*
- (C) *Of the Ceremonies requisite to a Bond or Obligation; and herein of Signing, Sealing, Date and Delivery.*
- (D) *Of the Parties to the Obligation: And herein,*
  - 1. Who may bind themselves, or be Obligors.
  - 2. Who may take such Security, or be Obligees.
  - 3. Who shall be said the Obligee; and therein of making several Obligees.
  - 4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.
  - 5. Of their Remedies against each other.
- (E) *Of the Condition and Consideration of the Obligation: And herein,*
  - 1. Of possible and impossible Conditions.
  - 2. Of repugnant Conditions.
  - 3. Lawful and unlawful Conditions.
- (F) *Of the Breach and Performance of the Condition of an Obligation: And herein,*
  - 1. What shall be a Breach or sufficient Performance.
  - 2. Where there are disjunctive Conditions, how to be performed.
  - 3. By and to whom to be performed.
  - 4. At what Time to be performed.
  - 5. At what Place to be performed.
  - 6. What the Obligee must do in order to intitle him to take Advantage of the Breach; and herein of Notice, Request, &c.
  - 7. How the Breach must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

### Offices and Officers. Page 718.

- (A) *Of the Nature of an Office, and the several Kinds of Offices.*
- (B) *Offices, by what Authority created.*
- (C) *Who hath a Right of granting or assigning an Office; and therein of one Office's being incident to another.*
- (D) *Of the Grant of Offices by Ecclesiastical Persons.*
- (E) *Of the Ceremony requisite to a compleat Creation or Grant, and of the Oaths required by Statute.*
- (F) *Of the Offence of buying or selling an Office, and what Offices are prohibited to be thus disposed of.*
- (G) *What Remedies a Person having a Right to an Office must pursue, to let into the Enjoyment of it, and how a Disturbance is punishable.*
- (H) *Of the Nature of Offices as to their Duration and Continuance; and therein of their being grantable in Fee, for Life, Years, at Will and Reversion.*
- (I) *Offices by whom to be executed, and who are incapable thereof.*
- (K) *Of the Manner of executing them; and therein of Offices that are incompatible, and where an Office may be executed by two or more Persons.*

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- (L) *Of the Execution of an Office by Deputy; and therein of Superiors being answerable for their Deputies.*  
(M) *Of the Forfeitures of an Office.*  
(N) *Where for Corruption and oppressive Proceedings officers are punishable; and therein of Bribery and Extortion.*

### Outlawry. Page 745.

- (A) *In what Cases Process of Outlawry lies.*  
(B) *By what Jurisdiction such Processes are to issue.*  
(C) *Against whom Process of Outlawry may be awarded: And herein,*  
1. Whether it may be awarded against a Peer.  
2. Whether Process of Outlawry may be awarded against an Infant.  
3. Of awarding Process of Outlawry against a Feme sole or covert, and the Proceedings thereon.  
4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.  
5. Of awarding Process against Principal and Accessary.  
(D) *What Forfeitures and Disabilities an Outlawry subjects the Party to: And herein,*  
1. Where it is of the same Effect with a Sentence or Judgment.  
2. Of the Forfeiture as to Lands, Goods, &c. and therein of the Difference between Outlawries in criminal and civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had; *and herein,*  
1. Of the Difference between the Forfeiture in a Criminal and Civil Case.  
2. What Things are forfeited by the Outlawry.  
3. To what Time the Forfeiture shall relate.  
4. Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.  
3. Of the Party's Disability to bring any Action.  
4. What further Disabilities outlawry subjects the Party to.  
(E) *Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reversed: And herein,*  
1. Where, for want of such Process as required by Law, the Outlawry may be reversed.  
2. Where for Want of Form in such Processes the Outlawry may be reversed.  
3. Where for Variance in such Processes the Outlawry may be reversed.  
4. Where for a defective Execution and Return the Outlawry may be reversed: *And herein,*  
1. To whom such Process is to issue and be executed.  
2. To what Process the Place is to issue; and therein of the *Quinto exactus*, and Proclamations on an Outlawry.  
3. What shall be said a good Execution and Return.  
(F) *Of the Manner of Reversing an Outlawry; and therein of the Difference between Errors in Fact and in Law.*  
(G) *What the Party must do in order to intitle him to a Reversal: And herein,*  
1. Of appearing in Person or by Attorney.  
2. Of giving Bail.  
3. Of suing out a *Scire facias*.



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- (H) *The Effects and Consequences of a Reversal*; and herein,
1. Where the Proceedings on the Reversal are in the same Plight as if an Outlawry had been.
  2. To what the Party shall be restored on Reversal of the Outlawry.

### **Papists and Popish Recusants.** Page 779.

- (A) *The Disabilities, Restraints, Forfeitures and Inconveniencies which Popish Recusants are subject to*: And herein,
1. Of their Disability to bring any Action.
  2. Of bearing any publick Office or Charge.
  3. Of claiming any Part of a Husband's Personal Estate.
  4. Of claiming an Estate by Curtesy or by way of Dower, after a Marriage against Law.
2. *Of the Restraints they are put under*: And herein,
1. From going five Miles from home.
  2. From coming to Court.
  3. From keeping Arms.
  4. From coming within ten Miles of London.
3. *Of the Forfeitures they are liable to*: And herein,
1. That of two Parts of a Jointure or Dower.
  2. That of 20*l.* for not receiving the Sacrament yearly after Conformity.
  3. That of 100*l.* for an unlawful Marriage.
  4. That of 100*l.* for an Omission of lawful Baptism.
  5. That of 20*l.* for an unlawful Burial.
4. *Of the Inconveniencies they are subject to*: And herein,
1. That their Houses may be searched for Reliques, whether they be Men or Women.
  2. If they be women, and married, that they may be committed.
- (B) *Of the Offence of not making a Declaration against Popery, and the Restraints it subjects them to*: And herein,
1. From sitting in Parliament.
  2. Holding a Place at Court.
  3. From living within ten Miles of London.
  4. From keeping Arms.
- (C) *Of the Offence in promoting or professing the Popish Religion*: And herein,
1. Of the Offence of saying or hearing Mass or other Popish Service.
  2. Of giving or receiving Popish Education.
  3. Of buying or selling Popish Books.
  4. Of keeping School.
  5. Of with-holding a competent Maintenance from a Protestant Child.
  6. Of the Disability of those professing the Popish Religion to present to a Church.
  7. Of their Disability to purchase.

### **Pardon.** Page 801.

- (A) *By whom to be granted.*  
(B) *In what Cases, and for what Offences it may be granted.*  
(C) *Where a Pardon is grantable of common Right.*

(D) *Of*

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- (D) *Of the Validity of a Pardon; and therein by what Words, Treason, Murder, Felony, and other Offences may be pardoned; and herein of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.*
- (E) *Whether a Pardon may be conditional.*
- (F) *Who may take Advantage of a Pardon, and to whom it shall be said to extend.*
- (G) *In what Manner a Pardon is to be taken advantage of: And herein,*
  - 1. *In what Manner a General Pardon by Parliament is to be taken advantage of.*
  - 2. *In what Manner a particular Pardon under the Great Seal is to be taken advantage of.*
- (H) *The Effects and Consequences of a Pardon, and to what the Party shall be restored.*

### **Pauper.** Page 811.

- (A) *Of the Right to sue in forma pauperis, and the Manner of Admittance.*
- (B) *Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue, in forma pauperis.*
- (C) *In what Cases to be so admitted.*
- (D) *In what Cases to be dispaupered and to pay Costs.*

### **Perjury.** Page 814.

- (A) *What it is by the Common Law, and how restrained and punished.*
- (B) *How restrained and punished by Statute.*

### **Piracy.** Page 819.

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**Habeas**

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# Habeas Corpus.

(A) Of the Nature and several Kinds of Writs of Habeas Corpus.

(B) Of the Habeas Corpus ad Subjiciendum : And herein;

1. What Courts have a Jurisdiction of granting it.
2. To what Places it may be granted.
3. In what Cases it is to be granted, and where it is the proper Remedy.
4. How far the Courts have a Discretionary Power in granting or denying it: And therein of the *Habeas Corpus* Act.
5. Of the Manner of suing it out, and the Form of the Writ.
6. To whom it is to be directed.
7. By whom to be returned.
8. Of the Manner of compelling a Return, and the Offence of a false Return.
9. What Matters must be returned together with the Body of the Party.
10. Where the Return shall be said to be sufficient, and to warrant the Commitment.
11. Whether the Party can suggest any Thing contrary to the Return.
12. Whether any Defect in the Return may be amended.
13. What is to be done with the Prisoner at the Return: And therein of bailing, discharging, or remanding him.

(C) Of the Habeas Corpus ad faciendum & recipiendum.

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(A) Of the Nature and several Kinds of Writs of Habeas Corpus.

**W**HEREVER a Person is restrained of his Liberty by being confined in a common Gaol, or by a private Person, whether it be for a Criminal or Civil Cause, he may regularly by *Habeas Corpus* have his Body and Cause removed to some superior Jurisdiction, which hath Authority to examine the Legality of such Commitment, and on the Return thereof either Bail, Discharge, or Remand the Prisoner.

*Vaugh. 136.*  
*Busbet's Case.*  
And that it is  
at this Day  
the most u-  
sual Remedy  
to be relieved  
against a  
wrongful Im-  
prisonment.

2 *Inst.* 55. The *Habeas Corpus ad Subjiciendum* is that which issues in Criminal Cases, and is deemed (a) a Prerogative Writ, which the King may issue to any Place, as he has a Right to be informed of the State and Condition of the Prisoner, and for what Reasons he is confined. It is also in Regard to the Subject deemed his Writ of (b) Right, that is, such a one as he is intitled to (c) *ex debito Justitiæ*, and is in Nature of a Writ of Error to examine the Legality of the Commitment; and therefore commands the Day, the Caption, and Cause of Detention to be returned. But it is no original Writ. *Carter* 221. *per Vaughan*. (c) 4 *Inst.* 290.

For this *vide* *Infra*. The *Habeas Corpus ad faciendum & recipiendum* issues (d) only in Civil Cases, and lies where a Person is sued, and in Gaol, in some inferior Jurisdiction, and is willing to have the Cause determined in some superior Court, which hath Jurisdiction over the Matter; in this Case the Body and also a Matter of Crime be returned; as if a Person be arrested for Debt, and also charged with a Warrant of a Justice of Peace for Felony. 1. If it appear to the Judge or Court, that the Arrest for Debt, or other Civil Action, is fraudulent, they may remand him. 2. If it be found Real, they may commit him to the King's Bench with his Causes, tho' they are Matters of Crime; for that Court hath Conusance as well of the Crime as of the Civil Action; but then in the Term the Court may take his Appearance or Bail to the Civil Action, and remand him, if they see Cause, as to the Crime to be proceeded on below; but upon the Writ *ad faciendum & recipiendum*, there ought not singly a Matter of Crime to be returned, for that belongs to the *Habeas Corpus ad Subjiciendum*. 2 *Hal. Hist. P. C.* 145. & *vide* 6 *Mod.* 153.

*Tyer* 197. a. There is likewise a Writ of *Habeas Corpus ad respondendum*, where a Person is confined in Gaol for a Cause of Action accruing within some inferior Court; and a third Person hath also a Cause of Action against him; in which Case he may have this Writ in order to charge him in such superior Court; for inferior Courts being tied down to Causes arising within their own Jurisdiction, the Party would be without Remedy, unless allowed to sue him in another Court; (e) but it seems, that regularly a Person confined in *B. R.* cannot be removed to the *C. B.* by this Writ, nor *vice versa*; for in these Cases there can be no Defect of Justice, as these Courts have (f) Conusance as well of Local as Transitory Actions.

*Habeas Corpus*, and intending to go over to the *Fleet*, procures him some Friend to bring a *Habeas Corpus* to remove him thither, he shall not be removed thither till he has answered to the Cause in *B. R.* for he shall not compel the Plaintiff to follow after a Rolling Defendant; and to *vice versa* of the *Common Pleas*, each Court shall retain the Defendant where he is first attached, and after he has answered there, he may be carried any where. 1 *Salk.* 350. (f) And therefore this Writ lies not to a County Palatine. 1 *Salk.* 354 — nor to the Cinque Ports, unless the Action be local, so that they cannot have Conusance of it. 1 *Mod.* 20.

(g) There is also a Writ of *Habeas Corpus ad deliberandum & recipiendum*, which lies (b) to remove a Person

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*Corpus ad faciendum* after a Judgment; and on this Writ the Attorney for the Plaintiff must indorse the Number-Roll of the Judgment on the back of the Writ. *Styl. Regist.* 331. — *Habeas Corpus* upon a *Capi*, where the Party is taken and in Execution in the Court below. — So upon an Attachment out of Chancery, and a *Capi Corpus* returned by the Sheriff, the next Step is a *Habeas Corpus*; for the Sheriff having executed the Command of the Writ of Attachment by taking the Body, he cannot carry him out of the County without the King's Writ. — There is also a Writ of *Habeas Corpus ad testificandum*, which is to remove a Person in Confinement in order to give his Testimony in some Court of Justice; for which *vide* *Styl.* 119, 126, 230. 3 *Keb.* 51. *Comb.* 17, 48. (b) A Person committing a Crime in *Barbadoes*, and apprehended here, may be sent thither by *Habeas Corpus* and tried. 3 *Keb.* 560, 566, 568. *Warner's Case*. — Also since the *Habeas Corpus Act*, a Person committing a criminal Offence in *Ireland* being here, may be sent to *Ireland* and tried there. 2 *Vent.* 314. Colonel *Lundy's Case*. — Also Justices of Gaol-Delivery may send Prisoners by *Habeas Corpus* to the Sheriff of another County, and a Precept to the Sheriff of that other County to receive them, namely, for a Felony committed in that County, tho' that County be out of the Circuit of the Justice that sends them. 2 *Hale's Hist. P. C.* 37. — That if any *Habeas Corpus* come to receive a Prisoner from another Gaol, the Gaoler to take Notice of

Person to the proper Place or County, where he committed some Criminal Offence. of the Offence for which he

stood committed at the other Gaol, and to inform the Court, that if he shall happen to be acquitted, or have his Clergy, he may yet be remanded to the former Gaol, if there be Cause. *Kelynge* 4. And that if any *Habeas Corpus* come to the Gaolers to remove a Prisoner, that with the Prisoner they also certify the Cause for which he stood there committed. *Kelynge* 4.

## (B) Of the Habeas Corpus ad Subjiciendum: And herein,

### 1. What Courts have Jurisdiction of granting it.

IT is clear, that both by the Common Law, as also by the Statute, the Courts of Chancery and King's Bench have Jurisdiction of awarding this Writ of *Habeas Corpus*, and that without any Privilege in the Person for whom it is awarded; but it seems, that by the Common Law the Court of King's Bench could only have awarded it in Term-time, but that the Chancery might have done it as well out as in Term, because that Court is always open. *2 Inst.* 55. *4 Inst.* 290. *2 And.* 297. *2 Jon.* 13, 14, 17.

If the *Habeas Corpus* issues out of Chancery, and on the Return thereof the Lord Chancellor finds that the Party was illegally restrained of his Liberty, he may discharge him, or if he finds it doubtful he may bail him; but then it must be to appear in the Court of King's Bench, for the Chancellor hath no Power to proceed in Criminal Causes; or the Chancellor may commit the Party to the Fleet, and in Term-time may *Propriis manibus* deliver the Record into the King's Bench, together with the Body; and thereupon the Court of King's Bench may proceed to bail, discharge, or commit the Prisoner. *2 Hal. Hist. P. C.* 147. *2 Hawk. P. C.* 114-5.

If the *Habeas Corpus*, and also a *Certiorari*, be granted returnable in Chancery, and the Cause and Body be returned there, they may be sent into the King's Bench; if the Body only be returned with his Causes, by *Habeas Corpus* into the Chancery, and delivered over into the King's Bench, they may proceed to the Determination of the Return, and either by *Procedendo* remand him, or grant a *Certiorari* to certify the Record also, and thereupon commit or bail the Prisoner, as there shall be Cause. *2 Hal. Hist. P. C.* 147 8.

But the sending an *Habeas Corpus ad faciendum & recipiendum* by the Chancellor for Persons arrested in Civil Causes, especially being in Execution, is neither warrantable by Law nor ancient Usage, and particularly forbidden by the Statute *2 H. 5. cap. 2.* as to Persons in Execution. *2 Hal. Hist. P. C.* 145.

There are several strong Opinions, that no *Habeas Corpus ad Subjiciendum* could by the Common Law issue of the Courts of Exchequer or Common Pleas, unless it were in the Case of Privilege, because these Courts are confined to Civil Causes meerly; and therefore unless the Party were an Attorney, or intitled to the Privilege of the Court as an Officer, &c. or unless there had been a Suit commenced against him in those Courts, they could not grant a *Habeas Corpus ad Subjiciendum*, tho' they might any other Writ of *Habeas Corpus*. *Dyer* 175. b. pl. 26. *2 Inst.* 55. *3 Leon.* 18. *4 Inst.* 70, 182, 290. *1 Mod.* 235. *2 Mod.* 193. *Vaugh.* 155. *Carter* 221. *2 Vent.* 22.

But notwithstanding these Opinions it was holden in *Bushe's Case*, that the Court of Common Pleas may issue a *Habeas Corpus ad Subjiciendum*, and that if it appeared on the Return thereof that the Party was imprisoned and detained against Law, the Court might, tho' there was no Privilege in the Case, discharge him; for that to remand him would be an Act of Injustice in the Court, and contrary to *Magna Charta*. *Vaugh.* 155. and several Precedents of Writs of *Habeas Corpus* of this kind out of the Court of C. B.

Also of C. B.

- <sup>2</sup> *Hal. Hist.*  
*P. C.* 144. Also by the Statute of 16 *Car. 1. cap. 10.* they have an original Jurisdiction to bail, discharge, or commit, upon an *Habeas Corpus* for one committed by the Council-Table, as well as the King's Bench, and that altho' there be no Privilege for the Person committed.
- <sup>2</sup> *Jen.* 14. 17. Also by the *Habeas Corpus Act*, 31 *Car. 2.* any of the said Courts in Term-time, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation, may award a *Habeas Corpus* for any Prisoner whatsoever, and on the Return thereof discharge him, if it shall clearly appear that the Commitment was against Law, as being made by one who had no Jurisdiction of the Cause, or for a Matter for which no Man ought by Law to be punished; or bail him, if it shall be doubtful whether the Commitment were legal or not; or remand him, according to the Nature and Circumstances of the Case.

## 2. To what Places it may be granted.

- <sup>2</sup> *Rol. Abr.* 69. It hath been already observed, that the Writ of *Habeas Corpus* is a Prerogative Writ, and that therefore by the Common Law it lies to any Part of the King's Dominions; for the King ought to have an Account why any of his Subjects are imprisoned, and therefore no Answer will satisfy the Writ, but to return the Cause with *Paratum habeo Corpus*, &c.
- Palm.* 54. Hence it was held, that this Writ lay to (a) *Calice* at the Time it was
- (a) Error of subject to the King of *England*.  
a Judgment in the King's Bench in *Ireland*; it was suggested, that the Plaintiff was in Execution upon the Judgment in *Ireland*; and the Court seemed to be of Opinion, that a *Habeas Corpus* might be sent thither to remove him, as Writs Mandatory had been awarded to *Calais*, and now to *Jersey*, *Guernsey*. 1 *Vent.* 357. — A *Habeas Corpus* granted to *Jersey*. 1 *Sid.* 386.

- <sup>2</sup> *Rol. Abr.* 69. It hath been held, that this Writ lies to the *Marches of Wales*, as it does to all other Courts which derive their Authority from the King, as all the Courts exercising Jurisdiction within his Dominions do, and that it being a Prerogative, it does not come within the Rule *Brevia Domini Regis non currunt*, &c. for that must be understood of Writs between Party and Party.

- (b) But a *Habeas Corpus ad faciendum* & recipiendum does not lie to the Cinque Ports. 1 *Sid.* 431. (c) *Palm.* 54-5. 96. *Bourne's Case*. *Cro. Jac.* 543. S. C. adjudged. 2 *Rol. Abr.* 69. (d) *Latch* 160. *Folson's Case*. 3 *Keb.* 279.

Also by the *Habeas Corpus Act*, 31 *Car. 2. cap. — par. 11.* it is enacted and declared, 'That an *Habeas Corpus*, according to the Intent and true Meaning of the Act, may be directed and run into any County Palatine, the Cinque Ports, or other privileged Places within the Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick* upon *Tweed*, and the Isles of *Jersey* or *Guernsey*, any Law, &c.

## 3. In what Cases it is to be granted, and where it is the proper Remedy.

- Vaugh.* 136. A *Habeas Corpus* is a Writ of Right, which the Subject may demand, and is the most usual Remedy by which a Man is restored again to his Liberty, if he hath been against Law deprived of it.

By the 31 Car. 2. cap. 2. par. 9. it is enacted, ' That if any Subject of this Realm shall be committed to any Prison, or in Custody of any Officer or Officers whatsoever, for any criminal or supposed criminal Matter, that the said Person shall not be removed from the said Prison and Custody into the Custody of any other Officer or Officers, unless it be by *Habeas Corpus*, or some other legal Writ; or where the Prisoner is delivered to the Constable, or other inferior Officer, to carry such Prisoner to some common Gaol; or where any Person is sent by Order of any Judge of Assise, or Justice of the Peace, to any common Work-house or House of Correction; or where the Prisoner is removed from one Prison or Place to another within the same County, in order to a Trial or Discharge by due Course of Law; or in case of sudden Fire or Infection, or other Necessity, upon Pain, that he who makes out Signs or Counter-signs, or obeys or executes such Warrants, shall forfeit to the Party grieved One hundred Pounds for the first Offence, Two hundred Pounds for the second, &c.

If a Party be imprisoned against Law, tho' he is intitled to a *Habeas Corpus*, yet may he have an Action of false Imprisonment, in which he shall recover Damages in Proportion to the Injury done him.

*Fitz. corpus cum causa* 2.  
9 H. 6. 44.  
2 Inst. 55.

10 H. 7. 17. 5 Co. 64. March 117. 11 Co. 98, 99.

But it was held in *Bussell's Case*, who together with the other Jurors appointed to try an Indictment for a Riot between the King and *Pen* and *Mead*, were fined at the *Old Baily*, because they found a Verdict *contra plenam evidentiam & directionem curie in Materia Legis*; and for Non-payment of the Fine, divers of them being committed to Prison, who brought their *Habeas Corpus* in C. B. and the Imprisonment (a) held illegal; in several Conferences with all the Judges, that yet no Action lay against the Commissioners, because they acted as Judges and Commissioners of *Oyer and Terminer*, can no more be punished for an erroneous Commitment, than they can be for an erroneous Judgment; and the highest Remedy the Party in this Case can have is a Writ of *Habeas Corpus*.

1 Mod. 119.  
3 Keb. 322.  
558.  
(a) *Vaugh.*  
153.  
2 *Fon.* 13.  
1 *Sid.* 273.

If a Husband confine his Wife, she may have a *Habeas Corpus*; but the Judges on the Return of it cannot remove the Wife from her Husband.

2 Lev. 128.

A Motion was made for a *Habeas Corpus* to the Lord *Leigh*, for having in Court the Body of his Wife; and the Case was, the Parties were married in 1669, and because they were both within Age, no Settlement was made in 1671; Lord *Leigh* persuades his Wife to levy a Fine of some Lands of 900 l. per Ann. whereof she had the Inheritance, to him and his Heirs; and because she prayed to advise with her Friends, he confined her until her Mother had petitioned the King and Council, and there the Matter was referred to three Lords of the Council; and they made an Award, which the Lady *Leigh* was ready to perform; but the Lord *Leigh* brought to her an Instrument to be sealed, upon which she made the same Request as before, that she might advise with her Friends, but he refused to permit it, and presently compelled his Wife to go with him to his House in the Country, where he made her his Prisoner; and tho' by the barbarous Usage of her Husband she fell Sick, yet he would not let her have Physicians or Servants to attend her, or to be visited by her Friends; & per Cur. a *Habeas Corpus* was granted, for this is a Writ of Right, which the Subject may demand, and the King ought to have an Account of his Subject; and tho' it was objected that here was no Affidavit but of such Complaint as the Lady *Leigh* had made in a Letter to her Mother, yet the *Habeas Corpus* shall go to put the Lady in a Condition to make Oath of this Matter herself, and to exhibit Articles against her Husband; for here is sufficient Matter to compel him to find Sureties of the Peace, and of his good Behaviour also; for this Treatment the Lady may sue out a Divorce *propter sevitiam*;

Lady Leigh's Case. Mich. 26 Car. 2. in B. R.  
2 Lev. 128.  
3 Keb. 433.  
S. C.

*tiam*; and in a like Case between Sir *Philip Howard* and his Wife a *Habeas Corpus* was granted; and in this Case an Attachment may be granted against my Lord *Leigh*, if he refuses Obedience to the Writ, for being a Contempt, a Peer has no Privilege.

4 *Inst.* 290.

If a Person be taken in the Manner within a Forest killing or chasing Deer, &c. and the Officer upon Tender of sufficient Sureties refuses to bail him, he may have a *Habeas* out of the Courts at *Westminster*, which Courts may bail him to appear at the next Eyre holden for the Forest; and this the rather, because Justice-Seats are but seldom holden, and the Party, without this Remedy, might be obliged to continue a long Time in Confinement.

1 *Vern.* 24.  
*Dominus Rex*  
*ver. Sneller*;  
*& vid.* 1 *Sid.*  
 181.

If a Person be excommunicated, and the *Significavit* does not express that the Cause of Excommunication is for any of the Offences within the Statute 5 *Eliz.* the Remedy expressly appointed upon that Statute is a *Habeas Corpus*, and upon the Return of it the Parties shall be discharged.

1 *Keb.* 683.

1 *Salk.* 349.

*per Holt C. J.*

If the Chief Justice of the King's Bench commit one to the Marshal by his Warrant, he ought not to be brought to the Bar by Rule, but by *Habeas Corpus*.

*Cro. Car.* 176.

A Person convicted of Horse-stealing, and in Gaol at *St. Albans*, was brought by *Habeas Corpus* and *Certiorari* to *B. R.* and the Court demanded of him what he could say why Execution should not be done upon the Indictment; and because he could not shew good Cause to stay the Execution, he was committed to the Marshal, who was commanded to do Execution, and the next Day he was hanged.

2 *Hal. Hist.*

210, 211.

1 *Salk.* 352.

*Comb.* 2.

If a Person be in Custody, and also indicted for some Offence in the inferior Court, there must, beside the *Habeas Corpus* to remove the Body, be a *Certiorari* to remove the Record; for as the *Certiorari* alone removes not the Body, so the *Habeas Corpus* alone removes not the Record it self, but only the Prisoner with the Cause of his Commitment; and therefore, altho' upon the *Habeas Corpus*, and the Return thereof, the Court can judge of the Sufficiency or Insufficiency of the Return and Commitment, and bail or discharge, or remand the Prisoner, as the Case appears upon the Return; yet they cannot upon the bare Return of the *Habeas Corpus* give any Judgment, or proceed upon the Record of the Indictment, Order or Judgment, without the Record it self be removed by *Certiorari*; but the same stands in the same Force it did, tho' the Return should be adjudged insufficient, and the Party discharged thereupon of his Imprisonment; and the Court below may issue new Process upon the Indictment.

1 *Salk.* 352.

But it is otherwise in an *Habeas Corpus* in Civil Causes, which suspends the Power of the inferior Court; so that if they proceed after, their Proceedings are *coram non iudice*.

#### 4. How far the Courts have a Discretionary Power in granting or denying it: And therein of the Habeas Corpus Act.

4 *Inst.* 290.

3 *Bulf.* 27.

Notwithstanding the Writ of *Habeas Corpus* be a Writ of Right, and what the Subject is intitled to, yet the Provision of the Law herein being in a great Measure illuded by the Judges being only enabled to award it in Term-time, as also by an imagined Notion in the Judges, that they had a Discretionary Power of granting or refusing it; but especially by the Art and Contrivance of Officers, to whom it was directed, who used great Delays in making any Return to it.

By the 31 *Car. 2. cap. 2.* commonly called the *Habeas Corpus Act*, reciting, 'That great Delays had been used by Sheriffs, Gaolers, and  
 1 other



other Officers, to whose Custody the King's Subjects had been committed for Criminal or supposed Criminal Matters, in making Return of Writs of *Habeas Corpus*, by standing out an *Alias* and *Pluries*, and sometimes more, and by other Shifts, to avoid their yielding Obedience to such Writs, contrary to their Duty and the known Laws of the Land, whereby many Subjects had been detained in Prison in such Cases, where by Law they were bailable.

Thereupon it is enacted, ' That whensoever any Person shall bring any *Habeas Corpus*, directed unto any Person whatsoever, for any Person in his Custody, and the said Writ shall be served on the said Officer, or left at the Gaol or Prison with any of the Under-Officers, Under-Keepers, or Deputy of the said Officers or Keepers, that the said Officer or Officers, his or their Under-Officers, Under-Keepers, or Deputies, shall within three Days after such Service thereof, (unless the Commitment were for Treason or Felony, plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding 12 *d. per Mile*, and on Security given by his own Bond to pay the Charges of carrying back the Prisoner, if he should be remanded, and that he will not make any Escape by the Way, make Return of such Writ, and bring or cause to be brought the Body of the Party so committed or restrained unto or before the Lord Chancellor, or the Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to the Command thereof; and shall then likewise certify the true Causes of his Detainer or Imprisonment, unless the Commitment be in a Place beyond twenty Miles Distance, &c. and if beyond the Distance of twenty, and not above one Hundred Miles, then within the Space of ten Days; and if beyond the Distance of one Hundred Miles, then within the Space of twenty Days.

And it is further enacted, *par. 3.* ' That all such Writs shall be marked in this Manner, *Per statum tricesimo primo Caroli Secundi Regis*; and shall be signed by the Person that awards the same; and if any Person shall be or stand committed or detained as aforesaid for any Crime, unless for Treason or Felony, plainly expressed in the Warrant of Commitment, in the Vacation-time, it shall be lawful for such Person so committed or detained, (other than Persons convict or in Execution by legal Process) or any one on his Behalf, to complain to the Lord Chancellor, or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer, of the Degree of the Coif; and the said Lord Chancellor, &c. Justice or Baron, on View of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorized and required, on Request in Writing, by such Person, or any in his Behalf, attested and subscribed by (a) two Witnesses who were present at the Delivery of the same, to grant an *Habeas Corpus* under the Seal of the Court, whereof he shall be one of the Judges, to be directed to the Officer in whose Custody the Party shall be, returnable *immediate* before the said Lord Chancellor, &c. Justice or Baron; and on Service thereof as aforesaid, the Officer, &c. in whose Custody the Party is, shall, within the Times respectively before limited, bring him before the said Lord Chancellor, Justice, or Baron, before whom the said Writ is returnable; and in case of his Absence, before any other of them, with the Return of such Writ, and the true Causes of the Commitment and Detainer; and thereupon, within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice, or Baron, before whom the Prisoner shall be brought as aforesaid, shall discharge the said Prisoner from his Imprison-

(a) One Witness with an Affidavit that the other is sick is sufficient. *Comb. 6.*

ment,

ment, taking his Recognizance, with one or more Sureties, in any Sum, according to their Discretions, having Regard to the Quality of the Prisoner, and Nature of the Offence, for his Appearance in the King's Bench the Term following, or in such other Court where the Offence is properly cognizable, as the Case shall require; and then shall certify the said Writ, with the Return thereof, and the Recognizance into such Court, unless it be made appear to the said Lord Chancellor, &c. that the Party so committed is detained upon a legal Process, Order or Warrant, out of some Court that hath Jurisdiction of Criminal Matters, or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such Matters or Offences, for the which by Law the Prisoner is not bailable.

But it is provided, *par. 4.* ' That if any Person shall have wilfully neglected, by the Space of two whole Terms after his Imprisonment, to pray a *Habeas Corpus* for his Enlargement, he shall not have a *Habeas Corpus* to be granted in Vacation-time in Pursuance of this Act.

And it is further enacted by the said Statute, *par. 6.* ' That no Person, who shall be set at large upon any *Habeas Corpus*, shall be again imprisoned for the same Offence by any Person whatsoever, other than by the legal Order and Process of such Court, wherein he shall be bound by Recognizance to appear, or other Court having Jurisdiction of the Cause, on Pain of 500 *l.*

(a) Need not enter his Prayer the first Week, if there be an Act of Parliament which suspends the *Habeas Corpus* Act, and takes away the Power of bailing for a

And it is further enacted, *par. 7.* ' That if any Person, who shall be committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment, upon his Prayer or Petition in open Court the (a) first Week of the (b) Term, or the first Days of the Sessions of *Oyer and Terminer*, or General Gaol-Delivery, to be brought to his Trial, shall not be indicted some Time in the next Term, Sessions of *Oyer and Terminer*, or General Gaol-Delivery, after such Commitment, the Justices of the said Court shall, upon Motion in open Court, the last Day of the Term, or Sessions, set at Liberty the Prisoner upon Bail, unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term; and if such Prisoner upon his Prayer, &c. shall not be indicted and tried the second Term or Sessions, he shall be discharged from his Imprisonment.

Time. 1 *Salk.* 103. (b) That to this Purpose the Grand Sessions of *Wales* is in the Nature of a Term, so that the Party entering his Prayer there on the Want of Prosecution for a Term, *B. R.* may bail him. *Comb.* 6.

Provided, *par. 8.* ' That nothing in this Act shall extend to discharge out of Prison any Person charged in Debt, or other Action, or with Process in any Civil Cause, but that after he shall be discharged of his Imprisonment for such his Criminal Offence, he shall be kept in Custody according to Law for such other Suit.

(c) And therefore this Statute makes the Judges liable to an Action at the Suit of

And it is further enacted, *par. 10.* ' That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his *Habeas Corpus*, as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas; and if the said Lord Chancellor, or Lord Keeper, or any Judge or Judges, Baron or Barons, for the Time being, of the Degree of the Coif, of any of the Courts aforesaid, in the (c) Vacation-time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that such Copy was denied, shall deny any Writ of *Habeas Corpus* by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved the Sum of 500 *l.*

the Party grieved in one Case only, which is the Refusing to award a *Habeas Corpus* in Vacation-time, but leaves it to their Discretion, in all other Cases, to pursue its Directions in the same Manner as they ought to execute all other Laws, without making them subject to the Action of the Party, or to any other express Penalty or Forfeiture. 2 *Hawk.* P.C. 92.

It is provided, *par.* 18. ‘ That after the Assises proclaimed for that County where the Prisoner is detained, no Person shall be removed from the common Gaol upon any *Habeas Corpus* granted in Pursuance of this Act, but upon such *Habeas Corpus* shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain.

But it is provided, *par.* 19. ‘ That after the Assises are ended, any Person detained may have his *Habeas Corpus*, according to the Direction of this Act.

In the Construction of this Statute it was held by two Judges, in the Absence of one, and contrary to the Opinion of the other, that Persons committed by Rule of Court are not intitled to the Benefit of this Act; and that none are intitled to make their Prayer but such as are committed by a Warrant of a Justice of Peace, or Secretary of State, and not those committed by Rule of Court, for that is not within the Meaning of the Act, which speaks of a Commitment by Warrant. *Cases in Law and Equity* 429.

## 5. Of the Manner of suing it out, and Form of the Writ.

By the (a) 1 & 2 Ph. & M. cap. 13. ‘ No Writ of *Habeas Corpus* or *Certiorari* shall be granted to remove any Prisoner out of any Gaol, or to remove any Recognizance, except the same Writs be (b) signed with the proper Hands of the Chief Justice, or in his Absence, of one of the Justices of the Court, out of which the same Writ shall be awarded or made, upon Pain that he that writeth any such Writs, not being signed, as is aforesaid, to forfeit for every such Writ 5*l.*

(a) And the 31 Car. 2. *supra*, every *Habeas Corpus* pursuant to that Statute shall be marked in this Manner, Per Statu-

tum tricesimo primo Caroli Secundi Regis, and shall be signed by the Person that awards the same.— for the Form of the Writ *vide* 2 Inst. 53-4 (b) *Vide* 1 Salk. 150. pl. 19.

A *Habeas Corpus* was prayed to the Gaoler of the County Gaol of Worcester, to remove one Fox in B. R. to assign Errors in Person, upon the Record of his Conviction of a *Premunire* for Recusancy; but this was not granted till the Writ of Error was brought into Court under Seal, and the Record certified. *Mish.* 26 Car. 2. Fox's Case.

Every *Habeas Corpus ad Subjiciendum* must in Term-time be awarded on Motion and Leave of the Court, but a *Habeas Corpus ad faciendum* & *recipiendum* is usually granted without Motion, as it relates to a Civil Affair only. 2 Mod 306.

So where Debt was brought against Husband and Wife on an Obligation sealed by them both, and both being taken by *Capias*, it was moved for an *Habeas Corpus* to bring them into Court, to the Intent that the Husband only might be committed in Custody, and the Wife discharged; and it was held by the Court, that this *Habeas Corpus* for removing the Bodies might have been for them without Motion, but where the Party is committed for a Crime, there it ought to be on Motion. 1 Lev. 1. Slater and Slater.

## 6. To whom it is to be directed.

Wherever a Person is imprisoned by any Person whatsoever, whether he be one concerned in the Administration of Justice, as a Sheriff, Gaoler, &c. or a private Person, such as a Doctor of Physick, who confines a Person under Pretence of curing him of Madnefs, &c. the *Habeas Corpus* must be directed to him. *Godb.* 44.

A *Habeas Corpus* was directed to the Chancellor of Durham, by which he was directed to make a Precept to the Sheriff to have the Body of *Hill* 25 & 26 Car. 2. in B. R. 3 Feb. J. S. 279. S. C.

7. S. with the Cause of his Commitment, *coram Domino Rege apud Westm'*; the Chancellor returned, that he made a Precept to the Sheriff to have his Body before him, with the Cause of, &c. who accordingly returned the Cause and the Body before him, and sets out the Cause, & *hæc est Causa detentionis*; & per Hale C. J. A *Habeas Corpus ad faciendum* & *re-  
cipiendum* directed in this Manner is good; *secus* of a *Habeas Corpus ad  
Subjiciendum*; for the King may send his Writ to whom he pleases, and  
he must have an Answer of his Prisoner wherever he be; there is a great  
deal of Difference between a *Habeas Corpus ad Subjiciendum* and other  
*Habeas Corpus*; for this is the Subject's Writ of Right, in which Case  
the County Palatine hath no Privilege; in 31 E. 1. a *Habeas Corpus ad  
Subjiciendum* was directed to the Bishop of Durham, who returned, that  
he was a Count Palatine, and therefore was not bound to Answer the  
Writ, for which he was fined 4000 l. *Hill. 17 Car. 1.* a *Habeas Corpus* was  
directed to the Bishop of Durham to return the Body of one *Rickoby*; and  
resolved, that the Writ did well run thither: In this Case the Writ  
is directed to the Chancellor, to command the Sheriff to have his Body  
here; but he commands him to have the Body before himself, which is  
ill; again, the Chancellor doth not return the Body to us, for here is  
no *Cujus Corpus Parat' habeo*; it is not enough for him to say, that the  
Sheriff returned the Body to him, but he ought to return it to us here;  
we have nothing before us, therefore he must be remanded, for he is  
brought up without a Warrant.

1 Salk. 350.  
per curiam.

A *Habeas Corpus* directed in the Disjunctive to the Sheriff or Gaoler  
is wrong; but where a Man is taken on a Warrant of the Sheriff, in  
Pursuance of a Writ to the Sheriff, the *Habeas Corpus* ought to be di-  
rected to the Sheriff, for the Party is in his Custody, and the Writ it  
self must be returned; otherwise it is where one is committed to the  
Gaoler immediately, as in Cases Criminal.

## 7. By whom it is to be returned.

This Writ must be returned by the very same Person to whom it is  
directed.

Pasch. 26 Car.  
2. Peck and  
Cresset.

A *Habeas Corpus* was awarded to the Sheriff of — who before the  
Return leaves the Office, and a new Sheriff is made, who returns *Lan-  
guidus*; this Return is not good, but it ought to be returned by them  
two, the first that he had the Body, and had delivered it to the new  
Sheriff, and the new Sheriff may then return *Languidus*.

## 8. Of the Manner of compelling a Return, and the Of- fence of a false Return.

F. N. B. 68.  
11 H 4 86.  
1 Mod. 195.  
2 Lev. 128-9.  
5 Mod. 21.

The Method to compel a Return to a *Habeas Corpus* is by taking out an  
*Alias* and *Pluries*, which if disobeyed, an Attachment issues of Course;  
also the Court may make a Rule on the Officer to return his Writ, and  
if disobeyed, the Court may proceed against such Disobedience in the  
same Manner as they usually do against the Disobedience of any other  
Rule.

And by the 31 Car. 2. cap. 2. par. 2. it is enacted, ' That if any Officer,  
' &c. shall neglect or refuse to make Returns, as by the Act is directed,  
' or to bring the Body of the Prisoner, according to the Command of the  
' Writ, or shall not within six Hours after Demand deliver a true Copy  
' of the Commitment, &c. he shall forfeit for the first Offence 100 l. for  
' the second Offence 200 l. and be made incapable to hold his Office.

A *Habeas Corpus* went to the *Stannary Court*, to which an insufficient Return was made, and therefore disallowed; & *per Cur.* the Warden of the *Stannaries* must be amerced, and you may go to the Coroners and get it affeered, and escheat it, and an *Alias Habeas Corpus* must go for the Insufficiency of the Return of the first, and upon that the Body and Cause must be removed up; if another Excuse be returned, we will grant an Attachment.

And as a Gaoler, &c. is obliged to bring up the Prisoner at the Day prefixed by the Writ, it is no Excuse for not obeying of a Writ of *Habeas Corpus ad Subjiciendum*, that the Prisoner did not tender the Fees due to the Gaoler; nor yet is the Want of such Tender an Excuse for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*; but if the Gaoler bring up the Prisoner by Virtue of such *Habeas Corpus*, the Court will not turn him over till the Gaoler be paid all his Fees.

For a false Return there is regularly no Remedy against the Officer, but an (a) Action on the Case at the Suit of the Party grieved, and an Information or Indictment at the Suit of the King.

until the Return be filed.

But it has been held, that if a Gaoler return one *Languidus* when the Party himself brings his *Habeas Corpus*, and is in good Health, an Attachment shall issue against him; *secus* if the *Habeas Corpus* was brought by another.

## 9. What Matters must be returned together with the Body of the Party.

As upon the Return of the Writ the Court is to judge, whether the Cause of the Commitment and Detainer be according to Law or against it; so the Officer or Party, in whose Custody the Prisoner is, must, according to the Command of the Writ, certify on the Return thereof the Day, Cause of Caption and Detainer.

A *Habeas Corpus* was directed to remove one *J. S.* to which no Return was made; then an *Alias* was granted, and it was returned *quod traditur in ballium ante adventum ipsius Brevis*; and the Truth of the Case was, that between the first and second Writ the Party was bailed; & *per Cur.* after an *Habeas Corpus* delivered, the Party cannot be bailed; and if it happens otherwise, yet the Cause of the Commitment ought to be returned, tho' the Body cannot be brought into Court; and in this Case the Officer having on the first Writ of *Habeas Corpus* taken 5*l.* to have the Body in Court, and yet making no Return, the Court granted an Attachment against him.

Where a Commitment is in Court to a proper Officer there present, there is no Warrant of Commitment; and therefore to a *Habeas Corpus* he cannot return a Warrant *in hec verba*, but must return the Truth of the whole Matter, under Peril of an Action; but if he be committed to one that is not an Officer, there must be a Warrant in Writing, and where there is one it must be returned; for otherwise it would be in the Power of the Gaoler to alter the Case of the Prisoner, and make it either better or worse than it is upon the Warrant; and if he may take upon him to return what he will, he makes himself Judge; whereas the Court ought to judge, and that upon the Warrant it self.

If a Person in Custody on an *Excommunicato capiendo* brings a *Habeas Corpus*, the Writ of *Excommunicato capiendo* it self must be returned, as well as the Sheriff's Warrant for taking him, because the Warrant may be wrong when the Writ is right; and tho' the Warrant be wrong, yet if the Writ is right, the Party is rightfully in Custody of the Sheriff.

Upon

*Pasch. 18 Car.*  
2. *Taylor's*  
*Case.*

Upon a *Habeas Corpus* directed to the Constable of *Windsor-Castle*, to remove the Body of one Mr. *Taylor* a Barrister, at the Day of the Return of the Writ, a Soldier brought in the Prisoner into Court, and the Writ, and the Warrant by which he was committed; but the Court held it no Manner of Return, for it ought to be entred in *Latin*, and engrossed in due Form.

### 10. Where the Return shall be said to be certain and sufficient to warrant the Commitment.

*Vaugh. 157.*

It is said in general, that upon the Return of the *Habeas Corpus* the Cause of the Imprisonment ought to appear as specifically and certainly to the Judges, before whom it is returned, as it did to the Court or Person authorized to commit.

But for this  
vide Head of  
Commitment,  
Head of Bail  
in Criminal  
Cases, and  
1 *Hal. Hist.*  
*P. C.* 584.  
*Skin.* 676.

For if the Commitment be against Law, as being made by one who had no Jurisdiction of the Cause, or for a Matter for which by Law no Man ought to be punished, the Court are to discharge him, and therefore the Certainty of the Commitment ought to appear; and the Commitment is liable to the same Objection where the Cause is so loosely set forth, that the Court cannot adjudge whether it were a reasonable Ground of Imprisonment or not.

12 *Co.* 130-1.  
*Trin. 22 Car.*  
in *C. B. Rudy-*  
*yard's Case.*

*Rudyard* an Attorney of *C. B.* being committed to *Newgate* by my Lord Mayor and Sir *John Robinson*, for refusing to give Security for his good Behaviour, was brought by *Habeas Corpus* to the *C. B.* and it was returned as the Cause of his Commitment, that whereas he had been complained of to my Lord Mayor and Sir *John Robinson* for several Misdemeanors, particularly for inciting his Majesty's Subjects to the Disobedience of his Majesty's Laws, more particularly of an Act of Parliament made in the 22d Year of his Reign, against seditious Conventicles; and whereas he had been examined before them for abetting such as abetted seditious Conventicles, contrary to the Statute 22 *Car. 2.* and upon his Examination they found Cause to suspect him, therefore they requested Sureties of him for his good Behaviour, and for Refusal committed him. *Wild*, Justice, was of Opinion, that by abetting such as frequented seditious Conventicles, must be intended abetting them in that Particular, and signifies as much as encouraging them to frequent such Conventicles, and finding Cause to suspect him, &c. (which cannot now be questioned, for the Return is admitted) they may well send him to Prison, and therefore he ought to be remanded. But *Vaughan C. J. Tyrrel*, and *Archer*, were of a contrary Opinion: 1. Because it does not appear but that he might abet the Frequenters of Conventicles in a Way which the Law allows, as by soliciting an Appeal for them, or the like. 2. To say that he was complained of, or that he was examined, is no Proof that he was guilty; and then to say, that they had Cause to suspect him, is too cautious; for who can tell what they may count a Cause of Suspicion, and how can that ever be tried? At this Rate they would have Arbitrary Power, upon their own Allegation, to commit whom they pleased, whereas they cannot require Sureties for any Man's Behaviour, and consequently not commit for Refusal, unless the Justices have any Thing against him of their own Knowledge, or by Proofs of Witnesses that tend to a Breach of the Peace; upon this Return *Archer* declared his Opinion to be, that he should not be remanded, but give his own Recognizance to appear in Court the next Term, to answer any Thing that should be alledged against him; but *Vaughan* and *Tyrrel* were for his absolute Discharge; for seeing by the Return it did not appear there was any Cause for his Commitment, they thought they had no Reason

Reason to require a Recognizance of him. Thereupon *Wild* moved, that he could not be discharged, there being but two for it. But *Archer* replied, that it had been several times ruled, that where there were three Opinions, that was taken to be *per Cur.* which had two of the Judges for it: And accordingly *Rudyard* was discharged. *Vaughan* and *Tyrrel* made another Objection to the Return, *viz.* that they should have expressed the Sum in which they required him to give Security, (which they had not done;) for they said that those Persons, that might be willing to be bound for him in 40 *l.* might not be willing to be bound for him in 100 *l.* &c. and therefore till he knew the Sum he could not know whom to provide. But as to this it was said, that *Rudyard* had refused absolutely to give any Security, and therefore it was to no purpose to tell him of the Sum; if he had consented to give Security, then the Justices ought to have told him the Sum.

### II. Whether the Party can suggest any thing contrary to the Return.

It seems to be agreed, that no one can in any Case controvert the Truth of the Return to a *Habeas Corpus*, or plead or suggest any Matter repugnant to it: Yet it hath been holden, that a Man may confess and avoid such a Return by admitting the Truth of the Matters contained in it, and suggesting others not repugnant, which take off the Effect of them.

Upon a *Habeas Corpus* it was returned, that *Swallow*, a Citizen of *London*, was fined for Alderman, and was committed for his Fine by the Judgment of the Court in *London*. *Swallow* alledged, that he was an Officer of the Mint, and by an antient Charter of Privilege granted to the Minters or Moneyers he ought to be exempted. It was at first doubted whether he might not plead this to the Return, it being a Matter consistent with it. Upon the Statute *W. 2.* it is held the Parties may come in and plead, and so upon 5 *Eliz.* but here there is a Difference; for he might have pleaded this in the Court below, but now that is past, and here is a Judgment and Execution. Another Day *Swallow* brought into Court a Writ of Privilege upon that Charter, and the Recorder prayed that it might not be allowed against the antient Customs of the City; for if such a Way might exempt Men, they should have little Benefit by Fines in such Cases: But *per Cur.* the Privilege ought to be allowed, for it is very antient, and it appears he has an Office of necessary Attendance elsewhere, which makes the Privilege reasonable. The King may by his Charter exempt from Juries, if there be enough besides, much more here; and if there be not sufficient besides, upon shewing of that, the Privilege ought to be suspended; and *Swallow* may be discharged by this Court now as well as he could at first, or as if he had taken upon him the Aldermanship. This Court is supreme and mandatory in such Cases. And he was accordingly discharged.

Also the Court will sometimes examine by Affidavit the Circumstances of a Fact, on which a Prisoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themselves, on Examination of the whole Matter, whether it be reasonable to bail him or not: And agreeably hereto (a), where one *Jackson*, who had been indicted for Piracy before the Sessions of Admiralty on a malicious Prosecution, brought his *Habeas Corpus* in the said Court, in order to be discharged or bailed, the Court examined the whole Circumstances of the Fact by Affidavits; upon which it appeared that the Prosecutor himself, if any one, was guilty, and carried on the present Prosecution to screen himself: And thereupon the Court, in Consideration of the Unreasonableness of the Prosecution, and

*Cro Eliz.* 821.  
5 Co. 71. b.  
2 Hawk. P. C.  
113.

*Pass. b.* 18 Car.  
2. in B. R.  
*Swallow's*  
Case, 1 Sid.  
287.  
2 Keb. 50. 54.  
&c.

5 Med. 323.  
454  
2 Jon. 222.

(a) Trin 4.  
Georg 1.

the Uncertainty of the Time when another Sessions of Admiralty might be holden, admitted the said *Jackson* to Bail, and committed the Prosecutor till he should find Bail to answer the Facts contained in the Affidavits.

## 12. Whether any Defect in the Return may be amended.

1 Mod. 102.  
103.

It seems that, before the Return is filed, any Defect in Form, or the Want of an Averment of a Matter of Fact may be amended; but this must be at the Peril of the Officer, in the same manner as if the Return were originally what it is after the Amendment.

1 Mod. 102.  
103.

But after the Return is filed it becomes a Record of the Court, and cannot be amended.

Hill. 26 & 27  
Car. 2. in B.  
R. Emerton  
ver. Sir Rob.  
Viner, 2 Lev.  
128. 3 Keb.  
454, 447.  
S. C. 3 Mod.  
164. S. C.  
cited.

So after a Rule to have the Return filed; as where a *Habeas Corpus*, Alias & *Pluries* was directed to Sir Robert Viner, Mayor of London, to have the Body of *Bridget*, Daughter and Heir of Sir *Thomas Hyde*, deceased; and upon the *Pluries* he returned *quod tempore receptionis hujus Brevis nec unquam posita non fuit infra custodiam meam*; and the Counsel of the Lord Mayor expounded this Return that she was within the House of the Lord Mayor, but not detained in Custody *prout per Breve supponitur*; & *per Cur.* this is an insufficient Return; for he ought to say not only *tempore receptionis hujus Brevis*, *sed alicujus*, upon Return of a *Pluries*. Then a Question was if the Return could be amended; for tho' a Rule was made that the Return should be filed, yet this was not actually done; but *per Cur.* this is filed by the Rule of the Court, and after cannot be amended; and this Return the Court held to be equivocal; for it is well enough known that she is not detained *in Ferris*; but tho' she hath the Liberty of the House, if she cannot go out of the House, or not without a Keeper, she is within his Custody; and the Court shall adjudge what sort of Custody is intended by the Writ.

## 13. What is to be done with the Prisoner at the Return; and therein of bailing, discharging, or remanding him.

3 Mod. 22.  
Styl. 16.

Upon the Return of the *Habeas Corpus* the Prisoner is regularly to be discharged, bailed, or remanded; but if it be doubtful which the Court ought to do, it is said that the Prisoner may be bailed to appear *de Die in Diem* till the Matter is determined.

(a) By the  
*Habeas Corpus*  
Act 31 Car.  
2. cap. 2. par.  
3. the Lord  
Chancellor,  
&c. shall

within two Days after the Return of the *Habeas Corpus* take Order, &c. and bail or remand the Prisoner. (b) That is, after the Return filed, for before then there is nothing before the Court.  
3 Mod. 22.

1 Vent. 330.

(c) As was  
done in *Rob.*  
*Peyton's Case*,  
who was re-  
manded to  
the Tower.

Also it hath been ruled, that the Court of King's Bench may, after the Return of the *Habeas Corpus* is filed, remand the Prisoner to the (c) same Gaol from whence he came, and order him to be brought up from time to time, till they shall have determined whether it is proper to bail, discharge, or remand him absolutely.

1 Vent 346.

1 Salk. 348.

3 Mod 19, 20.

And tho' in doubtful Cases the Court is to bail or discharge the Party on the Return of the *Habeas Corpus*; yet if a Person be convicted, and the



the Conviction on the Return of the *Habeas Corpus* appears only defective in Point of Form, it is at the Election of the Court either to discharge the Party, or oblige him to bring his Writ of Error.

If on the Return of the *Habeas Corpus* it appears that the Contest relates to the Right of Guardianship, tho' the Court will not determine that Point, yet will it set the Infant at Liberty, so as to let him chuse where he will go till that Matter is determined; or if there be any Danger of Abuse, will order him into such Hands as will take effectual Care of him.

### (C) Of the Habeas Corpus ad faciendum & recipiendum.

THE *Habeas Corpus ad faciendum & recipiendum* is used only in Civil Causes, and lies for removing Suits out of an inferior to some superior Court, at the Application of the Defendant, who may imagine himself injured by the Proceedings of such inferior Court.

This Writ suspends the Power of the Court below; so that if they proceed after, the Proceedings are (a) void, and *coram non Judice*.

Writ of *Habeas Corpus* it is Error to proceed after. *Cro. Car.* 261. *Ellis ver. Johnson.* 2 *Jen.* 209. *S. P.* adjudged. That if a *Habeas Corpus* be directed to an inferior Court returnable two Days after the End of the Term, yet the inferior Court cannot proceed contrary to the Writ of *Habeas Corpus*. 1 *Mod.* 195.

By this Writ the Proceedings in the inferior Court are at an End; for the Person of the Defendant being removed to the superior Court, they have lost their Jurisdiction over him, and all the Proceedings in the superior Court are *de novo*, and (b) Bail *de novo* must be put in in the superior Court.

yet if in the inferior Court special Bail was requisite, there shall be special Bail in the Court above. But for this *vide Tit. Bail, Letter B.*

And altho' this Writ be a Writ of Right, yet where it is to abate a rightful Suit the Court may refuse it; as where an Action of Debt was brought against a Feme Sole in the Palace Court, who, after Appearance and Plea pleaded, married, and then removed the Cause by *Habeas Corpus* to *B. R.* where she pleaded her Coverture in Abatement; and the Court held, that if this Matter had been moved on the Return of the *Habeas Corpus*, they would have granted a *Procedendo*; but that now the Plea in Abatement must be held good; for the Proceedings are *de novo*, and the Court takes not Notice of the Proceedings below, or of what preceded the *Habeas Corpus*.

After an Interlocutory, and before final Judgment in an inferior Court, a *Habeas Corpus cum Causa* was brought; before the Return of the Writ the Defendant died, and a *Procedendo* was awarded; because by the 8 & 9 *W. 3. cap. 11.* the Plaintiff may have a *Scire facias* against the Executors, and proceed to Judgment, which he cannot have in another Court; and by this means he would be deprived of the Effect of his Judgment, which would be unreasonable.

If an Action be brought in *London* for calling a Woman Whore, this cannot be removed by *Habeas Corpus*, because the Words not actionable elsewhere; and if allowed to be removed, the Custom would be destroyed.

# Heir and Ancestor.

- (A) Of the Nature of the Relationship between Heir and Ancestor.
- (B) Of the several kinds of Heirs : And herein,
1. Of the Heir Apparent.
  2. Of the Heirs General, or Heir at Common Law.
  3. Of the Special Heir, or Issue in Tail.
  4. Of the Customary Heir.
  5. Of the *Heres Factus*.
- (C) Of what Conditions, Covenants, &c. of the Ancestor's shall the Heir take Advantage.
- (D) What Conditions, Covenants, &c. shall extend to him so as to bind him.
- (E) What Actions may he commence and prosecute in Right of his Ancestor.
- (F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.
- (G) How to be proceeded against where he is bound.
- (H) Where he shall be liable himself, and the Judgment general or special : And herein,
1. Where he shall be liable for his false Pleading.
  2. Where by his Promise to pay or discharge the Debt of his Ancestor.
- (I) What shall be Assets in his Hands.

What Things shall go to the Heir, and not to the Executor,  
*vide* Tit. Executors and Administrators.

## (A) Of the Nature of the Relationship between Heir and Ancestor.

Co. Lit. 7. b.  
3 Co. 12. b.  
(a) But by the Civil Law  
*Heres ex Testamento succedit in universum jus Testatoris*; so that by taking the whole Estate, whether it be real or personal, by the Will he is made Heir, and called only by that Name. *Godol. h. Orph. Leg. 119* (b) And therefore Heir and Ancestor are always applied to natural Persons, as Predecessor and Successor are to Bodies Politick and Corporate. *Co. Lit. 78. b.* (c) For a Man cannot be Heir to Goods or Chattels; for *Heres dicitur ab Hereditate. Co. Lit. 8. a. vel dicitur ab herendo, quia Hereditas sibi heret. Co. Lit. 7. b.*

**A**N Heir, saith my Lord *Coke*, in the legal Understanding of the (a) Common Law, is he to whom Lands, Tenements, or Hereditaments, by the Act of God and Right of (b) Blood do descend, of some Estate of (c) Inheritance.

The Word *Heir* in the Notion of it implies, that the Party hath all those legal (a) Qualifications which our Laws require in all Persons that represent or stand in the Place of another, and is of such Importance, that regularly without the Word *Heir* no Fee-simple can be created. (a) *Co. Lit. 9.* For the Heir at Law is to be favoured, *vide Tit. Descent, & vide Tit. Estate in Fee-simple, and Tit. Devise.*

## (B) Of the several kinds of Heirs: And herein,

### 1. Of the Heir Apparent.

**H**ERE we must observe, that no Person can be Heir until the Death of his Ancestor, according to the Rule, *Nemo est Heres Viventis*; yet in common Parlance he, who stands nearest in Degree of Kindred to the Ancestor, is called, even in his Life-time, Heir Apparent. *Co. Lit. 3. d.*

Also the Law takes notice of an Heir Apparent so far as to allow the Father to bring an Action of Trespass for taking away his Son and Heir, *quare Filium & Heredem rapuit*, the Father being Guardian by Nature to his Son where any Lands descended to him. *3 Co. 37. Ratcliff's Case. Co. Lit. 75, 84. Dyer 189. Vaugh. 180.*

Also a Person may take by Purchase or *Descriptio Personæ* by the Name of Heir even in the Life-time of his Ancestor; as where a Man devised Lands to *A.* and his Heirs during the Life of *B.* in Trust for *B.* and after the Decease of *B.* to the Heirs Males of the Body of *B.* now living, it was held that by this Devise the Remainder was immediately vested in the Son, and that the Words *Heirs Males now living* in a Will, were a full Description of the Son, who then was the Heir Apparent of *B.* and known by the Devisor to be so. *1 Vent. 311, 334. Raym. 350. 2 Lev. 252. Eweret and Durdant. But for this vide Tit. Devise, Let. (L).*

But the Son and Heir hath no Power over the Inheritance during the Life of the Ancestor: Therefore if a Son and Heir bargains and sells the Inheritance of his Father, this is void, because he hath no Right to transfer; so if he (*b*) releases, the Law is the same. *Kelw. 84. Co. Lit. 265.*

the Son releases with Warranty, he and his Heirs are for ever after barred by the Rebutter. *Co. Lit. 265. a.*

But if the Son makes a Feoffment of the Inheritance of his Father, this passes an Estate during the Son's Life; for it is a Disseisin to the Father, and the Son after the Father's Death cannot avoid it: For no Man can alledge an Injury in any voluntary Act of his own. *Co. Lit. 265. a.*

Neither is there that Privy between the Heir Apparent and his Ancestor, as to make a Fine levied by the Ancestor a Bar within the 4 *H. 7.* as if the Heir Apparent be seised of Lands, and the Father levies a Fine, and dies, it shall not bar the Heir; because he does not claim or derive any Title to the Land from his Father, and therefore in that respect shall have five Years to preserve himself from the Fine: For the Privies understood and intended by the Act are those who are privy not only in Blood, but likewise in Estate and Title to the Land of which the Fine was levied, that is, those who must necessarily mention the Conuzor, and convey themselves thro' him, before they can make out their Title to the Estate. *2 Inst. 523. 2 Co. 89. a. Hob. 353.*

## 2. Of the Heir General, or Heir at Common Law.

That he must  
be of the  
whole Blood,  
not a Ba-  
stard, Alien,  
&c. *vide Tit. Descents, and Tit. Coparceners.*

The Heir at Common Law is he who after his Father or Ancestor's Death hath a Right to, and is introduced into all his Lands, Tenements, and Hereditaments.

*Co. Lit. 14. a.* None but the Heir General, according to the Course of the Common  
*Cro. Jac. 217.* Law, can be Heir to a Warranty, or sue an Appeal of the Death of his  
*218. Vide* Ancestor.  
*Tit. Appeal,*  
*Letter (C).*

*Cro. Eliz. 204.* If a Condition be annexed to Borough English or Gavelkind Lands,  
*Plow. 28.* and the Condition is broken, the Heir at Common Law shall enter;  
*Co. Lit. 11, 12.* for the Condition is a Thing of new Creation, and collateral to the Land:  
But when the eldest Son enters, the Heir or Heirs by Custom shall enjoy the Land; for by Breach of the Condition they are restored to their antient Estate.

*Hob. 25.* If a Man seised of Fee-simple Lands, as also of Lands of the Nature  
*Co. Lit. 376.* of Gavelkind and Borough English, acknowledges a Statute, and dies, the Heir at Law shall make the Special or Customary Heirs contribute in Proportion, because all of them come in as Heirs to the Land descended, and are equally chargeable with the Debts of the Ancestor.

*3 Co. 15. a.* So if *A.* binds himself in a Recognizance or Statute, and after his Death  
*2 Co. 25. b.* some of his Lands descend to the Heir of the Part of the Father, and some to the Heir of the Part of the Mother, both Heirs shall be equally charged; and if the Conuzee loads one only, he shall have Contribution.

*(b)* But if a Man conveys that  
The Heir at Law is bound by his Ancestor's *(b)* Alienations and Dispositions, as also by his Covenants and Conditions, as far as he hath Assets.  
after his Death his Heir at Law shall stand seised to the Use of his youngest Son, this is void. *Hob. 313. per Hobart.*

*2 Vern. 215.* Also if the Ancestor agrees to convey or sell Lands, and receives Part  
*Abr. Eq. 265.* of the Purchase-Money, but dies before a Conveyance is executed, and a Bill is brought against the Heir, he will be decreed to convey, and the Money shall go to the Executor, especially if there are more Debts due than the Testator's personal Estate is sufficient to pay.

*Vide 1 Vern. 16.* So if a Father conveys to a younger Son by a defective Conveyance, and dies, the Heir at Law in two Cases shall be compelled to make it good. 1. Where there is a Covenant for further Assurance, binding the Heir; because the Heir is bound by the Covenant. 2. Where there is a Provision made by the Father in his Life-time for the Heir, or he hath such Provision by Descent from the Father.

Also the Heir at Law is bound by a Decree obtained against the Ancestor; which may be carried into Execution two Ways. 1<sup>st</sup>, If the Decree is enrolled, the Party may sue out a *Subpœna Scire Facias* against the Heir, to shew Cause against the Decree: But this is only after an Enrollment, and not before: And the Party must, at the Return of the *Subpœna*, shew Cause, if he hath any, against the Decree.

2<sup>dly</sup>, The Plaintiff may bring his Bill of Revivor, to carry the Decree into an Execution: And this is the surest and safest Way; for where the Decree was obtained against the Ancestor, and his Heir does not claim under that Title, but by virtue of another Title paramount, there the Decree can never be carried into Execution against him; as where an Estate is decreed against a Man, and his Heir insists his Father had no Title thereto, or was only Tenant for Life thereof, the Decree in that Case can never be carried into Execution against him; he is at Liberty to controvert the Justice and Validity of that Decree; he may make a

new

new Defence from what his Ancestor did, and vary his Case as he shall be advised, and the Parties go into a new Examination of the Matter, and hear the Cause *de novo*, and the Court judge whether the Decree is right or not, and may affirm or reverse it at their Pleasure.

But where one Man obtains a Decree against another for a Real Estate, and the Party dies before the Plaintiff is put into Possession, in that Case if the Heir at Law claims the Estate by Descent under his Ancestor, or as Devisee under him, he shall never controvert the Justice of the Decree tho' his Ancestor should have mistaken his Defence; nor shall he be at Liberty to make a new Defence, or enter into new Proof, so as to overthrow the former Decree, especially where it appears to the Court that the Decree hath been of an ancient Standing.

### 3. Of the special Heir, or Issue in Tail.

The Issue in Tail claims *per (a) formam doni*, and as the Statute de *Donis* preserves the Estate to him, his Ancestor cannot Grant or Alien, nor make any (i) rightful Estate of Freehold to another, but for Term of his own Life.

tend to Lands in Tail; for as to them a Man must claim as Heir *per formam doni*. Co. Lit. 15. *vide* Tit. *Descents*, Letter (C). (b) How far he may discontinue, *vid.* Tit. *Discontinuance*, Letter (B). — That by the 32 H. 8. cap. 28. he may make Leases for three Lives, or 21 Years, to bind his Issue, but not those in Reversion or Remainder, *vide* Tit. *Lease*.

If the Issue in Tail be attainted of Felony in the Life of his Father, and is pardoned, upon the Death of the Donee, the Donor cannot enter; for tho' the Disability to take by Descent remains after the Pardon, yet the Donor cannot enter against his own Gift while there is any Issue in Being; and tho' the Issue cannot by Reason of such Disability claim as Heir to the Donee, yet he may enter as a special Occupant, for the Gift is still a good *designatio Personæ*, who shall take upon the Death of the Donee; but then the Issue must take it subject to the Charges of his Father, because he is to take it as the Tenant left it, and consequently is to make good all Charges which he left upon it.

### 4. Of the Customary Heir.

A Custom in particular Places varying the Rules of Descent at Common Law is good; such as the Custom of Gavelkind, by which all the Sons shall inherit, and make but one Heir to their Ancestor; but the general Custom of Gavelkind Lands extends to Sons only, but a special Custom, that if one Brother dies without Issue, all his Brothers may inherit, is good.

But if a Remainder of Lands of the Nature of Gavelkind be limited to the right Heirs of 7. S. the Heir at Common Law shall take it, and not the Heirs in Gavelkind; for this Remainder being newly created, cannot be reckoned within the Custom.

So the Custom of Borough English, that the youngest Son only shall inherit, is good; but the youngest Brother shall not inherit, by Force of this Custom, unless there shall be a particular Custom to that Purpose also.

### 5. Of

5. Of the *Hæres factus*.

- 3 Co. 42. a. An *Hæres factus* is only a Devisee of Lands, being made so by the Will of the Testator, and has no other Right or Interest than the Will gives him.
- 1 Vern 36 7. It has been held in Chancery, that such an Heir shall have the Aid of the Personal Estate in discharging the Debts of the Testator.
- Preced. Chan.* But this must be understood of an *Hæres factus* of the whole Estate, who shall have the Benefit of the Personal Estate, but a Devisee of particular Lands shall not.

## (C) Of What Conditions, Covenants, &amp;c. of the Ancestor's shall the Heir take Advantage.

- 43 E. 3. 4.  
1 And. 55.  
(a) That Conditions can only be reserved to the Feoffor, Donor or Lessor, and their Heirs, but not to any Stranger. *Lit. Sect.* 347. Co. Lit. 214. (b) *Secus* of Covenants in *Gros. Palm.* 558. — Also for a Breach in the Time of the Covenantee, the Action shall be brought by his Executor, tho' the Covenant was with him, his Heirs and Assigns only. 1 Vent. 175 2 Lev. 26. adjudged.
- 1 Rol. Abr. 407, 472. And this not only where there are express Words, but also where there are none; for the Law by Implication reserves the Condition to the Heir of the Feoffor, &c. for being prejudiced by the Disposition, it is but reasonable t'at he should take the same Advantages that his Ancestor whom he represents might.
- 8 Co. 43. If a Man seised of Lands in Right of his Wife, makes a Feoffment in Fee upon Condition, and dies, and after the Condition is broke, the Heir of the Husband shall enter; for tho' no Right descended to him, yet the Title of Entry by Force of the Condition, which was created upon the Feoffment, and reserved to the Feoffor and his Heirs, descended.
- Co. Lit. 162. b. The Heir shall take Advantage of a *Nomine Pænæ*, for being incident to the Rent, it shall descend to the Heir, being a Security or Penalty to engage the Payment of the Rent; whoever therefore has a Right to the Rent, ought in Reason to have the Penalty which is to oblige the Tenant to pay it.
- 2 H. 4. 6. b. If an Abbot and Covent covenant to sing for the Covenantee and his Heirs in such a Chapel, his Heirs at all Times shall have a Writ of Covenant for the not doing thereof.
- 2 Lev. 92. If a Man leases for Years, and the Lessee covenants with the Lessor, his Executors and Administrators, to repair and leave it in good Repair at the End of the Term, and the Lessor dies, &c. his Heir may have an Action upon this Covenant, for this is a Covenant which runs with the Land, and shall go to the Heir, tho' he is not named; and it appears, that it was intended to continue after the Death of the Lessor, in as much as his Executors, &c. are named.
- 1 Salk. 141. The Plaintiff as Heir declared, that his Ancestor *per Indenturam suam, cujus alteram partem Sigillo* of the Lessee (omitting *Sigillat'*) *hic in curia profert*, did demise, and that the Lessee covenanted to repair from Time to Time, and to leave in Repair, and then shewed that his Ancestor

cestor died *Anno 10 H. 2.* and for Breach assigned *quod primo Apr. anno tertio Regine nunc*, & per 10 Annos ante tunc, the Premises were out of Repair; after Verdict for the Plaintiff, it was moved in Arrest of Judgment; 1. That the Word *Sigillat'* is wanting; 2. That Part of the ten Years incurred in the Life of the Ancestor, and that this was a hard Action; & per Holt C. J. the Want of *Sigillat'* is cured by the Verdict and Pleading over; 2. If the Premises were out of Repair in the Time of the Ancestor, and continued so in the Time of the Heir, it is a Damage to the Heir, and the Jury give as much in Damages as will put the Premises in Repair; but hereby no Damages are given in Respect of the Length of Time they continued in Decay; but in Respect of what it will cost at the Time of the Action brought to put the Premises in Repair; therefore per decem Annos was frivolous; and he said, that this is not a hard Action, and good Damages are always given in these Cases; because the Damages recovered ought to be applied to the Repair of the Premises.

If *A.* infeoffs *B.* upon Condition, that if the Heir of *A.* pays to *B.* *Co. Lit. 214. b.* &c. 20 s. then he and his Heirs may re-enter; this is a good Condition, of which the Heir of *A.* may take Advantage, and yet *A.* himself never can.

*T. S.* having Issue three Sons, *William* his eldest, *Nathaniel* his second, and *Daniel* his third; *William* died in the Life-time of his Father, leaving Issue only a Daughter; afterwards the Father devises the Estate in Question to *Anne* his Wife for her Life, and after her Death to his Son *Daniel* and his Heirs; provided, that if *Nathaniel* do within three Months after the Death of my Wife pay to *Daniel*, his Executors or Administrators, the Sum of 500 *l.* then the said Lands shall come to my Son *Nathaniel* and his Heirs; the Wife lived several Years after, and during her Life *Nathaniel* died, leaving the Plaintiff his Heir; and the Wife afterwards dying, the Plaintiff brought his Bill within three Months after her Death, praying that upon Payment of the 500 *l.* he might have a Conveyance of the Estate; and the principal Point of the Case was, whether this 500 *l.* being to be paid by *Nathaniel* within a limited Time, and he dying before that Time came, whether his Heir at Law could now on Payment of the Money make a Title to these Lands; for it was agreed that he was not Heir at Law to the Testator; and it was insisted upon that he could not; that this was a Condition precedent and meerly Personal in *Nathaniel*, who had neither *Jus in re*, nor *ad rem*, and could neither have devised, or released, or extinguished this Condition; and being a bare Possibility, and he dying before it was performed, his Heir could not make it good; and tho' the Word *Heirs* be used in the Devise to *Nathaniel*, yet that is not designed to give them any Estate Originally, but to denote the Quantity of Estate which *Nathaniel* was to take; and for this were cited the Cases in the (a) Margin. On the other Side it was insisted, that this was like the common Case in (b) *Co. Lit.* where a Feoffment is made on Condition that the Feoffor shall before such a Day, &c. there if the Feoffor die before the Day, his Heir may perform the Condition, for the Reasons there mentioned, and that it being so at Law, it should still be construed more liberally in Equity, where the Letter of a Condition is not always required to be strictly performed; and for this were cited the Cases in the (c) Margin, that the Possibility of performing this Condition was an Interest or Right, or *Scintilla juris*, which vested in *Nathaniel* himself, that he survived the Testator; and therefore this differed from *Bret and Rigden's* Case, that consequently such Right, Possibility, or Interest, descended to his Heir, and might be performed by him, as before the Statute *De donis*, the Possibility of Reverter descended to the Heir of the Donor; and for this were also cited the Cases in the (d) Margin; the Cause being first heard

*Mish 5 Georg.*  
1. between  
*Marks* and  
*Marks*, in  
*Canc.*

(a) 10 *Co.*  
*Lampet's*  
Case.  
*Pleard. Bret*  
and *Rigden.*  
(b) *Co. Lit.*  
205. 219. b.

(c) 1 *Chan.*  
*Ca. 89.*  
2 *Chan. Ca.*  
*Bertie and*  
*Exkland.*

(d) 2 *Saurd.*  
*Pu fcy* and  
*Mann ng's Case.*

*Rogers. Cro. Car. 358. Cro. Jac. 591. 5 Co. Math. Mann ng's Case.*

by the Master of the Rolls, was thought by him a Matter of great Difficulty, and therefore he appointed the Counsel to speak to it when the Court was full; afterwards it was decreed by my Lord Chancellor, with the Assistance of the Master of the Rolls, for the Plaintiff, on *Lit. Sect.* 334, 335. and my Lord Chancellor said, that tho' a Condition in Strictness of Law was not devisable, yet since the Statute of Uses, the Devisee may take Benefit of it by an equitable Construction, &c. and that *Nathaniel* might have released or extinguished this Condition.

### (D) What Conditions, Covenants, &c. shall extend to the Heir so as to bind him.

2 *Roll. Abr.*  
421.

(a) Shall be bound by Conditions in Law as well as ex-

press Conditions. *Co. Lit.* 233, 8 *Co.* 44. *Hard.* 11. — And tho' an Infant, shall be bound to perform them; but for this *vide Tit. Infants.* (b) If the Ancestor levies a Fine of ancient Demesne Lands to the Prejudice of the Lord, an Action of Deceit lies against the Heir. 1 *Salk.* 210.

*Co. Lit.* 163. b.

If a Gift be made in Tail on Condition, that the Donee should not discontinue, and the Donee hath Issue two Daughters, and one of them discontinues, the Donor shall enter and evict them both, because it was the original Condition annexed to the whole Estate, that no Part of it should be discontinued.

*Vid. Head of Estates tail.*

But here we must take Notice, that neither Tenant in Tail nor his Issue can be restrained from aliening by Fine and Recovery, tho' they may be restrained from aliening by Feoffment, or other tortious Act, which amounts to a Discontinuance.

1 *Vent.* 321.

3 *Keb.* 787.  
*Piers and Winn.*

So where one devised Lands to *A.* and the Heirs Male of his Body, provided, that if he does attempt to alien, that then immediately his Estate shall cease, and *B.* shall enter, and *A.* makes a Feoffment in Fee, and thereupon *B.* enters; and it was adjudged against *B.* and that the Condition was void, because *non constat* what shall be adjudged an Attempt, and how it should be tried.

*Dyer* 316.

10 *Co.* 41.

1 *Vent.* 199.

Also where a Condition is annexed to the Estate given to the Heir, and which goes in Abridgment and Restraint thereof, the same shall in some Cases be construed a Limitation; for if it were a Condition, no Body could take Advantage of it but the Heir himself.

*Cro. Eliz.* 204.

*Wellock and Hammond.*

3 *Co.* 20. 1.

2 *Leon.* 114.  
S. C.

As if a Copyholder in Borough English surrenders to the Use of his Will, and after devises to his Wife for Life, Remainder to his eldest Son, paying 40 s. to each of his Brothers and Sisters within two Years after the Death of his Wife, &c. this is a Limitation, and not a Condition; for if it should be a Condition, it would extinguish in the Heir, and there would be no Remedy for the Money.

*Cro. Eliz.* 833.

919.

*Moor* 644.

pl. 891.

*Noy* 51.

*Haynsworth and Pretty*  
adjudged.

*Vaugh.* 271.

2 *Mod.* 26.

S. C. cited.

So where one seised of Lands in Fee, having Issue two Sons and a Daughter, devised to his youngest Son and Daughter 20 l. a-piece, to be paid by his eldest Son, and devised his Lands to his eldest Son and his Heirs, upon Condition, that if he did not pay the said Sums, that then the Land should remain to his youngest Son and Daughter and their Heirs, and dies, the eldest Son enters, and does not pay the Money; and it was adjudged that the youngest Son and Daughter should have the Land; for 1. This Devise to the eldest Son and Heir, being no more than what the Law gave him without such Devise, was void. 2. If this should



should be a Condition, it would be defeated by the Descent upon the eldest Son, who was to perform it; therefore 3. It was held to be a Devise to the eldest Son only, or no longer than till he failed to pay the said Sums, and then to the youngest Son and Daughter, which gives them the Land by way of Limitation, upon his failing to pay the said Sums.

One devises Lands to *A.* his Heir at Law; and devises other Lands to *B.* in Fee, and if *A.* molest *B.* by Suit, or otherwise, he shall lose what is devised to him, and it shall go to *B.* and dies; *A.* enters into the Lands devised to *B.* and claims them; and it was held, 1. That this was a sufficient Breach to give Title to *B.* 2. That if this should be a Condition, it would by the Descent thereof to *A.* who was to perform it, and also enter for the Breach thereof, be merged and defeated; therefore it was held to be a Limitation, which determined the Estate of *A.* and cast the Possession upon *B.* without Entry.

But wherever the Ancestor makes a Conveyance or Disposition on Condition, which goes in Restraint and Abridgment of the Estate of the Heir, he must have Notice of it; for having a good Title by Descent, he is not obliged to take Notice of such Condition at his Peril, as (a) others must do.

Case of *Fry and Porter*, 1 Vent. 198. 1 Mod. 86. 2 Lev. 21. Raym. 236.

As where *A.* seised of Lands in Fee, and having Issue only one Daughter named *B.* by Lease and Release conveys his Lands to the Use of himself for Life, and after his Death to the Use of *B.* in Tail, provided that she married, with the Consent of the Trustees, or the major Part of them, some Person of the Family and Name of *Fitzgerald*, or who should take upon him that Name immediately after the Marriage; but if not, then the Trustees to raise a Portion out of the said Lands for *B.* and the Lands to remain to *C.* afterwards *A.* dies, and *B.* marries one who neither was nor took upon him the Name of *Fitzgerald*; and the only Point upon which Judgment was given was the want of Notice in *B.* of the Settlement, without which being Heir at Law, and so having a Title by Descent, she was not bound *ex officio* to take Notice of the Condition.

## (E) What Actions may he commence and prosecute in Right of his Ancestor.

IT is clear that the Heir may bring any Real Action, or Action *Co. Lit. 164.* *Droitural*, in Right of his Ancestor, but cannot regularly bring any Personal Action, because he has nothing to do with the Assets or Personal Contracts of his Ancestor.

Also if an erroneous Judgment be given against the Ancestor, by which he loseth the Lands, the Heir may bring (a) a Writ of Error.

*Godh. 337.* (b) That Error and Attaint always descend to such Person, to whom the Land should descend, if no such Recovery or false Oath had been. 1 Leon. 261.

And if one hath Lands on the Part of his Mother, and loseth by erroneous Judgment, and dies, the Heir of the Part of the Mother shall have the Writ of Error.

Owen 68. So the younger Son, when intituled to the Land by the Custom of  
 1 Leon. 261. Borough English, shall bring the Writ of Error, and not the Heir at  
 4 Leon. 5. adjudget; & Common Law, for this Remedy descends with the Land.  
 vide Bridgm. 79. 1 Rol. Rep. 311.

Dyer 90. So if there be an erroneous Judgment against Tenant in Tail Female,  
 1 Leon. 261. the Issue Female, and not the Son, shall bring a Writ of Error.  
 1 Rol. Abr. 747.

Dyer 89. So if a Man settles Land to the Use of himself and the Heirs of his  
 Cro. Eliz. 469. Body, the Remainder to his own right Heirs, and dies, leaving Issue  
 3 Lev. 36. only a Daughter, who levies a Fine, and dies without Issue, and J. S. brings a Writ of Error as Cousin and Collateral Heir to the Daughter, yet he shall never reverse the Fine, for there could no Right descend to him from the Daughter, because she had but an Estate-tail, which determined by her Death without Issue; and it does not appear that the Remainder in Fee was in the Daughter as right Heir, wherefore J. S. shall not reverse the Fine, *quia de non apparentibus & non existentibus eadem est ratio*, especially in a Court of Judicature, where the Judges can take Notice of nothing that does not come judicially before them, and appear in the Pleading.

Styl. 38, 39. If J. S. binds himself and his Heirs in a Bond, and thereupon Judgment is obtained against J. S. and J. S. makes his Will, and his Heir at Law Executor, and dies, leaving Lands which descend to his Heir, yet he shall not have a Writ of Error as Heir, for he is not privy to the Judgment; and when an Extent is made upon him, it is as Tertenant, but after the Lands are taken in Execution, he may have a Writ of Error.

11 H. 6. 15. Also the Heir at Law may, in Right of his Ancestor, maintain an  
 19 H. 6. 41. Action of Debt for Rent reserved on a Lease made by his Ancestor, for  
 Co. Lit. 162. a. the Rent is Part of the Lands, and incident to the Reversion; but for Arrears of Rent incurred in the Life-time of the Ancestor, neither the Heir nor (a) Executor could by the Common Law maintain any Action; for as to the Heir, they were considered as Part of the Personal Estate, and as to the Executor, he could not represent his Testator as to any Contracts relating to the Freehold and Inheritance.

(a) But now by 32 H. 8. cap. 57. an Executor may maintain an Action of Debt for such Arrears; for which vide Tit. Debt, Letter (C).

Co. Lit. 18. b. If a Nobleman, Knight, Esquire, &c. be buried in a Church, and have  
 for this vid. his Coat of Arms, and Pennons with his Arms, and such other Ensigns  
 1 Rol. Abr. 625. of Honour as belong to his Degree or Order, set up in the Church, or if a Grave-stone or Tomb be laid or made, &c. for a Monument of him; Noy 104. in this Case, albeit the Freehold of the Church be in the Parson, and Godb. 200. that these be annexed to the Freehold, yet cannot the Parson, or any, Cro. Jac. 367. take them or deface them, but he is subject to an Action to the Heir and his Heirs, in the Honour and Memory of whose Ancestor they were set up. 2 Bulf. 151.

(F) Where the Heir shall be said to be bound to answer his Ancestor's Debts and Contracts.

WHERE the Ancestor binds himself and his Heirs in an Obligation, the Obligee may sue the Heir (a) or Executor at his Election, and may have Execution of the Land descended to the Heir; for the Common Law having allowed the Action of Debt against the Heir, he could have no Benefit by the Action, unless he were permitted to have Execution of the Lands which descended to the Heir.

*Plow. 441.*  
3 Co. 12. a.  
*Cro. Jac. 450.*  
(a) 1 And. 7.  
Or the Administrator of the Ancestor.

3 Lev. 189. adjudged on Demurrer. — May sue the same Person, being both Heir and Executor; also may sue the Executor for Part, and the Heir for the Residue; but if the Heir or Executor pay the Whole or Part, and afterwards the other is sued, there shall be Relief in an *Audita Querela*. 3 Lev. 303-4-5. — Where the Heir being likewise Administrator, and having Real Assets by Descent, discharged a Bond Debt, in which he was bound, which he insisted was out of the Personal Estate; but the Court of Chancery would not admit of this Construction, to the Defeating of the simple Contract Creditors. *Abr. Eq. 144.*

But the Body of the Heir is protected, for it would be most unreasonable to subject the Heir to the Payment of his Ancestor's Debts, any farther than to the Value of the Assets descended.

*Dyer 81. pl. 62.*  
207. pl. 15.  
*Moor, pl. 203.*  
*Co. Lit. 103,*  
290.

Also the Heir must be (b) expressly named, otherwise he is not chargeable; and the Reason why the Heir is not chargeable in this Case, as the Executor is in Case of a Bond entred into by the Testator, without being named, is this; by the Common Law only the Goods and Chattels of the Debtor, and the Annual Profits of the Land as they arose, and not the Land it self, were liable to Execution for Debt or Damages, because these being the Security the Creditor depended upon, they were liable in the Hands of his Representative, or Executor, as well as in the Hands of the Debtor himself; and hence it was, that the Executor was bound to answer the Debt of the Testator, so far as he had Chattels or Assets, tho' he was not named in the Contract; but the Land was not liable to Execution, because it was preserved from the Personal Contracts and Engagements of the Tenant, that he might be the better able to answer the feudal Duties to the Lord, which were the Life and Support of the Government; and therefore the Land not being originally liable to the Demand in the Hands of the Obligor, must be much less liable in the Hands of the Heir, who was not comprehended in the Contract.

2 Inst. 19.  
*Plow. 440.*  
*Leb. 60. &*  
*vid. Tit. Execution, Letter (A).*  
(b) And therefore no Action will lie against the Heir for the Escape of one in Execution suffered by the Ancestor, nor for any Tort or Trespas of his; also if the Ancestor be con-

demned in an Obligation and die, Execution shall be taken out by *Elegit*, and not of all the Lands descended. *Dyer 271. a. pl. 25.*

But if A. had granted for him and his Heirs to B. and his Heirs, such a Rent out of his Lands; in this Case, the Heirs being comprehended in the Contract are bound to make good the Grant, so far as they have Assets by Descent from the Grantor; and this was allowed at Common Law, because the Grantee of the Rent had the Land originally in View for his Security, and by the Grant it self having it in his Power to distress the Land for the Rent, it was equal to the Heir whether the Land was to answer the Rent by Distress, or by an Execution upon a Judgment in a Writ of Annuity.

1 Rol. Abr. 226.  
*Pepp. 87.*  
*Heb. 58.*  
*Dyer 344 b.*  
*Co. Lit. 144 b.*

If the Ancestor bind himself in a Statute, Recognizance, &c. the Heir is liable not only as Tertenant, but also as Heir, otherwise he could not have his Age; and cannot oblige a Purchaser, whether for valuable Consideration, or without, to contribute, but one Heir may oblige another to contribute; as if a Man seized of two Acres, the one descend-

3 Co. 12. Sir William Herbert's Case.

ble according to the Course of the Common Law, the other in Borough English, acknowledge a Statute, &c. the Heir at Law shall oblige the Heir in Borough English to contribute: So one Coparcener shall oblige the other to contribute; or if the Conuzor hath Lands, some descendible to the Heirs of the Father, and some descendible on the Heirs of the Mother, the Heir on the Part of the Father shall compel the Heir on the Part of the Mother to contribute; & *sic vice versa*.

Co. Lit. 102.

(a) Upon a Motion for a new Trial, *Tewden* said, That in his

Practice the Heir in an Action of Debt against him upon a Bond of his Ancestor pleaded *Riens per Descent*: The Plaintiff knew the Defendant had levied a Fine, and at the Trial it was produced; but because they had not a Deed to lead the Uses, it was urged, that the Use was to the Conuzor and his Heirs, and so the Heir in by Descent; whereupon there was a Verdict against him; and being a just Debt, they could never after get a new Trial. 1 *Mod.* 2. (b) Or filing a Bill in B. R. when to this Purpose has been held as effectual as an original Writ. *Carth.* 245.

*Carth.* 245.

*Gree and Oliver* adjudged; and *North's* Opinion, 1 *Mod.* 253. that he who first obtains Judgment shall be satisfied, denied to be Law.

In Consequence of this Doctrine, that the Lien shall have Relation to the Time of the Original purchased, it hath been adjudged, that if there be two Creditors to *J. S.* whose Heir is bound, *viz.* *A.* and *B.* and *A.* files an Original in C. B. and hath Judgment thereon, *Trin. Term.* 2 *Jac.* 2. by Default, and thereupon a general *Elegit* issues against all the Lands of the Heir, and a Moiety thereof is delivered to *A.* and *B.* on a Bill filed in B. R. 1 & 2 *Jac.* 2. has a special Judgment against the Assets confessed by the Heir, *Trin. Term.* 3 *Jac.* 2. tho' *B.*'s Judgment be subsequent to *A.*'s, yet it appearing that his Bill or Original was filed before *A.*'s, the Judgment shall have Relation thereto, and therefore he must be first satisfied.

*Carth.* 246.  
*per Cur.*

So it seems in the above Case, that tho' *A.*'s Judgment had been on an Original actually filed before *B.*'s, that *B.* must have been preferred, because his Judgment was general against the Heir, and the Execution a general and common Execution by *Elegit*, and not against the Assets only by way of Extent; and therefore such a general Judgment will not operate by way of Relation to the Original, but binds only as in common Cases from the Time of the Judgment given.

(c) A Bill brought in Chancery against the Heir and his Alience, and the Creditor relieved, tho' it was objected, that the Statute being introductive of a new Law, the Relief on it ought to have been at Common Law. *Abr. Eq.* 149.

But to prevent the Wrong and Injury to Creditors by Alienation of the Lands descended, &c. by the (c) 3 & 4 *W. & M. cap.* 14. it is enacted, ' That in all Cases, where any Heir at Law shall be liable to pay the Debt of his Ancestor, in regard of any Lands, Tenements, or Hereditaments descending to him, and shall sell, alien, or make over the same before any Action brought or Process sued out against him, that such Heir at Law shall be answerable for such Debt or Debts in an Action or Actions of Debt to the Value of the said Land so by him sold, aliened, or made over; in which Cases all Creditors shall be preferred, as in Actions against Executors and Administrators, and such Execution shall be taken out upon any Judgment or Judgments so obtained against such Heir, to the Value of the said Land, as if the same were his own proper Debt or Debts; saving that the Lands, Tenements, and Hereditaments *bona fide* aliened before the Action brought, shall not be liable to such Execution.

' Provided, That where any Action of Debt upon any Specialty is brought against any Heir, he may plead *Riens per Descent* at the Time of the original Writ brought, or the Bill filed against him; any thing herein contained to the contrary notwithstanding: And the Plaintiff in such Action may reply, that he had Lands, Tenements, or Hereditaments from his Ancestor before the original Writ brought, or the Bill filed: And if,

‘ upon Issue joined thereupon, it be found for the Plaintiff, the Jury shall  
 ‘ inquire of the Value of the Lands, Tenements, or Hereditaments so  
 ‘ descended, and thereupon Judgment shall be given, and Execution shall  
 ‘ be awarded, as aforesaid: But if Judgment be given against such Heir,  
 ‘ by Confession of the Action without confessing the Assets descended,  
 ‘ or upon Demurrer, or *Nihil dicit*, it shall be for the Debt and Da-  
 ‘ mages, without any Writ to inquire of the Lands, Tenements, or He-  
 ‘ reditaments so descended.

Also if, before this Statute, the Ancestor had devised away the Lands, *Abr. Eq. 149.*  
 a Creditor by Specialty had no Remedy either against the Heir or  
 Devisee.

But now, by the said Statute 3 & 4 W. 3. cap. 14. reciting that several Persons having by Bonds or other Specialties bound themselves and their Heirs, and have afterwards by Will disposed of their Lands, with an Intent to defraud their Creditors; it is Enacted, ‘ That all Wills and ‘ Testaments, Limitations, Dispositions, or Appointments of or concern- ‘ ing any Manors, Messuages, Lands, Tenements, or Hereditaments, or ‘ of any Rent, Profit, Term, or Charge out of the same, whereof any ‘ Person or Persons at the Time of his, her, or their Decease shall be ‘ seised in Fee-simple, in Possession, Reversion, or Remainder, or have ‘ Power to dispose of the same by his, her, or their last Wills or Testa- ‘ ments, shall be deemed and taken (only as against such Creditor or ‘ Creditors as aforesaid, his, her, and their Heirs, Successors, Executors, ‘ Administrators, and Assigns, and every of them,) to be fraudulent, and ‘ clearly, absolutely, and utterly void, frustrate, and of none Effect; ‘ (any Pretence, Colour, feigned or presumed Consideration, or any ‘ other Matter or Thing to the contrary notwithstanding.)

‘ And for the Means that such Creditors may be enabled to recover ‘ their said Debts, it is further Enacted, That in the Cases before men- ‘ tioned every such Creditor shall and may have and maintain his, her, ‘ and their Action and Actions of Debt, upon his, her, and their said ‘ Bonds and Specialties, against the Heir and Heirs at Law of such Obligor or Obligors, and such Devisee and Devisees jointly, by virtue of ‘ this Act; and such Devisee or Devisees shall be liable and chargeable ‘ for (a) a false Plea by him or them pleaded, in the same Manner as any ‘ Heir should have been for any false Plea by him pleaded, or for not ‘ confessing the Lands or Tenements to him descended.

(a) *Vide 29*  
*Car. 2. cap. 5.*  
*par. 10, 11.*  
 by which al-

tho’ the Heir of the *Cestui que Trust* is made liable to answer, &c. yet by reason of any kind of Plea, or other Matter, he shall not be chargeable to pay the Condemnation out of his own Estate.

‘ Provided, That where there hath been or shall be any Limitation or ‘ Appointment, Devise or Disposition of or concerning any Manors, Messuages, Lands, Tenements, or Hereditaments for the raising or Payment of any real or just Debt or Debts, or any Portion or Portions, Sum or Sums of Money for any Child or Children of any Person, other than the Heir at Law, according to, or in Pursuance of any Marriage Contract or Agreement in Writing *bona fide* made before such Marriage, the same, and every of them, shall be in full Force, and the same Manors, Messuages, Lands, Tenements, and Hereditaments shall and may be holden and enjoyed by every such Person or Persons, his, her, and their Heirs, Executors, Administrators, and Assigns, for whom the said Limitation, Appointment, Devise, or Disposition was made, and by his, her, and their Trustee or Trustees, his, her, and their Heirs, Executors, Administrators, and Assigns, for such Estate or Interest, as shall be so limited or appointed, devised or disposed, until such Debt or Debts, Portion or Portions shall be raised, paid, and satisfied; any thing contained in this Act to the contrary notwithstanding.

‘ And it is further Enacted by the said Statute, That all and every ‘ Devisee and Devisees made liable by this Act, shall be liable and charge-  
 ‘ able

‘ able in the same Manner as the Heir at Law, by Force of this Act,  
 ‘ notwithstanding the Lands, Tenements, and Hereditaments to him or  
 ‘ them devised shall be aliened before the Action brought.’

*Abr. Eq.* 149.  
*Parflow ver.*  
*Weedon.*

In the Construction of this Statute it hath been holden, that tho’ a Man is prevented thereby from defeating his Creditors by Will, that yet any Settlement or Disposition he shall make in his Life-time of his Lands, whether voluntary or not, will be good against Bond-Creditors; for that was not provided against by the Statute, which only took Care to secure such Creditors against any Imposition, which might be supposed in a Man’s last Sickness; but if he gave away his Estate in his Life-time, this prevented the Descent of so much to the Heir, and consequently took away their Remedy against him, who was only liable in respect of the Lands descended; and as a Bond is no Lien whatsoever on Lands in the Hands of the Obligor, much less can it be so when they are given away to a Stranger.

*Carth.* 353.  
*Re. Shaw and*  
*Hester* ad-  
 judged,  
*5 Mod.* 122.  
*S. C. Comb.*  
 544. *S. C.*  
 adjudged,  
 and that the  
 Statute was  
 made not to  
 create, but  
 to prevent  
 Difficulties  
 in pleading.

In Debt against an Heir, who pleaded *Riens per Descent* on the Day of the Bill, the Plaintiff replied specially, that the Obligor (Father of the Defendant) died on such a Day, and that the Defendant (after the Death of his Father) and before the Day of the Bill, *viz.* on such a Day, which was a Day after the Death of the Obligor, had Lands by Descent from his Father in Fee-simple, *unde prædict* (the Plaintiff) *de Debito prædicto satisfecisse potuit, viz. apud H. prædict. Et hoc parat’ est verificare, unde petit Judicium*, according to the above Statute. To this the Defendant made a frivolous Rejoinder; and thereupon the Plaintiff demurred. The Question was, if the Replication was good in Pursuance of the Statute; for it was objected that it was ill, because the Plaintiff had put the Value of the Lands in Issue by these Words, *unde, &c. de Debito prædicto satisfecisse potuit*, which ought to have been omitted; because the Statute is express, that after the Issue tried the Jury shall inquire of the Value; so that it is Matter of Inquest only *ex Officio*, and not to be the Point of the Issue; and by this Statute the Plaintiff is only to recover *pro tanto* against the Defendant with respect to the Value of such aliened Assets, and is not to have a general Judgment against the Heir, as at Common Law upon a false Plea; *sed per Cur.* upon Debate, this Replication was held good and as it ought to be, and that if *unde, &c. de Debito prædicto satisfecisse potuit* had been left out, it might have been a good Cause of Objection; for the Statute doth not give Occasion to alter any more of the Form of the Replication common in such Cases, but only as to the Time concerning Assets by Descent; and the Conclusion, which (before the Statute) was to the Country, must now be with an Averment only, because the Defendants may have an Opportunity to answer the new Matter alledged in the Replication.

*Trin* 32 *Car.*  
 2. in *C. B.*  
 between Ba-  
 ron *Weston*  
 and *Danby*  
 adjudged.  
 (a) But the  
 Heir of an  
 Heir is lia-  
 ble; but for  
 this *vide* 2  
*Chan. Cases*

It seems that neither before nor since this Statute the (a) Executor or Administrator of the Heir are liable; for the Person of the Heir is not chargeable, but with respect to the Land; and if, before the Statute, the Heir had aliened before Action brought, he should not be charged for the Profits he received; which is evident from the Plea of *Riens per Descent* the Day of the Writ purchased; much less could his Executor (b), nor can he yet, unless some Statute make him so: For an Executor is but in nature of a Trustee for the Personalty, and not at all privy to the Inheritance.

*Chan. Cases*  
 175. 1 *Vern.* 400. and *Dyer* 344. a Precedent cited in the Book of Entries, where Debt was brought against the Executor of an Heir upon a Bond made by the Ancestor, which is also mentioned 1 *Plew.* 441. 2 *Leon.* 11. 3 *Leon.* 70. (b) But *quare, &c. vide* 2 *Vern.* 62. where it is said, that if the Heir aliens the Land to prevent the Creditors of Satisfaction of their Debts, Equity will follow the Money into the Hands of the Heir or his Executor.

1 *Lev.* 30.  
*Raym.* 26.  
 1 *Keb.* 92.  
*S. C. Edstr.*  
 and *Smarts.*

If there be Judgment in Debt against two, and one dies, a *Scire Facias* lies against the other alone, reciting the Death, and he cannot plead that the Heir of him that is dead has Assets by Descent, and demand Judgment

Judgment if he ought to be charged alone: For at (a) Common Law the Charge upon a Judgment being (b) personal survived, and the Statute of *Westm.* 2. that gives the *Elegit* does not take away the Remedy of the Plaintiff at the Common Law, and therefore the Party may take out his Execution which Way he pleases; for the Words of the Statute are, *fit in Electione*: But if he should, after the Allowance of this Writ and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (c) Suggestion, or else by *Audita Querela*. and personal Execution, and that a personal Execution will survive, tho' a real one will not, *vide* 3 Co. 14. *Yelv.* 209. *Raym.* 153. 2 *Keb.* 3. 331. 4 *Mod.* 315. 3 *Keb.* 295. 1 *Salk.* 319, 320. 1 *Show.* 402. (c) For this *vide* *F. N. B.* 166. 44 E. 3. 10.

If there be a Sequestration for a Personal Duty against the Ancestor where the Heir is not bound, and the Defendant dies, there is an End of the Sequestration, and it cannot be revived against the Heir; because neither the Heir nor the Lands are bound by such Decree: But if the Decree were upon a Covenant that bound the Heir, and the Defendant died, such Decree might be revived by *Subpoena Scire Facias* against the Heir to shew Cause against the Decree, if the Decree be inrolled of Record, or if not, by Bill of Revivor; and when revived against Heir and Executor, (which is the usual and regular Way,) the Sequestration also will be revived on Motion, if, upon coming into Court, Cause is not shewn why the Decree should not be revived: And in this Case it hath been resolved, that the Decree should have the same Authority to bind the Personal Assets as a Judgment at Law, and therefore shall go *Par passu* to be paid off and discharged; but the Lien of the Judgment upon Lands came in by the Statute, which only gives an *Elegit* for a Moiety of the Land in Satisfaction of the Debt, and therefore that could give no Authority to lay a Sequestration on the Real Estate for a meer Personal Duty, where the Heir is not bound in the Covenant.

## (G) How to be proceeded against Where he is bound.

IF the Heir be sued upon a Bond or Covenant in which he is bound, it need not be shewn how he is Heir; for the Plaintiff is a Stranger, and it would be hard to compel him to set forth another's Pedigree: But where the Heir sues, he must shew his Pedigree, and *Coment Hares*; for it lies in his proper Knowledge.

It must be alledged, that the Heir was bound; and therefore, where a Bill was brought by the Obligee in a Bond against the Heir of the Obligor, alledging, that he having Assets by Descent, ought to satisfy this Bond, the Defendant demurred, because the Plaintiff had not expressly alledged in the Bill, that the Heir was bound in the Bond; and tho' it was alledged, that the Heir ought to pay the Debt, yet that was held insufficient, and the Demurrer was allowed.

If an Action is brought against the Heir upon the Bond of his Ancestor, and in which the Heir is bound, it must be in the (a) *Debet* and *Detinet*; because he hath the Assets in his own Right, and therefore is to be sued as if it were his own proper Bond.

712. S. P. and the Reason there given, because he is bound by special Words in the Obligation, *Et vide* 2 *Leon.* 11. 2 *Brownl.* 204-5. *Cro. Eliz.* 350. Like Point. (a) But if in the *Detinet* only, it is good after Verdict, by 16 and 17 *Car.* 2. *Comber and Watton*, 1 *Lev.* 224. adjudged, 1 *Sid.* 342, 375. S. C.



(H) Where he shall be liable himself, and the Judgment general or special: And herein,

1. Where he shall be liable for his false Pleading.

21 E. 3. 10. **T**HE Heir at Law, tho' bound by his Ancestor, shall yet, as has been  
40 E. 3. 14. observed, be chargeable no further than he has Assets from such An-  
Dyer 81. cestor, unless by his false Pleading he make himself so: And therefore if  
pl. 62. 149. an Action of Debt be brought against him, and he confesses the Action,  
pl. 80. and also sets forth in Certainty what Assets he hath, he shall be charged  
Plow. 440. no further, and neither his Goods, (a) Body, or other Lands shall be lia-  
Benl. 157. ble; but the Judgment in such Case shall be special, to recover the Debt  
5 Co. 35. of the Lands descended.  
2 Rol. Abr. 70. and the same  
Point admit-  
ted in all the Modern Books. (a) And therefore an Heir at Law is not to be held to special Bail, be-  
cause the Demand is not on the Person, but on the Assets of the Deceased. 2 Jon. 82. & vide Tit. Bail,  
Letter (B).

Vide the Au- But if an Action (b) of Debt be brought against an Heir on the Obligation of his Ancestor, in which he is bound, and he plead *Riens per Di-*  
thorities sup. scent, which is found against him, the Judgment shall be general to reco-  
and 1 Rol. ver the Debt, which he must pay out of his own Pocket for his false  
Abr. 269. Plea.  
1 Rol. Rep. 234. (b) But  
there is a

Diversity between an Action of Debt and a *Scire Facias* against the Heir upon a Judgment had against his Ancestor; for if in a *Scire Facias* the Heir plead a false Plea, and it is found against him, yet the Judgment shall be of the Lands descended only; for the Execution in such Case shall be upon the first Judgment against the Ancestor, and not upon the Judgment in the *Scire Facias*, *quod habeat Executionem*, because such Judgment did not alter nor enlarge the first Judgment. *Botwyer v. Rivett* adjudged, *Paf.* 193. 3 Bulst. 317. 1 Jon. 87. Cro. Car. 296. Carth. 93. S. C. cited.

Plow. 440. So if an Action of Debt be brought against the Heir, who confesses the  
2 Rol. Abr. 70. Action, but does not set forth the Assets in Certainty, the Judgment shall be general; for he is charged in the *Debet* as well as *Detinet*, and Assets shall be presumed.

Plow. 440. So if an Action be brought against the Heir on the Bond of his An-  
Davis and cestor, and there is Judgment against him by Default, *Non sum Informatus*,  
Pepys adjudged, and cited *Nihil dicit*, &c. the Judgment against him shall be general, and he shall  
and agreed to be Law in be charged *de Bonis propriis*.  
several Books.

Carth. 93. So where Debt was brought against an Heir, who pleaded in Bar that  
Brandlin and *J. S.* was jointly and severally bound with his Ancestor, and that he paid  
Milbank ad- the Money; which being found against him, it was held, that the Judg-  
judged, and ment should be general, and he for his false Plea chargeable *de Bonis*  
said, that the *propriis*.  
Law was so  
settled in the  
Case *supra* of *Davis* and *Pepys*. Plow. 440. Comb. 162. S. C. adjudged.

Salk. 354. So where the Heir pleaded that his Ancestor was seised in Fee of three  
Smith & Ux. fourth Parts of such and such Tenements, and that he demised the same  
ver. Angel. for 500 Years to *A.* who entered, and that the said Reversion descended,  
Farest. 40. & *Riens ultra*, and that at the Time of the Action brought he had no  
S. C. Tenements in Fee-simple by Descent *præterquam* the said Reversion; and  
that afterwards there was a Bill in Chancery exhibited against him by the  
Ancestor's Wife for Dower, and a Decree obtained against him for the  
third Part of these three Fourths for the Wife's Life; & *hoc*, &c. and in  
this Case a general Judgment was given against the Heir; and it was held  
by *Holt C. J.* 1st, That an Heir could not plead a Term for Years in De-  
lay



lay of present Execution, but ought to confess Assets; and that the Common Law had no Regard for a Term for Years, and that there is no Mischief in this Case; for tho' in Consequence a *Levied Eucias* may go, yet the Lessee may maintain himself against an Ejectment by Virtue of his Lease. 2. As to the Decree in Chancery, he held it plain that there was no Estate or Interest vested in the Wife by that, so that the Plea in this Respect is nought and most apparently false.

And it is said, that in these Cases the Court cannot give a special Judgment without the Assent of the Plaintiff; as where Debt was brought against the Heir, who pleaded *Riens per Descent*, which was found for the Plaintiff; and there being Judgment to recover the Debt, Damages and Costs of the Lands descended; and not knowing what Land descended, a Writ awarded to inquire what Land descended; the Court held this Judgment erroneous, because by Law the Judgment ought to be general, which cannot be altered without the Plaintiff's Consent, which d.d not appear here.

So in an Action of Debt against an Heir, if he pleads *Riens per Descent*, which is found against him; and it is further found by the Jury, that he had certain Lands by Descent, upon which Judgment is given that the Plaintiff shall recover his Debt, Damages and Costs, of the Lands descended; this is an erroneous Judgment, because it ought to have been general; also it is said, that upon this Issue could not inquire of the Assets descended.

But if in a Writ of Annuity the Plaintiff declares for the Arrearages, &c. against the Heir, upon the Grant of his Ancestor, and the Heir pleads that it is not the Deed of his Ancestor, which is found against him; in this Case the Judgment may be Special, without the Consent of the Plaintiff; for being in the Case of an Annuity, which is always executory, it is at least in the Election of the Plaintiff to have Execution of all the Lands descended; whereas on a general Judgment he can only have a Moiety of all the Heir's Land in Execution; also in this Case the Entering a special Judgment is for the Heir's Advantage, and therefore he cannot assign it for Error.

Also, if upon Pleading *Riens per descent* it be found against the Heir, or if he confesseth the Action without setting forth the Assets, or if there be a general Judgment upon these, or upon a *Non sum Informatus, Nihil dicit*, &c. against him, the Execution may be general of a Moiety of all the Lands of the Heir.

But if in an Action of Debt brought against the Heir, the Defendant acknowledges the Action, and shews in Certainty the Assets, upon which there is Judgment that the Plaintiff shall recover, and that the Debt shall be recovered of the Assets descended, here the Plaintiff shall have Execution to levy the Debt of all the Land descended, and to have a Moiety only, as on an *Elegit*.

Also in Case of a general Judgment against the Heir, altho' the Plaintiff may have Execution by *Elegit* of a Moiety of all the Heir's Lands; yet may he also at his Election surmise that the Heir hath such and such Land by Descent, and pray Execution thereof; for were it otherwise, the Plaintiff might be a Loser by this general Judgment, in which he is only intitled to a Moiety of the Land, in as much as the Heir might not have any other Lands, except those descended.

## 2. Where by his Promise to pay or discharge the Debt of his Ancestor.

<sup>1</sup> *Rol. Abr.* 28. If a Man binds himself and his Heirs in an Obligation, and dies, and Lord Gray's after the Obligee sues the Heir upon the Obligation, who had no Assets Case. descended to him; and the Heir says to him, that if he will not sue him, that then he will pay him the Money; this is no Consideration for <sup>3</sup> *Leon.* 67, 68. as to maintain an Action, because he was not chargeable (a) without <sup>4</sup> *Leon.* 6. Assets. *S. P. per Curiam.*

(a) But it is held, that in *Assumpsit* against an Executor on his Promise it is not necessary to alledge Assets, and that Forbearance is a good Consideration. *Vid. Tit. Executors and Administrators, Letter (M).* — And Note, by the Statute of Frauds the Promise must be in Writing.

*Barker and Fox, 2 Sand.* So in an *Assumpsit* against an Heir upon such a Promise, it must be expressly shewn that the Heir was bound, else it shall not be intended, <sup>1</sup> 36. tho' after a Verdict.

<sup>1</sup> *Vent.* 159. adjudged; *Hunt and Swain, 1 Sid.* 248. *Raym.* 12. <sup>1</sup> *Lev.* 165. <sup>1</sup> *Keb.* 890. *S. P.* adjudged. — And *Keeling* said, to charge an Executor upon his Promise you need not lay Assets, (tho' without them he shall not be bound) because we will intend Assets, but we cannot intend the Heir was bound, but in this Case must look upon him as a meer Stranger.

<sup>1</sup> *Sid.* 31. But in such a Case where the Plaintiff declared, that the Defendant in <sup>1</sup> *Lev.* 165. Consideration the Plaintiff would deliver the Bond to him and discharge *Ex vid. Yelv.* the Debt, promised, &c. it was held a good Declaration, and that it <sup>56.</sup> should be intended he was liable, or at least that the Discharge should be made to him who was so.

## (1) What shall be Assets in his Hands.

*Vid. Bro. Tit. Assets.* **W**herever the Ancestor binds himself and his Heirs, all his Lands *Fit. Tit. Assets.* of (b) Freehold, and which descend in (c) Fee-simple, are Assets by Descent, and shall be liable, as far as they extend, to answer the <sup>1</sup> *Rol. Abr.* 269. *Tit. Assets.* Ancestor's Obligations.

(b) But if a Copyhold descends to an Heir, this shall not be Assets, because 'tis an Inheritance created by Custom, and the Common Law directs the Descent; but not that it shall have any other collateral Qualities which do not concern such Descent, and which other Inheritances at Common Law have. <sup>4</sup> *Co.* 22. a. — But Lands by Descent in ancient Demesne shall be Assets, <sup>7</sup> *H.* 4. 14. *Bro. Tit. Assets* 11. — So an Advowson is Assets, and may be extended at the Rate of a Shilling for every Mark of the yearly Value of the Living. *Co. Lit.* 374. b. (c) Must be Lands in Fee-simple, <sup>42</sup> *E.* 3. 10. b. — For what shall be Assets to make a lineal Warranty a Bar to an Estate-tail, *vid. Co. Lit.* 374. b. <sup>2</sup> *Inf.* 293. *Kelw.* 104. b. 124. <sup>2</sup> *Rol. Abr.* 774.

<sup>1</sup> *Salk.* 354-5. A Reversion after a Lease for Years made by the Ancestor is present *Farell.* 42. Assets, (d) so that the Heir cannot plead *Riens per Discent* in Delay of Execution <sup>2</sup> *Mod.* 50-51. *Hern Plead.*

<sup>320.</sup> (d) In Debt against the Heir if he pleads *Riens per Discent*, the Plaintiff may have Judgment presently, and a *Scire facias* when Assets descend. <sup>8</sup> *Co.* 134. in *Mary Shepley's Case*, which Point is held to be Law; likewise in Case of an Executor, in *Hob.* 199. <sup>1</sup> *Vent.* 94-5. <sup>1</sup> *Sid.* 448. contrary to the Case of *Dorchester and Webb. Cro. Car.* — So in a *Warrantia Chartæ* against an Heir, who pleads *Riens per Discent*, or that the Plaintiff is not impleaded, the Plaintiff may pray Judgment presently, *F. N. B.* 134. <sup>8</sup> *Co.* 134. <sup>1</sup> *Vent.* 94. and *Hob.* 199. *S. P.* and that the same may be done in the Case of an Executor; but if the Plaintiff will proceed to prove Assets presently, and that he be found against him, he shall be barred for ever; and yet there was a Debt due, and that in Effect confessed,

Execution of the Rent and Reversion, (a) tho' the Plaintiff cannot have feised. *Hib.*  
Benefit of the Reversion till the Lease be determined. 199.

(a) Where a Man obtains a Judgment against an Heir who has a Reversion in Fee descended to him, the Judgment is only of Assets *quando acciderit*, and the Creditor cannot by a Bill in Equity compel the Heir to sell the Reversion, but must expect until it falls. 2 *Vern.* 134. *Fortrey and Fortrey.*

So a Reversion expectant upon the Determination of an Estate for Life is *quasi* Assets, and ought to be pleaded specially by the Heir, and the Plaintiff in such Case may take Judgment of it *cum acciderit*. *Carth.* 129. *per Holt.*

But a Reversion in Fee expectant upon an Estate-tail is not Assets, because it lies in the Will of the Tenant in Tail to dock and bar it at his Pleasure. 6 *Co.* 58. 1 *Rel. Abr.* 269. 2 *Rel. Rep.*

129. S. P. 3 *Lev.* 287. 3 *Mod.* 257. *Carth.* 129. S. P. agreed, and that it shall not charge the Heir upon the general Issue, *Reins per Defent.* — But after the Tail is spent, it is Assets. 3 *Mod.* 257.

If A. hath Issue B. and C. and conveys Lands to the Use of himself for Life, the Remainder to B. in Tail Male, the Remainder to his own right Heirs, and A. dies, and the Reversion descends to B. his Son, and B. dies feised, and the Reversion descends to his Son, who dies without Issue, so that the Tail is spent, and C. enters, these Lands shall be Assets to answer the Debt of his Father. *Carth.* 127. 3 *Lev.* 286. 3 *Mod.* 253. S. C. *Kilmer ver. Rowden.*

The Lands, as has been observed, must descend to the Heir; and therefore it was (b) formerly held, that if he took by Purchase, as if the Testator devised them to him paying so much, or if he devised Lands to one or two, and his Heir at Law jointly, that those Lands were not Assets; but if he devised one Part to A. another to B. and another to his Heir at Law, this third Part was Assets. *Cro. Eliz.* 431. 2 *Mod.* 286. (b) But now by 3 & 4 *W. 3.* which ord. the Devisee as well as Heir are chargeable. 29 *Car.* 2. cap. 3. that it was not Assets before, 10 *Co.* 93. a.

By the Statute of Frauds and Perjuries it is enacted, that if Lands come to the Heir by Reason of a special Occupancy, they shall be chargeable in his Hands as Assets by Descent, as in Case of Lands in Fee-simple; and in Case there be no special Occupant thereof, it shall go to the Executors or Administrators of the Party that had the Estate thereof by Virtue of the Grant, and shall be Assets in their Hands.

Also by the said Statute, *par.* 10. & 11. where Lands are settled in Trust, and descend in Fee to the Heir of *Cestuy que Trust*, the same shall be Assets in the same Manner as Lands in Possession, but he shall not, by Reason of any Plea or other Matter, be chargeable to pay the Condemnation out of his own Estate. *Vol.* 2 *Vern.* 243.

An Equity of Redemption of an Inheritance is Assets, for the Heir having a Right in (c) Equity, that ought in Equity to be liable to satisfy a Bond Debt. 4 *Chan. Ca.* 143. (c) But the Equity of

Redemption of a Mortgage that is forfeited is not Assets at Law, for at Law there is no Redemption, 2 *Vern.* 61. — and there it is made a *Quare*, whether an Heir being Creditor by Bond or Judgment may not retain, the Reason being the same in the Case of an Heir as it is of an Executor, for neither can sue himself.

Tenant in Tail suffers a Recovery to let in a Mortgage of 500 Years, and then limits the Land to the old Uses, and makes his Will, and devises all his Lands for the Payment of his Debts, the Redemption was limited to him, his Heirs and Assigns; and the Court thought that the Equity of Redemption of this Mortgage should be Assets to satisfy Creditors, or a subsequent Grantee of an Annuity. *Pre ed. Chan.* 59. *Fosset and Auslin.*

A Right without any Estate in (d) Possession, Reversion or Remainder is not Assets till it be recovered and reduced into Possession. 6 *Co.* 58. (d) If a Rent-seek descends

to an Heir, it is not Assets till he hath gained Seisin, 6 *Co.* 58. b. — But if Lands descend to an Heir, this is Assets before Entry, for he may enter when he will, 42 *E.* 3. 10. b. 1 *Rel. Abr.* 269.

# Heresy, and Offences against Religion,

(A) **Of Heresy:** And herein,

1. What it is.
2. By whom it is cognizable.
3. How punished.

(B) **Of Witchcraft, and how punished.**

(C) **Of Offences against Religion as punishable by the Common Law.**

(D) **Of Offences by Statute against Religion:** And herein,

1. Of the Offence of prophaning the Lord's Day.
2. Of the Offence of Swearing.
3. Of the Offence of Drunkenness.
4. Of the Offence of reviling the Sacrament.
5. Of Offences against the Common Prayer.
6. Of the Offence of teaching School without conforming to the Church.
7. Of the Offence in not coming to Church: And herein,
  1. What Forfeitures of Money, Lands or Goods such Offenders incur.
  2. In what Manner they are to be proceeded against for those Forfeitures.
  3. What other Inconveniencies they are subject to.
  4. By what Means they may be discharged.
  5. How far a Person is punishable for suffering such Absence in others.
8. Of Offences against the Established Church by Protestant Dissenters.

Of the Offence of professing or encouraging the Popish Religion, *vide* Tit. **Popish Recusants.**

Of the Offence of holding an Office without conforming to the Established Religion, *vide* Tit. **Office.**

(A) Of Heresy: And herein,

1. What it is.

**H**ERESY (*a*) among Protestants is said to be a false Opinion repugnant to some Point of Doctrine clearly revealed in Scripture, and either absolutely essential to the Christian Faith, or at least of most high Importance.

1 Hawk P. C. 3.  
(a) That anciently under the general Name of Heresy there have been comprehended three Sorts of Crimes; 1. Apostacy, when a Christian did apostatize to Paganism or to Judaism. 2. Witchcraft. 3. Formal Heresy, which seems to be an Apostacy from the Established Religion; for which, and the several Ways of determining, punishing, and the Difference between the Civil and Imperial Laws, Popish Canons, and the Laws of England concerning Heresy, *vide* a large Account in 1 Hal. Hist. P. C. 383 to 410.

It seems (*b*) difficult precisely to determine what Errors shall amount to Heresy, and what not; but the Statute 1 Eliz. cap. 1. which erected the High Commission Court, having restrained it to such as are either determined by Scripture, or by one of the four first General Councils, or by some other Council, by express Words of Scripture, or by Parliament, with the Assent of the Convocation; these Rules are at present generally thought the best Directions concerning this Matter.

1 Hawk P. C. 3, 4.  
(b) And it is said by my Lord Hale, that the Papal Canonists have by ample and general Terms extended Heresy so far, and left so much in the Discretion of the Ordinary to determine it, that there is scarce any the smallest Deviation from them but may be reduced to Heresy, according to the great Generality, Latitude and Extent of their Definitions and Descriptions, from whence he observes, how miserable the Servitude of Christians was under the Papal Hierarchy, who used so arbitrary and unlimited a Power to determine what they pleased to be Heresy, and then, *emni appellatione postposita*, subjecting Mens Lives to their Sentence. 1 Hal. Hist. P. C. 383, 389.

2. By whom it is cognizable.

According to the Common and Imperial Law, and generally by other Laws in Kingdoms and States where the Canon Law obtained, the Ecclesiastical Judge was the Judge of Heresies, and hereby they obtained a large Jurisdiction touching them.

Hence it is, that by the Common Law with us, the Convocation of the Clergy, or Provincial Synod, might and frequently did proceed to the Sentencing of Hereticks, and when convicted, left them to the Secular Power, whereupon the Writ of *Heretico comburendo* might issue.

Also it is agreed, that every Bishop may convict Persons of Heresy within his own Diocese, and proceed by Church Censures against those who shall be convicted; but it is said, that no Spiritual Judge, who is not a Bishop, hath this Power; and it has been (*c*) questioned, whether a Conviction before the Ordinary were a sufficient Foundation whereon to ground the Writ *de Heretico comburendo*, as it is agreed that a Conviction before the Convocation was.

1 Hawk P. C. 4.  
State Trials, Vol. II. 275.  
(c) Lord C. J. Hale seems to be of Opinion, that if the Diocesan convict a Man of Heresy, and either upon his Refusal to abjure, or upon a Relapse, decree him to be delivered over to the Secular Power; and this being signified under the Seal of the Ordinary into the Chancery, the King might thereupon by special Warrant command a Writ *de Heretico comburendo* to issue, tho' this were a Matter that lay in his Discretion to grant, suspend or refuse, as the Case might be circumstantiated. 1 Hal. Hist. P. C. 392.

But it seems agreed, that regularly the Temporal Courts have no Cognizance of Heresy, either to determine what it is, or to punish the Heretick as such, but only as a Disturber of the Publick Peace; and that therefore, if a Man be proceeded against as an Heretick in the Spiritual Court,

27 H. 8. 14. b  
5 Co. 58.  
Heb. 236.

Court *pro salute animæ*, and think himself aggrieved, his proper Remedy is to bring his Appeal to a higher Ecclesiastical Court, and not to move for a Prohibition from a Temporal one.

3 *Inst.* 42.  
1 *Rol. Rep.*  
110.  
2 *Bulf.* 500.

Yet a Temporal Judge may incidentally take Knowledge, whether a Tenet be heretical or not; as where one was committed by Force of 2 *H. 4. cap. 5.* for saying, that he was not bound by the Law of God to pay Tithes to the Curate; another for saying, that tho' he was excommunicate before Men, yet he was not so before God; the Temporal Courts on an *Habeas Corpus* in the first Case, and an Action of false Imprisonment in the other, adjudged neither of the Points to be Heresy within that Statute, for the King's Courts will examine all Things which are ordained by Statute.

5 *Co.* 58.  
1 *And.* 191.  
3 *Leon.* 199.  
3 *Lev.* 514.

Also in a *Quare Impedit*, if the Bishop plead that refused the Clerk for Heresy, it seems that he must set forth the particular Point, that it may appear to be heretical to the Court wherein the Action is brought, which having Conuzance of the original Cause, must by Consequence have a Power to all incidental Matters necessary for the Determination of it, and without knowing the very Point alledged against the Clerk, will not be able to give Directions concerning it to the Jury, who (if the Party be dead) are to try the Truth of the Allegation.

### 3. How punished.

*F. N. B.* 269.  
3 *Inst.* 43.  
*Doffor and*  
*Student, lib.*  
2. *cap.* 29.  
1 *Hawk. P.*  
C. 4, 5.

By the Common Law, one convicted of Heresy, and refusing to abjure it, or falling into it again after he had abjured it, might be burnt by Force of the Writ *de hæretico comburendo*, which issued out of Chancery upon a Certificate of such Conviction; but he forfeited neither Lands nor Goods, because the Proceedings against him were only *pro salute animæ*.

12 *Co.* 44.  
1 *Hawk. P.*  
C. 5.

But at this Day the said Writ *de hæretico comburendo* is abolished by 29 *Car. 2. cap. 9.* and all the old Statutes, that gave a Power to arrest or imprison Persons for Heresy, or introduced any Forfeiture on that Account, are repealed; yet by the Common Law, an obstinate Heretick being excommunicate is still liable to be imprisoned by Force of the Writ *de excommunicato capiendo*, till he make Satisfaction to the Church.

Also by the 9 & 10 *H. 3. cap. 32.* it is enacted, ' That if any Person ' having been educated in, or having made Profession of the Christian ' Religion within this Realm, shall be convicted in any of the Courts of ' *Westminster*, or at the Assises, of denying any of the Persons in the ' Holy Trinity to be God, or Maintaining that there are more Gods ' than one, or of Denying the Truth of the Christian Religion, or the ' Divine Authority of the Holy Scriptures, he shall for the first Offence ' be adjudged incapable of any Office, and for the second shall be disabled to sue any Action, or to be a Guardian, Executor or Administrator, or to take by any Legacy or Deed of Gift, or to bear any ' Office Civil or Military, or Benefice Ecclesiastical for ever, and shall ' also suffer Imprisonment for three Years, without Bail or Mainprize, ' from the Time of such Conviction.

(B) Of Witchcraft, and how punished.

Witchcraft, or *Sortilegium*, was by the ancient Laws of England of 3 Inst. 42. (1) Ecclesiastical Conuzance, and upon Conviction thereof without Abjuration, or Relapse after Abjuration, was punishable with Death by Writ *de heretico comburendo*. Cro Eliz. 571. 1 Hawk. P. C. 5. 1 Hal. Hist. P. C. 583.

(2) Also it is said, that Offenders of this Kind may be condemned to the Pillory, &c. upon an Indictment at Common Law. 1 Hawk. P. C. 5.

Also by an Act of Parliament 1 Jac. 1. cap. 12. it was made Felony, without Benefit of Clergy, to Use any Invocation or Conjuratiō of any evil Spirit, or to consult or covenant with any evil Spirit, or to exercise any Witchcraft, Inchantment, Charm, or Sorcery, whereby any Person shall be killed, destroyed, consumed or lamed in his Body, &c.

But by the 9 Georg. 2. cap. 5. the abovementioned Statute is repealed; and it is thereby enacted, 'That no Prosecution, Suit, or Proceeding, shall be commenced or carried on against any Person or Persons for Witchcraft, Sorcery, Inchantment or Conjuratiō, or for charging another with any such Offence in any Court whatsoever in Great Britain.

But for the more effectual preventing and punishing of any Pretences to such Arts or Powers as are before mentioned, whereby ignorant Persons are frequently deluded and defrauded, it is enacted by the said Statute, 9 Georg. 2. 'That if any Person shall pretend to Exercise or Use any Kind of Witchcraft, Sorcery, Inchantment or Conjuratiō, or undertake to tell Fortunes, or pretend from his or her Skill, or Knowledge, in any occult or crafty Science, to discover where or in what Manner any Goods or Chattels, supposed to have been stolen or lost, may be found; every Person so offending, being thereof lawfully convicted on Indictment or Information in that Part of Great Britain called England, or on an Indictment or Libel in that Part of Great Britain called Scotland, shall for every such Offence suffer Imprisonment by the Space of one whole Year, without Bail or Mainprize; and once in every Quarter of the said Year, in some Market-Town of the proper County, upon the Market-Day, there stand openly on the Pillory by the Space of one Hour, and also shall (if the Court, by which such Judgment shall be given, shall think fit) be obliged to give Sureties for his or her good Behaviour, in such Sum, and for such Time, as the said Court shall judge proper, according to the Circumstances of the Offence; and in such Case shall be further imprisoned until such Sureties be given.

(C) Of Offences against Religion as punishable by the Common Law.

Although Offences against Religion are, strictly speaking, of Ecclesiastical Conuzance, yet where a Person, in Maintenance of his Errors, sets up Conventicles, or raises Factions, which may tend to the Disturbance of the publick Peace, or where the Errors are of such a Nature as subvert all Religion or Morality, which are the Foundation of Government, they are punishable by the Temporal Judges with Fine and Vol. III. L and

and Imprisonment, and also such corporal infamous Punishment, as to the Court in Discretion shall seem meet, according to the Heinousness of the Crime, *ne quid detrimenti res Publica capiat*.

1 Vent. 293.

3 Keb. 607,  
621.

1 Hawk. P.  
C. 7.

1 Hawk. P.  
C. 7.

1 Sid. 168.

1 Keb. 620.

2 Rol. Abr.

187.

1 Hawk. P.

C. 7.

(a) But not

before Justices of the Peace. Cro. Jac. 44.

Such as all Blasphemies against God, as denying his Being or Providence, and all contumelious Reproaches of Jesus Christ.

Also all prophane Scoffing at the Holy Scriptures, or exposing any Part thereof to Contempt or Ridicule.

Impostors in Religion, as falsely pretending to extraordinary Commissions from God, and terrifying or abusing the People with false Denunciations of Judgments, &c.

All open Leudness grossly scandalous, such as was that of those Persons who exposed themselves naked to the People in a Balcony in *Covent-Garden*, with most abominable Circumstances.

Seditious Words in Derogation of the Established Religion are (a) indictable, as tending to a Breach of the Peace; as these, your Religion is a new Religion, and Preaching is but Pratling, and Prayer once a Day is more edifying.

## (D) Of Offences by Statute against Religion: And herein,

### 1. Of the Offence of Prophaning the Lord's Day.

BY the 1 Car. 1. cap. 1. it is enacted, ' That there shall be no Assembly of People out of their own Parishes on the Lord's Day for any Sport whatsoever, nor any Bull-baiting, or Bear-baiting, Interludes, common Plays, or other unlawful Exercises and Pastimes used by any Persons in their own Parishes, on Pain that every Offender shall forfeit 3 s. 4 d. to the Use of the Poor, &c.

By the 29 Car. 2. cap. 7. it is enacted, ' That all Persons shall every Lord's Day apply themselves to the Observation of the same, by exercising themselves in Duties of Piety and true Religion publicly and privately, and that no Tradesman, Artificer, Workman, Labourer, or other Person whatsoever, shall do or exercise any worldly Labour, Business, or Work of their ordinary Callings, upon the Lord's Day, or any Part thereof; (Works of Necessity and Charity only excepted) and that every Person being of the Age of fourteen Years, or upwards, offending in the Premises, shall for every such Offence forfeit the Sum of 5 s. and that no Person shall publicly cry, shew forth, or expose to Sale any Wares, Merchandizes, Fruit, Herbs, Goods or Chattels whatsoever, upon the Lord's Day, or any Part thereof, upon Pain that every Person so offending shall forfeit the same Goods so cryed, or shewed forth, or exposed to Sale.

But by 11 &

12 W. 3. cap.

21. forty

Watermen

may be ap-

pointed by

the Company

of Water-

men to ply

on the River

Thames. —

And by the 9 Ann. cap. 23.

Hackney-Coachmen and Chairmen are permitted to work within the Bills of Mortality on Sunday.

And it is further enacted, par. 2. ' That no Drover, Horse-Courser, Waggoner, Butcher, Higler, their or any of their Servants, shall come into his or their Inn or Lodging upon the Lord's Day, or any Part thereof, upon Pain that each and every such Offender shall forfeit 20 s. for every such Offence; and that no Person or Persons shall Use, Employ, or Travel upon the Lord's Day with any Boat, Wherry, Lighter or Barge, except it be upon extraordinary Occasion, to be

allowed



‘ allowed by some Justice of Peace of the County, or Head Officer, or  
 ‘ some Justice of the Peace of the City, Borough, or Town Corporate  
 ‘ where the Fact shall be committed, upon Pain that every Person so  
 ‘ offending shall forfeit and lose the Sum of five Shillings for every such  
 ‘ Offence; and that if any Person offending in any of the Premises shall  
 ‘ be thereof convicted before any Justice of Peace of the County, or the  
 ‘ chief Officer or Officers, or any Justice of the Peace of or within any  
 ‘ City, Borough, or Town Corporate, where the said Offence shall be  
 ‘ committed, upon his or their View, or Confession of the Party, or  
 ‘ Proof of any one or more Witnesses by Oath, (which the said Justices,  
 ‘ chief Officer, or Officers, is by this Act authorised to administer,) the  
 ‘ said Justice or chief Officer or Officers shall give Warrant under his or  
 ‘ their Hand and Seal to the Constable or Churchwardens of the Parish  
 ‘ or Parishes, where such Offence shall be committed, to seize the said  
 ‘ Goods cried, shewed forth, or put to Sale as aforesaid, and to sell the  
 ‘ same, and to levy the said other Forfeitures or Penalties by way of  
 ‘ Distress and Sale of the Goods of every such Offender distrained, ren-  
 ‘ dering to the said Offenders the Overplus of the Monies raised thereby;  
 ‘ and in Default of such Distress, or in case of Insufficiency or Inability  
 ‘ of the said Offender to pay the said Forfeitures or Penalties, that then  
 ‘ the Party offending to be set publicly in the Stocks by the Space of  
 ‘ two Hours: And all and singular the Forfeitures or Penalties aforesaid  
 ‘ shall be employed and converted to the Use of the Poor of the Parish  
 ‘ where the said Offences shall be committed; saving only that it shall and  
 ‘ may be lawful to and for any such Justice, Mayor, or Head Officer or  
 ‘ Officers, out of the said Forfeitures or Penalties, to reward any Person  
 ‘ or Persons, that shall inform of any Offence against this Act, according  
 ‘ to their Discretions, so as such Reward exceed not the third Part of  
 ‘ the Forfeitures or Penalties.

‘ Provided, That this Act shall not extend to the Prohibiting of dressing  
 ‘ of Meat in Families, or dressing or selling of Meat in Inns, Cooks Shops,  
 ‘ or Victualling Houses, for such as otherwise cannot be provided, nor to  
 ‘ the Crying or Selling of Milk before Nine of the Clock in the Morning,  
 ‘ or after Four of the Clock in the Afternoon.

‘ Provided also, That no Person shall be impeached, prosecuted, or  
 ‘ molested for any Offence before mentioned in this Act, unless he or they  
 ‘ be prosecuted for the same within ten Days after the Offence com-  
 ‘ mitted.

Also it is enacted by the said Statute, *par.* 6. ‘ That no Person upon  
 ‘ the Lord’s Day shall serve or execute, or cause to be served or executed  
 ‘ (a) any Writ, Process, Warrant, Order, Judgment, or Decree, (ex- (a) It hath  
 ‘ cept in Cases of Treason, Felony, or Breach of the Peace,) but that the been held,  
 ‘ Service of every such Writ, Process, Warrant, Order, Judgment, or that not-  
 ‘ Decree shall be (b) void to all Intents and Purposes whatsoever, and the withstanding  
 ‘ Person or Persons so serving or executing the same shall be as liable to this Statute,  
 ‘ the Suit of the Party grieved, and to answer Damages to him for doing a Person  
 ‘ thereof, as if he or they had done the same without any Writ, Process, Judge’s War-  
 ‘ Warrant, Order, Judgment, or Decree at all.’ rant for  
 escaping out

of Prison on a Sunday. 5 Mod 95. Parker ver. Sir William Moor. 2 Salk. 626. S. C. — So a Citation  
 may be sued out of the Spiritual Court on a Sunday, notwithstanding this Act. Carth. 524. Alonson and  
 Brockbank. 5 Mod. 449. S. C. But an Indictment cannot be taken on a Sunday. 2 Keb. 731. 1 Vent. 107.  
 2 Sand. 290. (b) In Salk 78. it is said, that the Arrest is void, so that the Party may have an Action  
 of false Imprisonment for it. — And in 5 Mod. 95. it is said, that the Court would not discharge the  
 Party on Motion, but directed him to bring an Action of false Imprisonment. — And in 6 Mod. 95.  
 it is said by Holt C. J. that if the Court will relieve from such an Arrest, it must be by *Audita Querela*;  
 for it being on a Sunday, is a Fact traversable: But the other Judges held, that it could be done on  
 Motion.

## 2. Of the Offence of Swearing.

By the 21 *Jac.* 1. *cap.* 10. and 6 & 7 *W.* 3. *cap.* 11. every Servant, Day-Labourer, Seaman, or Soldier convicted of profane Cursing or Swearing forfeits one Shilling, and every other Person two Shillings, to the Use of the Poor, to be levied by Distress; and in case the Party is unable to pay, to be set in the Stocks for the Space of an Hour for every single Offence, and for any Number of Offences two Hours; but Persons under the Age of Sixteen, unable to pay, to be whipt. The Justice neglecting his Duty in executing the Act forfeits five Pounds. The Prosecution to be within ten Days next after the Offence committed.

And by the 13 *Car.* 2. *cap.* 9. all Persons in the King's Pay at Sea for profane Oaths, &c. shall be punished by Fine and Imprisonment, as the Court Martial shall think fit.

## 3. Of the Offence of Drunkenness.

By the Statutes 4 *Jac.* 1. *cap.* 5. and 21 *Jac.* 1. *cap.* 7. all Persons whatsoever convicted of Drunkenness by the View of a Justice, Oath of one Witness, or Party's Confession, shall forfeit five Shillings to the Use of the Poor, to be levied by Distress and Sale of Goods; and for Want of a Distress, Party to be set in the Stocks six Hours.

By the 13 *Car.* 2. *cap.* 9. Seamen are to be punished by Fine, &c. as the Court Martial shall think fit.

## 4. Of the Offence of Reviling the Sacrament.

By the 1 *E.* 6. *cap.* 1. Reviling the Sacrament is an Offence for which the Party shall be imprisoned, fined, and ransomed; and this Statute, which was repealed 1 *Mar.* *cap.* 2. is again revived by 1 *Eliz.* *cap.* 1. and is now in Force.

## 5. Of Offences against the Common Prayer.

By the 2 & 3 *E.* 6. *cap.* 1. and 6 *E.* 6. *cap.* 1. (which were repealed by 1 *M.* *cap.* — and revived by 1 *Eliz.* *cap.* 2.) the Common Prayer Book was first established, under severe Penalties; but the same Penalties being repealed and enlarged by 1 *Eliz.* *cap.* 2. and 13 & 14 *Car.* 2. *cap.* 4. which enacts the Use of the same Common Prayer, with some Alterations, those Statutes of *Ed.* 6. seem at this Day to be of little Use.

By the 1 *Eliz.* *cap.* 2. *par.* 4. 'If any Parson, Vicar, or other whatsoever Minister, that ought to say the said Common Prayer, &c. shall refuse to use it in such Church, &c. or other Place where he should use to minister the same, or wilfully or obstinately standing in the same, use any other Form, or speak any thing in Derogation of the said Book, or any thing therein contained, he forfeits for the first Offence one Year's Profit of all his spiritual Promotions, and shall suffer six Months Imprisonment, and for the second Offence shall be deprived.'

In the Construction hereof it hath been resolved,

*Dyer* 203.  
*pl.* 73.

That under the Words Parson, Vicar, or other whatsoever Minister that ought or should say the said Common Prayer, &c. those Clergymen, who have no Cure, are included as much as those who have one, and that they

they are punishable for using any other Form, &c. inasmuch as by their Ordination they are obliged to officiate in the Offices of the Church, &c. and it is said that they are sufficiently shewn to be in Holy Orders by the Word *Clericus* in an Indictment.

That this Statute being not only in the Affirmative, but also expressly saving the Jurisdiction of the Ecclesiastical Courts, does not restrain them from proceeding against those Offenders in their own Methods as Disturbers of the Unity and Peace of the Church, and consequently that such Persons may be deprived by the said Court, according to the Ecclesiastical Law, for the first Offence.

And it is further enacted by 1 *Eliz. cap. 2. par. 9.* ‘ That if any Person shall in Plays, Songs, or other open Words speak any thing in Derogation, Depraving, or Despising of the said Book, &c. or by open Fact compel, or otherwise procure or maintain any Minister to say any Common Prayer openly, &c. in other Form, or shall by any of the said Means let any Minister to say the said Common Prayer, &c. he shall forfeit one hundred Marks for the first Offence, and four hundred for the second, &c. (which if he pay not (a) within six Weeks after Conviction, he shall suffer six Months Imprisonment for the first Offence, and twelve for the second,) and for the third Offence shall forfeit all his Goods and Chattels, and shall suffer Imprisonment for Life.’

5 Co. 5, 6.  
Cawdry's  
Case,  
Po. b. 59.  
2 Rol. Abr.  
222.

(a) Whether  
if the Party  
die within  
six Weeks,  
the said For-  
feiture be

not discharged; since by the Act of God the Election of paying it, or suffering Imprisonment in lieu of it, is taken away; *quere*, & vide *Dyer* 203, 231.

## **6. Of the Offence of teaching School without conforming to the Church.**

By the 23 *Eliz. cap. 1. par. 6 & 7.* it is Enacted, ‘ That if any Person or Persons, Body Politick or Corporate, shall keep or maintain any Schoolmaster who shall not repair to Church according to the Form of the said Statute, or be allowed by the Bishop or Ordinary of the Diocese, (who shall not take any thing for the said Allowance,) they shall forfeit for every Month ten Pounds; and such Schoolmaster presuming to teach contrary to the said Act, and being thereof convicted, shall be disabled to be Teacher of Youth, and shall suffer Imprisonment without Bail or Mainprize for one Year.

And by the 1 *Jac. 1. cap. 4. par. 9.* it is Enacted, ‘ That no Person shall keep any School or be a Schoolmaster out of the Universities or Colleges of this Realm, except it be in some publick or free Grammar School, or in some such Nobleman's or Noblewoman's, or Gentleman's or Gentlewoman's House, as are not Recusants, or where the same Schoolmaster shall be specially licensed thereunto by the Archbishop, Bishop, or Guardian of the Spiritualities of that Diocese, upon Pain that as well the Schoolmaster, as also the Party that shall retain or maintain any such Schoolmaster contrary to the Meaning of the said Statute, shall forfeit each of them, for every Day so wittingly offending, forty Shillings.’

And *note*; These Statutes are still in Force as to Persons not within the Benefit of the Toleration Act; but as to such Persons they seem to be impliedly repealed by that Act, and 12 *Ann. cap. 7.* which obliged Schoolmasters to subscribe the Declaration concerning the Liturgy, and to have a Licence from the Bishop, is repealed by 5 *Georg. 1. cap. 4.*

As for Popish  
Schoolma-  
sters, vide  
Tit. Popish  
Recusants.

## 7. Of the Offence in not coming to Church : And herein,

## 1. What Forfeitures of Money, Lands, or Goods such Offenders incur.

By the 1 *Eliz. cap. 2.* it is Enacted, ' That all Persons inhabiting in any of the (a) King's Dominions, having no reasonable Excuse to be absent, shall endeavour to resort to their Parish Church, &c. or on Let thereof to some usual Place where Common Prayer, &c. shall be used, upon every *Sunday* and Holiday, and then and there orderly abide (b) during the Service, on Pain of Punishment by the (c) Censures of the Church, and Twelvence for every Offence.

(a) An Indictment or Suit on this Statute need not shew that the Party was an Inhabitant of the King's Dominions, or that he had no reasonable Excuse to be absent; but the Defendant, if he hath any Matter of this kind in his Favour, must shew it himself. 2 *Leon* 5. *Godb.* 148. — Nor need the Offence be alledged in the County where the Party was in truth at the Time, because a meer Nonfeasance, and properly speaking not committed any where. 1 *And.* 139. *Hob.* 251. & vide *Leon.* 167. (b) A Misbehaviour at Church, or Absence from Morning or Evening Service, is equally punishable with a total Absence; also he who is absent from his own Parish Church shall be obliged to prove where he went to Church. 1 *Rol. Rep.* 93. *Godbolt* 148. 1 *Sid.* 230. (c) If the Spiritual Court ground its Proceedings on this Statute, and refuse to allow a reasonable Excuse, it shall be prohibited; but not where it proceeds merely on the Canons of the Church. 2 *Rol. Rep.* 438, 455. 1 *Bulf.* 159. *Giff. Cod.* 358.

By the 23 *Eliz. cap. 1. p. 5.* it is Enacted, ' That every Person above the Age of sixteen Years, who shall not repair to some Church, Chapel, or usual Place of Common Prayer, but forbear the same contrary to the Tenor of the said Statute of 1 *Eliz.* and being thereof lawfully (d) convicted, shall forfeit to the King, for every (e) Month which he or she shall (f) so forbear, (g) twenty Pounds.

(This is no more than what the Law implies, and therefore there must be a Judgment on the Conviction to cause a Forfeiture. *Dyer* 160. *pl.* 40. 11 *Co.* 57. b. 59. b. 1 *Rol. Rep.* 89. 233. 3 *Bulf.* 87. *Lutw.* 162. — A Condemnation by Demurrer or *Nil dicit* is as much within the Statute as a Conviction by Verdict. 11 *Co.* 58. 1 *Rol. Rep.* 89, 90. (e) Which is to be understood a Lunar Month, or 28 Days, according to the common Rule of expounding Statutes which speak generally of a Month. *Telv.* 100. *Cro. Eliz.* 835. 2 *Rol. Abr.* 521. (f) One sick for Part of the Time shall not be excused, if it be proved that he was a Recusant before and after. *Cro. Jac.* 529. (g) This Forfeiture of twenty Pounds dispenses not with that of Twelvence given by 1 *Eliz.*

(b) That this Statute is the 28th, and not the 29th, as it is sometimes improperly called, 3 *Lev.* 333. *Lutw.* 203. 2 *Mod.* 240. 2 *And.* 294. By the (b) 28 *Eliz. cap. 6.* and 3 *Jac. cap. 4.* it is Enacted, ' That every Offender being convicted of not coming to Church, contrary to the Purport of the Statutes above-mentioned, shall pay twenty Pounds for every Month after such Conviction, until he shall conform himself, and come to Church; and that if the Offender shall have made Default of Payment of the twenty Pounds both for every Month contained in the Conviction, and also for every Month subsequent during which he shall not conform himself to the Church, the King shall seize, take, and enjoy all his Goods, and two Parts of his Hereditaments, Leafes, and Farms, leaving the third Part only of the same Hereditaments, Leafes, and Farms to and for the Maintenance and Relief of the same Offender, his Wife, Children, and Family, notwithstanding any prior Conveyance thereof made by such Offender, with Power of Revocation, or to the Use of himself or his Family: Also by the said Statute of 3 *Jac. 1.* the King may refuse the Penalty of twenty Pounds a Month, tho' it be tendered according to Law, and thereupon seize two Parts of all the Hereditaments, Leafes, and Farms which at the Time of such Seizure shall be, or afterwards shall come to any such Offender, or to any other to his Use, or in Trust for him, or at his Disposition, or whereby or in Consideration whereof he or his Family shall be relieved, maintained, or kept, leaving unto him his chief Mansion-House as Part of his third Part.'

In the Construction of these Statutes it hath been holden,

1. That the King by making his Election given him by 3 *Jac.* 1. to <sup>1 Jones 24.</sup> <sup>Cowley 171.</sup> seize the Offender's Hereditaments, &c. waves the Benefit of the twenty Pounds a Month, and the Power of seizing the Offender's Goods.
2. That Bonds, Recognizances, &c. taken in the Offender's own Name, <sup>12 Co. 1, 2.</sup> or in the Names of others to his Use, come within the Words *all his* <sup>1 Leon 98.</sup> <sup>1 Rol. Rep. 7.</sup> Goods, &c.
3. That no Copyhold Lands are within either of the Statutes, by <sup>Owen 57.</sup> reason of the Prejudice that would accrue thereby to the Lord of the <sup>1 Leon. 97.</sup> Manor.
4. That tho' it may be doubtful on the Statute 28 *Eliz.* whether <sup>Lane 105.</sup> Lands conveyed in Trust by some Friend for the Recusant may be seized, <sup>Cowley 169.</sup> yet it is clear that such Lands may be seized by 3 *Jac.* 1. which expressly <sup>12 Co. 1, 2.</sup> provides, that the King upon his waving the Forfeiture of twenty Pounds a Month may seize two Parts of all the Hereditaments, &c. which shall come to any such Offenders, or to others to their Use or in Trust for them.
5. But that the King cannot seize Lands of which the Offender is seized <sup>Lane 39.</sup> in Trust for another, altho' the Statute hath made no express Provision <sup>Hard. 466.</sup> for *Cestui que Trust*.
6. That the Profits of the Lands seized by the King by Force of 29 <sup>Cro. Eliz. 845.</sup> *Eliz.* for the Non-payment of the twenty Pounds a Month, ought not <sup>2 Rol. Rep 25.</sup> to be applied to the Satisfaction thereof, but that the Lands ought to <sup>Pa m. 41.</sup> remain in the King's Hands by way of Pledge, till the whole Forfeiture <sup>1 Jones 24.</sup> be paid some other Way: But this Construction of the Statute seeming <sup>1 Hawk. P.C. 15.</sup> over severe, it was provided by 3 *Jac.* 1. that the Profits of the said Lands should go towards the Satisfaction of the twenty Pounds.

## 2. In what Manner they are to be proceeded against for those forfeitures.

As to the Forfeiture of Twelvepence, it is by the 1 *Eliz.* cap. 2. and 3 *Jac.* 1. cap. 4. Enacted, ' That the said Forfeiture of Twelvepence ' for the Absence of a *Sunday* or Holiday may, on the Confession of the ' Party, or Oath of one Witness, &c. be levied on the Goods of the ' Offender, &c. by the Warrant of a Justice of Peace to the Church- ' warden of the Parish where the Party dwells, and employed to the ' Use of the Poor.

As to the Forfeiture of twenty Pounds for a Month's Absence by the 23 *Eliz.* cap. 1. 28 *Eliz.* and 3 *Jac.* 1. cap. 4. ' The same may be reco- <sup>For the Ex-</sup> <sup>position of</sup> <sup>these Clauses</sup> <sup>of these Sta-</sup> <sup>tures, vide</sup> <sup>1 Hawk. P.C.</sup> <sup>16, 17.</sup> vered by Indictment not only in the Court of King's Bench, but also ' before Justices of Oyer, Assise, Gaol-Delivery, and Quarter-Sessions of ' the Peace: And by the 3 *Jac.* 1. cap. 4. par. 7. it is Enacted, That ' upon an Indictment at the Assises, Gaol-Delivery, or General Sessions ' of the Peace, Proclamation shall be made, that the Offender render ' himself to the Sheriff before the next Assises, Gaol-Delivery, or Sessions; ' and that if he shall not then appear, of Record upon such Default ' recorded, the same shall be a Conviction in Law, as if a Trial by Ver- ' dict on the Indictment had been recorded: And by the said Statute ' every such Conviction shall be certified into the Exchequer.

By the 35 *Eliz.* cap. 1. par. 10. it is Enacted, ' That all and every the ' said Pains, Duties, Forfeitures, and Payments shall and may be reco- ' vered and levied to her Majesty's Use, by Action of Debt, Bill, Plaint, ' Information, or otherwise, in any of the Courts commonly called the ' King's Bench, Common Pleas, or Exchequer, in such sort and in all ' respects, as by the ordinary Course of the Common Laws of this Realm ' any other Debt due by any such Person in any other Case should or ' may

‘ may be recovered, or levied, wherein no Effoin, Protection, or Wager of Law shall be admitted or allowed.

By the 20 *Eliz. cap. 6.* and 3 *Jac. 1.* ‘ Every such Offender, being once convicted, shall for every Month after such Conviction, without any other Indictment or Conviction, pay into the Exchequer twice in the Year, *viz.* in every *Easter* and *Michaelmas* Term, as much as shall then remain unpaid, after the Rate of Twenty Pounds for every Month after a Conviction; and that for a Default herein, the King may seise all the Goods and two Parts of the Hereditaments of such an Offender, &c.

### 3. What other Inconveniencies they are subject to.

By the 1 *Jac. 1. cap. 4. par. 8.* it is enacted, That no Recusant convict shall practise either the Common or Civil Law, or Physick, or use the Trade of an Apothecary, or be Judge or Minister of any Court, or bear any Office in Camp, Troop, or Company of Soldiers, or in any Ship or Fortrefs, but shall be utterly disabled for the same, and forfeit for every such Offence 100 *l.*

And it is further enacted, *par. 22.* ‘ That such Recusants as shall be convicted at the Time of the Death of the Testator, or at the Time of granting of any Administration, shall be disabled to be Executors or Administrators, and that no such Persons shall be Guardians to any Child.

And by the 23 *Eliz. cap. 1.* it is enacted, ‘ That every Person, forbearing the Church twelve Months, shall on Certificate thereof into the King’s Bench, by the Ordinary, a Justice of Assise and Gaol-Deliverer, or a Justice of Peace of the County where such Offender shall dwell or be, be bound with two sufficient Sureties in the Sum of Two Hundred Pounds, at the least, to the good Behaviour, and so continue bound until such Offender shall conform himself, &c.

### 4. By what Means they may be discharged.

By the 23 *Eliz. par. 10.* it is enacted, ‘ That every Person guilty of the abovementioned Offences, who shall, before he be thereof indicted, or at his Arraignment or Trial before Judgment, submit and conform himself before the Bishop of the Diocese where he shall be resident, or before the Justices where he shall be indicted, arraigned or tried, (having not before made like Submission at any his Trial, being indicted for his first like Offence) shall, upon his Recognition of such Submission, in open Assises or Sessions of the County where such Person shall be resident, be discharged of all and every the said Offences against the said Statute, &c.

And by the 29 *Eliz. cap. 6. par. 6.* ‘ That whensoever any such Offender shall make Submission, and become conformable according to the Form limited by the abovementioned Statute of 23 *Eliz. cap.* — or shall fortune to die, that then no Forfeiture of 20 *l.* for any Month, or Seifure of the Lands of the same Offender, from and after such Submission and Conformity, or Death, and full Satisfaction of all the Arrearages of twenty Pounds Monthly, before such Seifure due or payable, shall ensue, or be continued against such Offender, so long as the same Person shall continue in coming to Divine Service, according to the Intent of the said Statute.

By the 1 Jac. 1. cap. 4. it is enacted, ' That Recusant conforming himself according to the Meaning of the abovementioned Statutes, &c. shall, during such Conformity, be (a) discharged of all Penalties which he might otherwise sustain by reason of his Recusancy. (a) And may plead his Conformity

to a Suit either by the Informer or King, and even after Judgment may have an *Audita Querela* against the Informer; also he may plead it after a Judgment for the King, before Execution awarded; but after Execution hath been awarded for the King, or the Profits of his Lands on a Seizure have been actually taken to the King's Use, he hath no other Remedy but by Petition to the King. *Rayn.* 391. 2 *Jen.* 187. 1 *Mod.* 213.

If the Heir of a Recusant be a Conformist, he is discharged by 1 Jac. 1. cap. 4. as to all Penalties happening by reason of his Ancestor's Recusancy, unless two Parts of his Lands were seized by the King in his Ancestor's Life, in which case they shall continue in the King's Hands till the whole Debt be levied.

### 5. How far a Person is punishable for suffering such Absence in others.

By the 1 Jac. 1. cap. 4. ' Whoever shall keep in his Service, Fee or Livery, or willingly maintain, &c. in his House any Servant, Sojourner or Stranger, (except a Parent, wanting, without Fraud, other Habitation or Maintenance, and except a Ward, &c. who shall forbear going to Church, &c. for a Month, shall for every such Month forfeit 10*l.*

### 8. Of Offences against the Established Church by Protestant Dissenters.

By 31 *Eliz.* cap. 1. ' Obstinate Nonconformists were compellable to abjure the Realm, and were also subject to other Penalties; and Dissenters were farther restrained by 17 *Car.* 2. cap. — & 22 *Car.* 2. cap. 1. but at this Day by 1 *H. & M.* cap. 13. all Persons dissenting from the Church, (except Papists, and those who shall in Preaching or Writing deny the Doctrine of the Trinity) are exempted from all Penal Laws relating to Religion, except 25 *Car.* 2. cap. 2. (by which all Officers of Trust are bound to receive the Sacrament according to the Usage of the Church of *England*, and also to take the Oaths of Allegiance and Supremacy, and the Test;) and also, except 30 *Car.* 2. cap. 1. (by which the Members of both Houses of Parliament, and all the King's sworn Servants, are bound to make a Declaration against Transubstantiation, and the Invocation of Saints, and the Sacrifice of the Mass) provided such Dissenters take the Oaths of Allegiance and Supremacy, and make the said Declaration against Transubstantiation, &c. and come to some Congregation for Religious Worship in some Place Registered, either in the Bishop's Court, or at Sessions, the Doors whereof shall neither be locked, barred nor bolted.

Also by the said Statute 1 *H. & M.* ' Dissenting Teachers are tolerated, if they take the said Oaths, &c. at the General or Quarter-Sessions, to be held for the Place where such Persons live, and subscribe the Thirty-nine Articles of the Church of *England*, except those few scrupled ones concerning Church Government and Infant Baptism; and by 10 *Ann.* cap. 2. they may qualify themselves as well during a Prosecution upon any Penal Statute as before, and being qualified in one County may officiate in another, upon producing a Certificate, and taking the said Oaths, &c. if required. *Via Salk* 572.

And

And by the Statute 1 *W. & M.* ‘ Those who scruple the taking of any  
 ‘ Oath are within the like Indulgence, provided they subscribe the afore-  
 ‘ said Declaration, and also a Declaration of Fidelity to the King, and  
 ‘ against the deposing Doctrine and Papal Supremacy, and also profess  
 ‘ their Faith in God the Father, and Jesus Christ his eternal Son, the  
 ‘ true God and the Holy Spirit, one God for evermore; and acknow-  
 ‘ ledge the Holy Scriptures of the Old and New Testament to be given  
 ‘ by Divine Inspiration.

3 *Lev.* 376.

It has been holden, since this Statute, a Prohibition lies to the Spiritual Court proceeding against Persons for Incontinency who have been married in a licensed Conventicle.

By the 5 *Geor.* 1. *cap.* 4. it is enacted, ‘ That if any Magistrate shall  
 ‘ be knowingly present at any publick Meeting for Religious Worship,  
 ‘ other than the Church of *England*, in the peculiar Habit of, or at-  
 ‘ tended with, the Ensigns belonging to his Office, he shall be disabled  
 ‘ to hold such Office, and adjudged incapable to bear any publick Office  
 ‘ or Employment whatsoever.



# Heriot.

(A) Of the Original and Nature of Heriots.

(B) Of the several Kinds, and where an Heriot shall be said to be due: And herein,

1. Where an Heriot shall be said to be due by Custom.
2. Where an Heriot shall be said to be due by Tenure or Reservation.

(C) Of the Remedies to be pursued for the Recovery of an Heriot where it is due.

## (A) Of the Original and Nature of Heriots.

**T**HE Heriot Duty is thought by our best Antiquaries to be far more ancient, and to differ from (a) *Relief*, the Original whereof seems to be thus.

*S. elm. 287.*  
(a) *Relief* began in this Manner;

when the Feuds were only for Life, yet if the Tenant had any Son or Relation fit for the Service, the Tenant would recommend him to the Lord, and the Lord would generally let him in on better Terms than any other; and thus began the Payment of Money on new Admittances, which when the Feud became inheritable, was turned into a Sum certain, and was called a *Relief*, being originally a charitable Benignity to the Heir to admit him tho' he paid not the full Value of the Land. See *Wright of Tenures* 97, &c. — And *Fleta* thus defines a Heriot: *Herietum est quadam præstatio uli tenens liber, vel Servus in morte sua Dominum suum respicit de meliori averio suo vel de Secundo meliori, quæ quidem præstatio magis fit de gratia quam de jure, & nullam habet comparationem ad relevium, eo quod relevium non contingit quia factum est Antecessoris.* *Fleta*, lib. 4. cap. 18. — My Lord Coke says, that Heriots are very ancient, and that they were preferred to Mortuaries, the Lord being intitled to the best Beast, and second was due as a Mortuary. *Co. Lit.* 185. b.

Anciently when the Tenures were Military and for Life only, the Arms and War-Horse of the Tenant, upon his Death, went, together with the Land, to the Lord, being due to him, as having been purchased out of the Profits of the Land, or as having been originally granted by the Lord for publick Defence, and therefore belonged to the Lord that he might bestow them on the succeeding Tenant for the like Service; but when the Feud became inheritable, the Reason of the Heriot ceased, and then the Arms and War-Horse went to the Heir who succeeded to the Land; yet in some Manors the Custom of the Heriot was by particular Agreement retained, or the Lord reserved it as Parcel of his Tenure; and tho' originally the Heriot was the (b) best Horse, yet it came in Time to be the best Beast; for the Tenants, to disappoint their Lords, would often sell their Arms and Horses, and then of Necessity a Law was made that the Lord might take the best Beast in lieu of them, and

*Spelm. Glos.*  
287.  
*Bract. lib. 2.*  
fo 60.  
*Britton* 178.

(b) That in the Saxon Language the Word Heriot signifies Ar-

mour, Weapons or Provision, and was a Tribute of old given to the Lord of a Manor for his better Preparation towards War; and therefore at their first Institution were paid in Arms and Habillments of War. *Fortesc.* in the Preface to *Absolute and Limited Monarchy* 57.

(a) *Vide*  
*Kitchin* 133.

*Spelm.* 287.  
(b) In *Lam-*  
*bert* we have  
an Account  
of these  
Laws, and  
amongst o-  
thers that  
which fol-  
lows: *Si quis*  
*Inuria sine*  
*Morte repen-*  
*tina fuerit n-*

*testat' Mortuus, Dom nus tamen nullam rem suam partem (praterquam quã de jure debetur Heriotti no-*  
*mine) sibi Assunite, verum ea judicio suo uxori, Liberis & Cognatione Proximis jussu pro suo cuique fure d sibi*  
*buito.* Lamb. Sax. Laws 119. — And in *Co. Lit.* 185. b. the same Law cited.

to the Heriot came to be esteemed the best Beast ever after ; and as it arose by Custom, or Tenure, after the Feud became inheritable ; hence we find in some Manors a Custom of paying it in (a) Goods, and in some in Money.

It appears not only from *Spelman's* Conjectures, but likewise from the (b) Laws themselves of King *Canutus*, that the *Danes* were the first Inventers of Heriots, and that it was a Political Institution of theirs, whereby the *Danish* Tenants were to hold by Military Service, and their Arms and Horses, at their Deaths, to revert to the Publick ; and by that Means putting the whole Strength and Defence of the Kingdom into their Hands, committing only the Affairs of Agriculture, and the Improvement of the Nation to the *English*, tho' thereby they enjoyed greater Freedom and Immunities in their Tenures than the *Danish* Tenants did.

## (B) Of the several Kinds, and Where an Heriot shall be said to be due : And herein,

### 1. Where an Heriot shall be said to be due by Custom.

*Dyer* 199. b.  
*Bro. Tit. He-*  
*riot* 2, 3.

AS to the several Kinds of Heriots, some are due by Custom, some by Tenure, and some by Reservation on Deeds executed within Time of Memory ; those due by Custom are the most frequent, and arose by the Contract or Agreement of the Lord and Tenant, in Consideration of some Benefit or Advantage accruing to the Tenant, and for which an Heriot, as the best Beast, best Piece of Household Furniture, &c. became due, and belonged to the Lord either on the Death or (c) Alienation of the Tenant, and which the Lord may seize either within the Manor or without, at his Election.

(a) That an  
Heriot may  
be as well  
due by Custom

upon an Alienation of the Tenant, as by his Death. 8 *Co.* 106. a. *Palm.* 342.

*Dyer* 199. b.  
*Dav.* 33.  
2 *And.* 153.  
1 *Roll. Abr.*  
561.  
4 *Mod.* 431.

But tho' a Custom, that the Lord shall have the best Beast, &c. of his Tenant who dies is good, yet a Custom or Prescription to have a Heriot of every Stranger dying within such a Manor is void, because it cannot have a reasonable Commencement between the Lord and a Stranger, tho' it may between him and his Tenants.

*Meor* 16. pl.  
58. adjudged  
*N. Bendl.*  
112. pl. 147.  
adjudged.

So a Custom or Prescription to have a Heriot, viz. the best Beast of his Tenant, and if it be esloigned before the Lord (d) seizes it, that then he may take the Beast of any other Person Levant and Couchant upon the Land, is unreasonable and void.

4 *Mod.* 431.  
302. pl. 294.

cited. (d) But the Cattle of a Stranger may be distrained, tho' not seized. *N. Bendl.* 302. pl. 294. *Dalf.* 61. *Owen* 146. *March* 165. & vide infra, Letter (C).

7 *H.* 6. 26. b.  
*Bro. Tit. He-*  
*riot*, 3.  
*Bro. Custom*,  
22.  
1 *Roll. Abr.*  
567. S. C.

If the Custom be, that the Lord ought to have the best Beast as an Heriot of him that dies his Tenant, and the Parson of the Parish the second best Beast as a Mortuary ; if the Tenant holds two several Tenements of the Lord, subject to the Custom within the Parish, the Lord shall have the two best Beasts within the Intent of the Custom, and the Parson the third.

A Copyholder for Life, where the Custom is, that if the Tenant died seised a Heriot should be paid, dies disseised or ousted, the Lord having first granted the Seignory to *A.* for 99 Years, if the Tenant should so long live, Remainder to *B.* for 4000 Years; and herein two Questions were made: 1<sup>st</sup>, Whether any Heriot should be paid, because the Copyholder did not die seised: And as to this, the Court held clearly, that a Heriot was due and payable; for notwithstanding the Ouster and Disseisin, he still continued legal Tenant, and such Disseisin might have been by Comblination to defeat the Lord of his Heriot. The second Question was (a), to whom the Heriot should be paid: And as to this, the Court held clearly, that the Remainder Man for 4000 Years could have no Right to it, because the Copyholder was never his Tenant; and as to the Grantee for 99 Years, *Barkley* Justice was of Opinion, that it belonged to him; but hereof *Jones* Justice (they two only being in Court) doubted, because that *eo instante* the Tenant died, *eodem instante* the Estate of the Grantee for 99 Years was determined.

March 23.  
Norrice and  
Norrice,  
2 Rol. Abr. 72.  
S. C.

(a) That an  
Heriot shall  
go with the  
Reversion,  
Winch 57.  
and always  
incident  
thereto,  
2 Lutw. 1567.  
6 Mod 63, 85.  
1 Salk. 188.  
S. C.  
Smalls and  
Penhallow.

If by the Custom of a Copyhold Manor the Lord may grant a Copyhold to three Persons, to hold to them *successive sicut nominantur in Charta*, & *non alibi*, for their Lives, and that on the Death of every Tenant the Lord should have his best Beatt for an Heriot, and a Grant is made to *J. S.* and his Assigns, to hold to him for his own Life and the Lives of two others; this at least is a good Grant for the Life of *J. S.* tho' not strictly pursuant to the Custom, and the Lord on his Death shall have an Heriot; but he cannot have an Heriot on the Death of the *Cestui que Vies* (b), because they were never his Tenants.

(a) So where  
a Bill was

exhibited in Chancery to discover the best Beatt of *Cestui que Trust* of a College Lease, and the Defendant demurred thereto, because the best Beatt of *Cestui que Trust* could not be taken for a Heriot; also it appeared by the Plaintiff's own shewing, that the Tenants who had the Estate in Law in them were still living; and the Demurrer was allowed. 1 Vern. 441.

If a Copyholder for Life, on whose Death the Lord is intitled to a Heriot, becomes a Bankrupt, and the Copyhold is assigned to the Creditors, this Transmutation of the Tenant by Act of Parliament shall not work a Prejudice to the Lord; but the Lord shall, on the Death of the (c) Copyholder, have an Heriot.

1 Salk. 188.

(c) On the  
Death of the Assignee, 6 Mod. 63; but *quare*.

If an Heriot be due by Custom of the Manor, *viz.* that upon the Death of every Tenant of the Manor the Lord shall have an Heriot, if the Lord purchases Parcel of the Tenancy it shall not extinguish the Custom; because the Lord has only purchased Part, and the Tenant, on account of the Residue, is still within the Lord's Homage, and Tenant of his Manor; and consequently upon his Death, as upon the Death of every other Tenant of the Manor, the Lord is intitled to the Heriot.

8 Co. 106.  
2 Brownl 296.

But if the Heriot were due by Tenure or Heriot-Service, and the Lord had purchased Parcel of the Tenancy, the whole Heriot-Service had been extinct; for being intire, it cannot, from the Nature of the Thing, be apportioned, and the Tenant shall be discharged from the Payment of it: For the whole Tenancy being equally chargeable with the Payment of such Service, the Lord by his own Act shall not discharge Part, and throw the whole Burden upon the Residue, for his own private Benefit and Advantage.

8 Co. 104.  
6 Co. 1.  
Moor 203.  
Co. Lit. 149 a.

If there be Lord and Tenant by Fealty and Heriot-Service, and the Tenant aliens Part of the Tenancy, the Alienee shall hold by a distinct Heriot-Service; for in this Case the Services shall be (c) multiplied; and

8 Co. 104.  
J. Talbot's Case.  
Co. Lit. 149 b.  
(d) That if  
the Tenure

be by Homage, Fealty, and a Horse, Hawk, or Spur, if the Tenant aliens Part, the Services shall multiply, and both Feoffor and Feoffee shall pay each of them a Horse and a Spur to the Lord; but if the Tenure had been by any corporal Service, as to be Butler to the Lord, Steward or Bailiff of his Manor, or to cover or repair his House, or to reap or thresh his Corn, in all these Cases upon Alienation of Part, such personal Services shall not multiply. Co. Lit. 149. 6 Co. 1. *Bryerton's Case*, *Flow*, 240. b.

if after such Alienation the Lord purchases the Residue of the Tenancy, only the Heriot-Service due from the first Tenant shall be extinguished; because by the Alienation each held his Proportion by a separate and distinct Tenure; and therefore if the Lord purchases one Tenancy, that can no way affect the Services of his other Tenant; but if the Lord, before the Tenancy had been separated and had been held by two distinct Tenures, had purchased Part of it, the whole Heriot-Service had been extinct, for the Reasons above-mentioned.

*Palm. 342.*

*Snaq ver. Fox.*

If by the Custom of a Manor every Copyholder, upon his Alienation and Surrender, is to pay a Heriot to the Lord, and a Copyholder surrenders Part of his Copyhold to one, and Part to another, and retains Part in his own Hands, the Heriots in this Case shall be multiplied; and as to the first Alienation, the Heriot shall be paid by the Copyholder who aliened, because he still continued Tenant to the Lord, and so upon the Alienation of every other Tenant *toties quoties*; for otherwise it might be in the Power of the Copyholder intirely to defeat the Lord of his Heriot.

*6 Co. 37.*

*Cro. Jac. 76.*

*77. Moor 759.*

Dean and

Chapter of

*Worcester.*

*Co. Lit 44. b.*

*S. P. 6 Mod.*

*64. S. C.*

cited.

The Dean and Chapter of *Worcester* were seised of the Manor of *H.* in Fee in Right of their Church, of which Manor one *G.* was Copyholder for Life under the antient Rent of 8 *s.* and 8 *d.* payable at the four Quarter-Days of the Year, and Heriotable at the Death of the Tenant, and the Copyholds of that Manor were grantable by Custom for three Lives; the Dean and Chapter by Indenture under their common Seal demise the said Lands to *G.* and his Assigns, for the Lives of *A. B.* and *C.* and the Survivor of them, rendering 8 *s.* and 8 *d.* half-yearly, and without Reservation of any Heriot; and after this Lease made the Dean dies, and his Successor and the Chapter enter to avoid this Lease, upon the 13 *Eliz.* (amongst other Reasons) because the antient Rent was not reserved, by reason of the Loss of the Heriot: But the Lease was adjudged good, and that it should bind the Successor. For the 13 *Eliz.* does not avoid any Lease, if the accustomed Rent or more be reserved; and here the accustomed Rent is reserved, and the Omission or Loss of the Heriot is not material, because that was not a Thing annual or depending upon the Rent, but perfectly casual and accidental.

## 2. Where an Heriot shall be said to be due by Tenure or Reservation.

*Plow. 96.*

*Bro. Tit. He-*

*riot 2.*

It has been already observed, that when the Feud became inheritable the Heriot was still continued by Custom, or the Lord reserved it as Parcel of his Tenure, and then he might either seise or distrain for the same as he might do for any other Feudal Service.

*Keilw. 84.*

pl. 8.

(a) But by

*Dodderidge* it

does not be-

come due by

the Death of

the Wife,

because the

Wife can

have no Property.

If a Feme Tenant by Fealty, certain Rent, and Heriot-Service dies, leaving a Husband Tenant by the Curtesy, the Heriot becomes due by the Death of the (a) Wife, tho' the Lord need not distrain for it till after the Death of the Husband; but if he distrains for it after the Death of the Husband, it is not sufficient for him to alledge Seisin of the Services by the Hands of the Tenant by the Curtesy; for such Seisin can no more bind the Heir, than the Seisin of any other Tenant for Life, who has no Body's Estate but his own.

4 *Leon. 234.*

1 *Mod. 216.*

2 *Mod. 93.*

*S. C. Ingram*

*and Totbil.*

A Man made a Lease for 99 Years, if *A. B.* and *C.* should so long live, rendering an Heriot after the Death of each of them successively as they were all three named in the Deed; the last named died first; and if an Heriot should be paid, was the Question. It was objected, that the

Refer-

Reservation being upon the Death of the three successively, the Lessor was contented to trust to that Contingency: But as to this Point the Court gave no Opinion; but Judgment was given against the Avowant for other Faults in the Pleadings.

In Covenant the Plaintiff sets forth a Lease made to the Defendant for 99 Years, if J. and S. should so long live, which Lease was to commence after the End, Forfeiture, Surrender, or other Determination of another Lease for 99 Years, if A. and B. did so long live, & *post Principium inde reddendo & solvendo* 10 l. Rent per Ann. and also one Capon every Christmas, *ac etiam reddendo & solvendo* to the Lord the chief Rent, and also rendering and paying at the Death of J. or S. or either of them, 3 l. in the Name of an Heriot, and also doing several Days Work with his Team at such Days in the Year as was therein appointed; he saith, that J. is dead, and that S. is living, and that the Defendant according to his Covenants hath not paid the 3 l. &c. and, upon Demurrer, the Question was, whether the 3 l. was payable before the Lease took Effect. *Keling C. J.* was of Opinion, 1<sup>st</sup>, That a Reservation being in lieu of the Profits, the other Reservations (tho' there had been no such Thing expressed as *post Principium inde*) they must not have begun till the Lease had come into Possession. 2<sup>dly</sup>, That this 3 l. is a Sum in gross, and could not have been distrained for, being only an Agreement of the Parties that a Sum of Money shall be paid at the Death of J. and S. or either of them, like an Agreement to pay a Fine; and being such an Agreement shall be paid, tho' the Lease never take Effect; neither is it material what other Reservations it comes in Company with, for no Body shall make an Interpretation of the express Words of the Party. But the other three Judges were of Opinion, that the 3 l. in the Name of an Heriot was not to be paid upon any Death that fell out before the Lease came into Possession; for tho' it be appointed to be paid after the Death of J. and S. or either of them, yet that must be understood *secundum subjectam materiam*, viz. if their Death happen within the Term; for till the former Lease expire, this is a future Interest, and then the Lessor hath no Reversion, and the Lessee has no Term; and how then can a Heriot be payable? for a Heriot by Reservation is in the Nature of a Rent, and may be distrained for as well as any other. 2<sup>dly</sup>, (a) Covenants must be expounded according to the Intentions of the Parties, which are to be collected from the Nature of the Grant on which they depend, and of other Covenants which come in Company with them; and therefore the Reservation of 3 l. in the Name of an Heriot being upon Account of the Term, and the Term not being yet come in Effect, and also being joined with other Reservations, none of which were to begin till *post Principium* of the Term, this must have the same Construction too, and must not commence before the Term.

If to an Avowry for Heriot Custom or Service the Party pleads in Bar, that the Tenant at the Time of his Death *nulla habet Animalia*, this, as to its being a good Plea, is left a *Quere* by *Hobart* and *Hutton*; tho' the latter Book seems to hold it a good Plea, and that it will bar the Lord, especially (b) if there was no fraudulent Disposition to defeat the Lord of his Heriot; in which Case he has his Remedy by Force of the Statute (c) 13 Eliz.

nant devises away all his Goods. *Co. Lit.* 158. b. (c) An Action brought on this Statute against a Person being Party to a fraudulent Disposition, in order to defeat a Lord of his Heriot.

2 Sand. 161.  
1 Vent. 9, 91.  
1 Lev. 294.  
1 Sid. 437.  
2 Keb. 677.  
S.C. between  
Tanion and  
Kerne.

(a) For this  
vide *Hob.* 275.  
*Dyer* 371.  
pl. 5.  
377. pl. 27.  
10 Co. 107.

*Hob.* 176.  
*Hutt.* 4, 5.  
*Shaav* and  
*Taylor*.

(b) The Lord  
shall have  
his Heriot,  
tho' the Te-

## (C) Of the Remedies to be pursued for the Recovery of an Heriot When it is due.

*Evo. Tit. Heriot, 2, 2.  
Keilw. 82.*

IT seems to have been always agreed, that for an Heriot-Custom the Lord might seise the best Beast of the Tenant, or whatever else was due as an Heriot, wherever he could find it.

*Doffor and Student, Dialogue 2. cap. 9.  
N. Bendl. 30. pl. 47.  
Keilw. 82.*

But according to some antient Opinions, the Lord could only distrain, but not seise for an Heriot-Service; because, say they, it lies in *Render*, and not *Prender*; also the Form of Pleading is, that he was seised thereof by the Hands of his Tenant, which would be absurd, if the Lord had such a Property therein that he might seise it as his own.

*Plew. 96. adjudged.*

But it hath been solemnly adjudged, that for a Heriot-Service, or for a Heriot reserved by way of Tenure, the Lord may either seise or distrain; for when the Tenant agrees that the Lord shall on his Death have his best Beast, &c. the Lord hath his Election which Beast he will take, and by seising thereof reduces that to his Possession, wherein he had a Property at the Death of the Tenant, without the concurring Act of any other Person; and it is not like the Case where the Lessor reserves 20 s. or a Robe, for there the Lessee has his Election which he will pay, and being to do the first Act, the Lord cannot seise, but must distrain.

*Cro. Eliz. 589.*

*Odham and*

*Smith, S. P.*

*adjudged in*

*B. R. on a*

*Writ of Er-*

*ror of a*

*Judgment*

*to the con-*

*trary in C. B.*

*Moor 540. S. C.*

*adjudged accordingly in B. R. on a Conference with the Judges of the Court of C. B.*

*1 And. 298. S. C. as adjudged in C. B.*

*Cro. Car. 260.*

*(a) This must*

*be the very*

*Beast of the*

*Tenant,*

*3 Mod. 231.*

*(b) For this*

*vide Dalf. 61. Owen 146. March 165. N. Bendl. 302. pl. 294. Lit. Rep. 35.*

*1 Salk 356.*

*Justin and*

*Bennet per*

*Cur. 1 Show.*

*81. S. P. 3*

*Mod. 231. S. P. arguendo.*

*(c) For a Heriot-Custom the Lord may seise in the Highway,*

*for that is no Distress, but a Seizure; but he cannot distrain for a Heriot-Service there. 2 Inst. 132.*

*1 Show. 81.*

*3 Mod. 231.*

*(d) 2 Intw.*

*1566. Osborne*

*and Steeward,*

*3 Mod. 230.*

*S. C. ad-*

*judged into*

*the Exche-*

*quer, &c. vide*

*1 Mod. 217.*

*2 Mod. 93.*

*(e) That after the Determination of the Lease the Lessor cannot distrain, Co. Lit. 47. 6 Co. 64. but*

*for this vide Title Rents, and the Statute of the 5 Anne. (f) But may have an Action of Covenant.*

*2 Sand. 165.*

*Cro. Car. 260.*

*Maj. and*

*Brandwood*

*adjudged, and two Precedents cited to the same Purpose, 1 Jones 300. S. C. adjudged, and the same*

*Precedents taken Notice of; but there said, that there were divers Precedents in which the best Beast*

*is precisely avowed, and this by the Reporter is said to be the best Way, when it can be known, tho'*

*the other is sufficient: — But in Hob. 176 Shaw and Taylor, for this Incertainty in the Avowry*

*Judgment was given against the Lord. Hunt. 4. S. C. and S. P. adjudged as in Hobart.*

riot, he need not in his Avowry shew which was the best Beast which he was intitled to, nor of what Value it was; for the Tenant might have esloigned the Cattle, and thereby it might be impossible for the Lord to know which was the best Beast; and the Tenant at his Peril is to render the best Beast, or sufficient Recompence.

If in Replevin the Defendant avows for an Heriot upon a Lease made by Indenture to *A.* his Executors and Assigns, for 99 Years, if the said *A. B.* and *C.* or any of them, should so long live, rendering Rent, and rendering and paying after the Death of the said *A.* his Executors and Assigns, his or their best Beast for an Heriot, or 50 s. at the Election of the Lessor, his Heirs or Assigns, and *A.* assigns to *J. S.* and dies, on whom the Lessor distrains; and upon Oyer of the Indenture it appears, that the Clause for the Heriot was *rendering, and paying to the Lessor, his Heirs and Assigns, after the Death of the said A. B. and C. and every of them, his or their best Beast in the Name of an Heriot, or 50 s. &c.* This Variance is fatal; for tho' the Lessor be intitled to an Heriot on the Death of *A. B.* or *C.* yet ought he to have set it forth according to the Indenture, and not to have avowed for an Heriot after the Death of *A.* his Executors and Assigns, when there are no Words which make an Heriot payable on the Death of the Executors or Assigns.

If an Heriot be due by Custom from every Tenant dying seised, the Lord need not alledge what Estate the Tenant died seised of.

But where a Person would intitle himself as Devisee of a Reversion after a Lease on which an Heriot is reserved, he ought to shew of what Estate the Devisor was seised at the Time of making his Will, and that he died seised of such Estate; for if disseised before his Death, the Will could not operate.

*Cro. Car.* 313.  
*Randal and Story*: But vide this Case as reported in *Hetley* 57. and 2 *Roll. Abr.* 451

1 *Bulf.* 101

*Cro. Eliz.* 530.  
*Dyer* 229.  
1 *Sid.* 265.  
(a) 1 *Mod.* 217.  
2 *Mod.* 93.

## Highways.

- (A) Of the several Kinds, and what shall be said a Highway.
- (B) To whom the Highway and Soil belong.
- (C) Who hath a Right to a Way, and how he must claim it.
- (D) Whether a Highway may be changed.
- (E) Of Stopping a Highway, and other Nusances therein.
- (F) Who are obliged to repair a Way by the Common Law; and therein where a Person shall be said liable by reason of Inclosure, Tenure, or Prescription.
- (G) Of the Provision for Repairing the Highways by several Acts of Parliament.
- (H) How the Parties obliged to repair are to be proceeded against: and what Defence they may make.

## (A) Of the several Kinds, and what shall be said a Highway.

**I**T seems that (a) antiently there were but four Highways in *England*, which were free and common to all the King's Subjects, and thro' which they might pass without any Toll, unless there was a particular Consideration for it; all others, which we have at this Day, are supposed to have been made thro' private Persons Grounds, on a Writ of *Ad quod Damnum*, &c. which being an Injury to the Owner of the Soil, it is (b) said that they may prescribe for Toll without any special Consideration.

(a) That without any Reservation of Tenure, &c. the *Tri-noda Necessitas* lay upon all Lands in *England*, viz. Contributions against Invasions, to the Highways, and to Bridges. (b) 1 *Mod.* 231. 2 *Mod.* 143.

*Co. Lit.* 56. a. There are, says my Lord *Coke*, at this Day three Kinds of Ways: 1. A Footway, called in Latin *Iter*. 2. A Pack and Primeway, which is both a Horse and a Footway, called in Latin *Attus*. 3. A Cartway, called in Latin *Via* or *Aditus*, which contains the other two, and also a Cartway, and is called *Via Regia*, if it be common to all Men; and *Communis Strata*, if it belong only to some Town or private Person.

But notwithstanding these Distinctions, it seems that any of the said Ways which is common to all the King's Subjects, whether it laid directly to a Market-Town, or only from Town to Town, may properly be called a Highway, and that any such Cartway may be called the King's Highway; and that a River common to all Men may also be called a Highway; and that Nuisances in any of the said Ways are punishable by Indictment; for otherwise they would not be punished at all: For they are not actionable unless they cause a special Damage to some particular Person; because if such Action would lie, a Multiplicity of Suits would ensue. But it seems that a Way to a Parish Church, or to the common Fields of a Town, or to a Village, which terminates there, may be called a Private Way, because it belongs not to all the King's Subjects, but only to the particular Inhabitants of such Parish, House, or Village, each of which, as it seems, may have an Action for a Nuisance therein.

If Passengers have used Time out of Mind, when the Roads are bad, to go by Outlets on the Land adjoining to a Highway in an open Field, such Outlets are Parcel of the Highway; and therefore if they be sown with Corn, and the Tract foundrous, the King's Subjects may go upon the Corn.

*Palm.* 389.  
*Cro. Eliz.* 63.  
664.  
1 *Vent.* 189.  
208.  
3 *Keb.* 28.  
*Co. Lit.* 56.  
6 *Mod.* 255.  
1 *Hawk. P.C.*  
201.

1 *Rel. Abr.*  
39c.  
*Cro. Car.* 366.  
S.C.

## (B) To Whom the Highway and Soil belong.

**T**HOUGH every Highway is said to be the King's, yet this must be understood so as that in every Highway the King and his Subjects may pass and repass at their Pleasure.

But the Freehold, and all the Profits, as Trees, &c. belong to the (b) Lord of the Soil, or to the Owner of the Lands on both Sides the Way.

(b) That if Trees grow upon the Highway, he to whom the Seignory of the Leet of the same Place doth belong, shall have the Trees. 1 *Rel. Abr.* 392.

Also the Lord or Owner of the Soil shall have an Action of Trespass for digging the Ground.

8 *E. 4.* 9.  
1 *Rel. Abr.*  
392.



But the Lord of a Rape, within which there are ten Hundreds, may prescribe to have all the Trees growing within any Highway within this Rape, tho' the Manor or Soil adjoining belongs to another: For Usage to take the Trees is good Badge of Ownership.

### (C) Who hath a Right to a Way, and how he must claim it.

A Man may have a Way either by Prescription, by Grant, by Reservation, by Implication, or by Owelty of Partition, and shall not in a *Car. Claudend.* be obliged to shew which Way he claims it; but it will be sufficient for him to alledge *debet & solet*, &c. but in a Bar or Repleviation he must shew his Title precisely.

But he who prescribes for a Way, must shew in certain (a) whether it is a Foot, Horse, or Cartway.

(a) If a Man prescribes *habere Viam tam Pedestrem quam Equestrem pro omnibus Carriagiis*, by this he shall not have a Cartway; for every Prescription is *Stricti Juris*, per 3 *Le. n. 13.* per Leonard Prothonotary, which Dyer conceived to be Law, and therefore said it was good to prescribe *habere Viam pro omnibus Carriagiis* generally, without speaking of Horseway, Cartway, or other Way.

If in Bar of an Action of Trespass the Defendant pleads that *7. s. Telw. 163.* and all those whose Estate he hath in certain Lands, for themselves and their Servants, Time out of Mind have had and used a Way *in, per & trans* the Place where, &c. (b) to the said Lands, this is no good Plea, because it is not (c) shewed (d) *a quo Loco* the said Way is claimed, and the rather, because it is claimed by Prescription, which ought not to be laid *in certo Loco*.

shew his Interest in the Close; but otherwise where he prescribes for a Way *usque talem Campum*, for that may be intended a common Field. *Latch 160.* (c) In an Indictment for an Inroad upon, or not repairing the Highway, it need not be shewn, per 2 *Keb. 715, 728.* — but vide 2 *Rol. Abr. 81. pl. 18. cont.* and that it is a common Exception, and several Indictments have been quashed for it; — so it need not be shewed where in pleading an Highway is named only as an Abuttal, and is not the Foundation of the Plea. *Palm. 421.* (d) It must be shewed *a quo loco ad quem*, because you must not go over any Ground but to the right Place. *Hob. 190.* yet vide 2 *Rol. Rep. 134.* and such Defect is helped where Issue is joined and tried upon the Right of the Way. *Hob. 189, 190. Hutton 10. 1 Vent. 13. 2 Keb. 480, 488.* adjudged, & vide 1 *Brownl. 6.*

If A. be seised in Fee of a Backside in a Town, and the High-street is next adjoining thereto of the East, and there is a Gate in the Backside which incloses it from the Street, the Gate being in the East next to the Street, and A. is also seised in Fee of a Messuage and Piece of Land next adjoining to the Backside of the North of the Backside, and by Deed infeoffs B. of the Messuage and Piece of Land which are of the North of the Backside, and by the same Deed further grants to him and his Heirs *liber. ingressum, egressum, & regressum in, ad & extra eadem concessa premissa in, per & trans predict.* Januam and Backside, by Force of this Grant B. may go from the Street thro' the Gate, and over the Backside, to the Messuage or Piece of Land of which he is infeoffed; but he cannot go thro' the said Gate and Backside to other Places, or from other Places, to the Street, without coming to the said Messuage or Piece of Land; for the Liberty is granted to him of Ingress and Egress *in, ad & extra eadem concessa premissa*; so that this is made appurtenant to the Premises before granted.

In Trespass for breaking his Close, if the Defendant justifies going over this Close, because he hath used Time out of Mind to have a Way over it from D. to Blackacre, and the Plaintiff replies, that at the Time

of the Trespass the Defendant went with his Carriages from *D.* to *Blackacre*, & *dehinc* to a Mill; this will not maintain his Action, for when the Defendant was at *Blackacre*, he might go whither he would.

1 *Roll. Abr.*  
391.

But it seems, that if a Man hath a Way for Carriages from *D.* to *Blackacre* over my Close, and after he purchases Land adjoining to *Blackacre*, he cannot use the said Way with Carriages to the Land adjoining, for then it may be very prejudicial to my Close; but it seems, if I will help my self, I must shew the special Matter, and that he used it for the Land adjoining.

*Yelv.* 159.

(a) But it  
may be *quasi*

Appendant thereto, and as such pass by Grant thereof. *Cro. Jac.* 190.

*Yelv.* 163.  
adjudged.

If in Bar to an Action of Trespass the Defendant pleads, that *7. S.* and all those whose Estate he hath in certain Lands, Time out of Mind, for themselves and their Servants, have had and used *Passagium in, per & trans* the Place where, &c. and so justifies as Servant, this is no good

(b) For this  
*vide* 8 Co. 46 b.

(c) So a Pre-  
sentment in a

Leet for di-  
verting the

King's Highway is merely void, for the Word *Divert* may be applied to a Course of Water, and a Way may be obstructed or stopped, but it is not diverted and stoppt, and another made in another Place. 1 *And.* 234. adjudged. (d) So a Man cannot prescribe for a Way *trans* Cemetery, for that is a Greek Word, and signifies only *Commune Dormitorium, quia Corpora illic usque ad diem resurrectionis dormiunt.* *Jenk. Cent.* 142.

*Palm.* 387,  
388.

2 *Roll. Rep.*

397.

(e) So if a  
Man hath a

Way over a common Field, Part whereof doth belong to himself, for the Infiniteness of the Case he may prescribe generally. *Palm.* 388. 2 *Roll. Rep.* 398.

*Godb.* 52, 53.

A Man cannot alledge that he cannot use his Way as well as he could before, but must plead that he could not use the Way at all.

6

## (D) Whether a Highway may be changed.

*Cro. Car.* 266.  
*Vaugh.* 341.  
*Yelv.* 141.  
1 *Hawk. P.*  
C. 201-2.

AN ancient Highway cannot be changed without an Inquisition found on a Writ of *Ad quod damnum*, that such Change will be no Prejudice to the Publick; and it is said, that if one change a Highway without such Authority, he may stop the new Way whenever he pleases; neither can the King's Subjects, in an Action brought against them for going over such new Way, justify generally as in a common Highway, but ought to shew specially, by way of Excuse, how the old Way was obstructed, and a new one set out; neither are the Inhabitants bound to keep Watch in such new Way, or to repair it, or to make Amends for a Robbery committed in it.

22 *Aff.* 93.  
1 *Roll. Abr.*  
390.

But it hath been holden, that if a Water, which hath been an ancient Highway, by Degrees changes its Course, and goes over different Ground from that whereon it used to run, yet the Highway continues in the new Channel in the same Manner as in the old.

## (E) Of Stopping a Highway, and other Nufances therein.

**I**T is clearly agreed to be a Nufance to dig a Ditch, or make a Hedge over-thwart the Highway, or to erect a new Gate, or to lay Logs of Timber in it, or generally to do any other Act which will render it less commodious. *Kitchen 34, 1 Hawk. P. C. 212.*

Also it is a Nufance for an Heir, and for which he may be indicted, to continue an Ineroachment, or other Nufance to a Highway, begun by his Ancestor, because such a Continuance thereof amounts in the Judgment of Law to a new Nufance. *1 Hawk. P. C. 214.*

Also it is agreed, that it is no Excuse for him who lays Logs in the Highway, that he laid them only here and there, so that the People might have a Passage thro' them by Windings and Turnings. *2 Rol. Abr. 137. 1 Hawk. P. C. 212.*

It is a Nufance to suffer the Highway to be incommoded by reason of the Foulness, &c. of the adjoining Ditches, or by Boughs of Trees hanging over it, &c. and it is said, that the Owner of Land next adjoining to the Highway, ought of common Right to scour his Ditches; but that the Owner of Land, next adjoining to such Land, is not bound by the Common Law so to do without a special Prescription; also it is said, that the Owner of Trees hanging over an Highway, to the Annoyance of Travellers, is bound by the Common Law to lop them; and it is clear that any other Person may lop them, so far as to avoid the Nufance. *8 H. 7. 5. a. Kitchen 34. Dalt. cap. 26. 1 Hawk. P. C. 212, 213.*

But it is no Nufance for an Inhabitant of a Town to unlade Billets, &c. in the Street before his House, by reason of the Necessity of the Cafe, unless he suffer them to continue there an unreasonable Time. *2 Rol. Abr. 137.*

Any one may justify pulling down, or otherwise destroying a common Nufance, as a new Gate or House erected in a Highway; and it hath been of late holden, that there is no need, in Pleading such Justification, to shew that as little Damage was done as might be. *2 Rol. Abr. 144. Cro. Car. 184. 1 Jon. 221. 2 Salk. 458.*

Also besides that all Nufances are punishable by Indictment with Fine and Imprisonment, it is said, that one convicted of a Nufance to the Highway, may be commanded by the Judgment to remove it at his own Cofts, &c. *2 Rol. Abr. 84. 1 Hawk. P. C. 200.*

## (F) Who are obliged to repair a Way by the Common Law; and therein, Where a Person shall be said liable by reason of Inclosure, Tenure, or Prescription.

**O**F common Right, the general Charge of Repairing Highways lies on the (a) Occupiers of Lands in the Parish wherein they lie; but it is said, that the Tenants of the Lands adjoining are bound to scour their Ditches. *1 Rol. Abr. 390. March 26. 1 Vent. 90, 183. 8 H. 7. 5.*

(a) But if there be no Occupier by the Owner's letting the Lands lie fresh, he must repair them himself. *2 Rol. Rep. 412. Palm. 389.*

Also if a Parish is Part in one County and Part in another, and the Highways in one County are out of Repair, the whole Parish shall contribute *1 Med. 112. 1 Vent. 256. 3 Keb. 301.*

tribute to the Repair; but there may be an Agreement between the Inhabitants, that the one shall repair one Part, and the other the other; and such Agreement is good between themselves, and for Breach the one may have an Action upon the Case against the other, but in an Indictment they shall take no Advantage of these Agreements, for as to the King they are equally liable.

1 Vent. 256.

1 Mod. 112.

3 Keb. 301.

Therefore if the Indictment is general against all the Parish, all the Parish shall be charged; but if it be intended to charge one Part or Precinct of the Parish to repair all the Ways within the Parish, it must be alledged in Pleading, that by special Prescription, or *ratione tenuræ*, such a Part of the Parish *de temps dont*, &c. have been charged with the Reparation of the Ways.

1 Rol. Abr.

390.

Cro. Car. 366.

1 Sid. 464.

But tho' the Parish be obliged of common Right to repair the Highways in it, yet it is certain that particular Persons may be bound to repair the Highway, by reason of Inclosure or Prescription; as where the Owner of Lands not inclosed, next adjoining to the Highway, incloses his Lands on both Sides of it; in which Case he is bound to make a perfect good Way, and shall not be excused by making it as good as it was before the Inclosure, if it were then any way defective, because by the Inclosure he takes from the People the Liberty of going over the Lands adjoining to the common Track.

1 Sid. 464.

Also it is said, that if one inclose Land on one Side, which hath anciently been inclosed of the other Side, he ought to repair all the Way; but that if there be not such an ancient Inclosure of the other Side, he ought to repair but Half the Way.

1 Sid. 464.

2 Keb. 665.

2 Sand. 157.

Therefore if there be an old Hedge, Time out of Mind, belonging to *A.* on the one Side of the Way, and *B.* having Land lying on the other Side, makes a new Hedge, there *B.* shall be charged with the whole Repair.

1 Sid. 464.

2 Keb. 665.

2 Sand. 160.

But if *A.* makes a Hedge on the one Side of the Way and *B.* on the other, they shall be chargeable by Moieties.

But it seems clear, that wherever a Person makes himself liable to repair a Highway by reason of Inclosure, that by throwing of it open again, he thereby frees himself of the Burthen of any further Reparation.

27 Aff. 8.

21 E. 4 38.

Bro. Prescription

49, 78.

Keilw. 52. a.

Latch 206.

1 Hawk. P.C.

202-3.

Particular Persons may be bound to repair a Highway by Prescription; and it is said, that a Corporation aggregate may be charged by a general Prescription, that it ought and hath used to do it, without shewing any Consideration in respect whereof they had used to do it, because such a Corporation never dies, neither is it any Plea, that they have done it out of Charity; but it is said, that such a general Prescription is not sufficient to charge a private Person, because no Man is bound to do a Thing which his Ancestors have done, unless it be for some special Reason; as having Lands descended to him holden by such Service, &c. but it seems, that an Indictment charging a Tenant of Lands in (a) Fee with having used of Right to repair such a Way *ratione tenuræ terræ suæ*, without adding that his Ancestors, or those whose Estate he hath, have so done, is sufficient, for 'tis implied.

(a) Also an Occupier as such, tho' at Will only, is indictable

for suffering

a House standing upon the Highway to be ruinous, &c. and the Words *ratione tenuræ*, &c. if added, are Surplus. 1 Salk. 357.

1 Mod. 112.

3 Keb. 301.

1 Vent. 256.

And it seems certain in all those Cases, whether a private Person be bound to repair a Highway by Inclosure or Prescription, that the Parish cannot take Advantage of it on the general Issue, but must plead it specially; and that therefore if to an Indictment against the Parish, for not Repairing a Highway, they plead Not guilty, this shall be intended only that the Ways are in Repair, but does not go to the Right of Reparation.

(G) Of the Provision for Repairing the Highways by several Acts of Parliament.

THE Statutes for this Purpose are very numerous and too long to be here inserted, such as the 13 E. 1. called the Statute of *Winchester*, cap. 5. 2 & 3 Ph. & Mar. cap. 6. 5 Eliz. cap. 13. 18 Eliz. cap. 10. 22 Car. 2. cap. 12. 3 & 4 W. & M. cap. 12. 7 & 8 W. 3. cap. 29. 8 & 9 W. 3. cap. 15. 6 Ann. cap. 29. 1 Georg. 1. cap. 52. 7 Georg. 2. cap. 9.

Which *vide* collected  
1 Hawk. P.C.  
203, &c.

In the Construction whereof it hath been holden, 1. That Clergymen are within these Statutes in respect of their Spiritual Possessions, as much as any other Persons in respect of any other Possessions.

3 Keb. 255,  
476.  
1 Vent. 273.  
2 Inst. 704.  
1 Hawk. P.C.  
204

2. That he who keeps a Draught, ought to send a Team tho' he occupy no Land in the Parish; and in like Manner, he who occupies a (b) Plough-Land ought to send a Team tho' he keep no Draught.

Raym. 186,  
356.  
Da't. cap. 26.  
2 Keb. 617.

(b) Which by 7 & 8 W. 3. cap. 29. is taken for Woodland, or other Land, to the Value of 50 *l.* per Annum.

3. That notwithstanding the Words of the Statute 2 & 3 Ph. & Mar. cap. 6. extend only to the Occupiers of Land, yet if the Owner neither occupy them, nor let them, but suffer them to lie fresh, he shall be charged as much as if he had occupied them, for the Publick ought not to suffer for his Negligence.

Palm. 389.  
2 Rol. Rep.  
412.

4. That he who keeps a Draught and but two Horses, ought to attend with them at the Times appointed, and to carry such Loads as they are able to carry.

Dalt. cap. 26.

5. That it is no Excuse for Parishioners indicted at Law for not Repairing their Highways, that they have done their full Work required by Statute; for the Statute being in the Affirmative, doth not abrogate any Provision of this Kind by the Common Law.

Dalt. cap. 26.  
1 Hawk. P.C.  
204.

6. That the King's Charter, or Letters Patent, discharging certain Lands from the Duty of contributing to the Repair of the Highways, are not sufficient to exempt Lands from the Charge of the Repairing the Highways, which by the Statute Ph. & Mar. and other subsequent Statutes, are chargeable to send Men for that Purpose.

3 Mod. 96.  
Bret and  
Whitchot.

7. That the Justices ought to fix the particular Days, and not generally to appoint six Days between such and such a Day.

1 Salk. 347.  
adjudged.

8. That tho' by the express Provision of the Statutes no Presentment, Indictment, or Order, shall be removed by *Certiorari*, yet if the Quarter-Sessions, under Pretence of the Jurisdiction given them by those Statutes, take upon them to do a Thing manifestly exceeding their Authority, as to make an Order on Surveyors of the Highways to make up their Accounts before a Special Sessions, their Proceedings may be removed by *Certiorari* into the King's Bench, and there quashed; for the Quarter-Sessions have no Manner of Power given them to intermeddle originally with such Accounts, but only by way of Appeal.

1 Hawk. P.C.  
218.

(H) How

(H) how the Parties obliged to repair are to be proceeded against, and what Defence they may make.

*Keilw.* 34.  
*Crom.* 131.  
*Dalt. cap.* 26.  
*5 H. 7. 4. a.*  
*Dyer* 13. *b.*  
*14. pl.* 64.  
*1 Keb.* 256,  
291, 829.  
*2 Keb.* 715,  
728.  
*Raym.* 182.  
(*b*) So held  
by *Holt*; but the other Justices *cont.* because such a Presentment cannot be a greater Estoppel than the finding of a Grand Jury, who are upon Oath. *Carth.* 212-3.

IT seems clear, that no one ought to be punished for any Offence against the Highways, without being first called upon to answer for himself, except in the Case of a Presentment in a Court-Leet, and, as (*a*) some say, in the Case of a Presentment by a Justice of Peace on his View; and even in the Case of a Presentment in a Court-Leet, if it touch a Man's Freehold, as by charging him with being bound to Repairs in respect of the Tenure of his Land, it may so far be traversed in the King's Bench, being removed thither by *Certiorari*; also it may be traversed where a Defendant in Trespass justifies under it.

*1 Hawk. P.C.*  
219.

Upon a Certificate and Affidavit that the Highway is in good Repair, Exceptions to the Form of the Indictment may be taken, but not easily without such Certificate and Affidavit; and the Exceptions of this Kind are:

*2 Rol. Abr.*  
*81. pl.* 18.  
*Palm.* 389,  
420. *2 Keb.*  
715, 728.

1. That the Indictment doth not certainly shew a *Locus a quo*, and a *Locus ad quem*, but there is no Need to shew that a Highway leads to a Market-Town.

*1 Brownl.* 6.  
*2 Rol. Abr.* 81.  
*3 Keb.* 644.

2. That it is repugnant to it self, in shewing where the Nuisance was done; as where it sets forth, that a Man stopped a Way at *D.* leading from *D.* to *E.*

*Cro. Jac.* 324.  
*2 Rol. Abr.*  
80, 81.

3. That it doth not certainly shew to what Part of the Highway the Nuisance extended; as where it only says, that a certain Part of the King's Highway at *K.* was stopped, without shewing how much; or where it says, the Place nufanced contained so many Foot in Length, and so many in Breadth, by Estimation.

*1 Salk.* 359.  
*6 Mod.* 255.  
*Cro. Eliz.* 63.  
*1 Vent.* 208.  
*Poph.* 206.  
*2 Keb.* 728.

4. That it doth not shew with sufficient Certainty, that the Place nufanced was a Way common to all the King's People; as where it only calls it a Horseway, or having called it a common Footway to the Church of *D.* adds, for all the Inhabitants of *D.*

*Noy* 93.  
*3 Keb.* 855.  
(*b*) But this

5. That an Indictment for not Repairing a Highway, which the Defendant ought to repair *ratione tenuræ*, doth (*b*) omit the Word *suæ*.

Exception hath been of late over-ruled. *1 Hawk. P. C.* 220.

*3 Keb.* 58.

6. That an Indictment against *J. S.* Bishop of *A.* for not Repairing a Highway, &c. doth not shew in what Capacity he ought to do it.

*1 And.* 234.

7. That the Nuisance is not expressed in proper Terms; as where the Indictment is, that the Defendant diverted the Highway, which cannot be, because a Highway cannot be diverted, must always continue in the same Place where it was, howsoever it be obstructed, and a new Way made in another Place.

*2 Rol. Abr.* 79,  
81.  
*1 Vent.* 4.

8. That an Indictment against several Persons for not Repairing is laid jointly and severally; but it is no Exception, that a Presentment of such a Highway's being out of Repair by the Default of the Inhabitants, &c. doth not name any Persons in certain, or that a Presentment against a Man for Stopping a Highway in his own Land, which is well proved by the Evidence of Ploughing it, doth not lay the Offence *vi & armis*.

9. That the Defendants cannot plead *quod non debent reparare*, without shewing who ought.

And Note; the Defendant shall not be discharged by submitting to a Fine, but a *Disfringas* shall go *ad infinitum*, till he repair the Way.

1 Sid. 140.  
Carth. 203.  
S. P. agreed.  
1 Salk. 358.  
6 Mod. 163.

## Hue and Cry.

**H**UE and Cry is the Pursuit of an Offender from Town to Town till he be taken, which all who are present when a Felony is committed, or a dangerous Wound given, are by the (a) Common Law, as well as by Statute, bound to (b) raise against the Offenders who escape, on Pain of Fine and Imprisonment.

Crompt. 178. (a) That it is the old Common Law Process after Felons and such as have dangerously wounded any Person. 2 Hal. Hist. P. C. 98. — And therefore Bract. says, *Quod omnes tam Milites quam alii, qui sunt quindecim annorum & amplius, Furare debent quod Utlagatos, Murdratores, Robbatores & Burglatores non receptabunt, nec iis consentient, nec eorum receptatoribus, & si quos tales noverint eis attachiari facient, & hoc vic. comiti & ballivis suis monstrabunt, & si huecium vel clamorem de talibus audierint, statim Audio clamore sequentur cum familia & hominibus de terra sua.* Bract. lib. 3. cap. 1. (b) May be by a Horn or by the Voice. 2 Inst. 172.

3 Inst. 116,  
117.  
2 Inst. 172.  
Dalt. Justice,  
cap. 28, 159.  
Fitz. Coron.  
395.  
Cro. Eliz 654.

As the Raising of Hue and Cry is enjoined by the Common Law, which may be called a Raising of it at the Suit of the King, as well as by several Acts of Parliament, which may be called a Raising of it at the Suit of a private Person, in as much as those Statutes make the Hundred answerable to the Party robbed, if they Neglect to pursue the Hue and Cry, and apprehend the Robbers; therefore we shall consider,

### (A) Hue and Cry at the Common Law, or Suit of the King: And herein,

1. By whom Hue and Cry is to be levied.
2. In what Manner it is to be levied.
3. In what Manner to be pursued.
4. What the Persons may justify doing who pursue it.
5. How the Omission or Neglect of not doing it is punished.

### (B) Of Raising Hue and Cry pursuant to the several Statutes which declare in what Manner the Hundred shall be chargeable: And herein;

1. What Kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be done on the Highway.
2. On what Day, or Time of the Day, it must be committed.

3. What Hundred shall be said to be liable.
4. What Person is to bring the Action, and make Oath of the Robbery.
5. Of the Notice to be given of the Robbery.
6. Where the Party must give Bond for Payment of Costs, in Case he does not prevail.
7. Of the Oath to be taken of the Robbery, and before whom the same must be.
8. At what Time the Action is to be brought.
9. What Evidence will maintain it; and therein of the Witnesses for and against it.
10. What shall Excuse the Hundred; and therein of apprehending the Robbers.
11. How the Money is to be levied, and each Hundredor to contribute to the Charges.

### (A) Hue and Cry at Common Law, or Suit of the King: And herein,

#### 1. By whom Hue and Cry is to be levied.

<sup>2</sup> *Inst.* 172.  
<sup>3</sup> *Inst.* 116.  
<sup>1</sup> *Hal. Hist.*  
*P. C.* 464.

IT seems to be clearly agreed, that a private Person who hath been robbed, or who knows that a Felony hath been committed, is not only authorized to levy Hue and Cry, but is also bound to do it under Pain of Fine and Imprisonment.

<sup>2</sup> *Hal. Hist.*  
*P. C.* 99.

From hence it follows, that altho' it is a good Course, as my Lord *Hale* says, to have a Precept or Warrant from a Justice of Peace for raising of Hue and Cry, yet it is neither of absolute Necessity, nor sometimes convenient, for the Felons may escape before the Justice can be found; also Hue and Cry was Part of the Law before the Statute of 1 *E.* 3. *cap.* 16. which first instituted Justices of the Peace.

<sup>2</sup> *Hal. Hist.*  
*P. C.* 99, 100.

And altho' also, says he, it is especially incumbent upon Constables to pursue Hue and Cry, when called upon, and they are severely punishable if they neglect it; and it prevents many Inconveniencies if they be there, for it gives a greater Authority to their Pursuit, and enables the Pursuants, in his Assistance, to plead the general Issue upon the Statutes of 7 & 21 *Jac.* 1. without being driven to special Pleading; and therefore to prevent Inconveniencies that may happen by Unruliness, it is most advisable that the Constable be called to this Action; yet upon a Robbery, or other Felony committed, Hue and Cry may be raised by the (a) Country, in the Absence of the Constable; and in this there is no Inconveniency, (b) for if Hue and Cry be raised without Cause, they that raise it are punishable by Fine and Imprisonment.

(a) And is therefore called *Cry de pais*, <sup>2</sup> *Hal. Hist.* *P. C.* 100. —

Of the Manner of Raising it according to the Law of the Forest, *vide* 4 *Inst.* 294. (b) 29 *E.* 3. 39. *Fitz. Trespass* 252. *Crompt.* 179. 21 *H.* 7. 28. *a.* — As Disturbers of the King's Peace. <sup>2</sup> *Inst.* 172.



## 2. In what Manner it is to be levied.

The regular Method of levying Hue and Cry, is for the Party to go to the Constable of the next Town and declare the Fact, and (a) describe the Offender, and the Way he is gone; whereupon the Constable ought immediately, whether it be Night or Day, to raise his own Town, and make search for the Offender; and upon the not finding him, to send the like Notice, with the utmost Expedition, to the Constables of all the Neighbouring Towns, who ought in like Manner to search for the Offender, and also to give Notice to their Neighbouring Constables, and they to the next, till the Offender be found.

3 *Inst.* 116.  
*Dalt. Justice*  
*cap.* 28.  
*Crompt.* 178.  
*2 Hawk. P. C.*  
 75.  
 (a) Ought, if  
 he knows it,  
 tell his  
 Name, de-  
 scribe his  
 Person, Ha-

bit, Horse, and such other Circumstances, that he knows, which may conduce to his Discovery,  
 2 *Hal. Hist. P. C.* 100.

## 3. In what Manner to be pursued.

The Constable is not only to make search in his own Vill, but is also to raise all the Neighbouring Vills, who are all to pursue the Hue and Cry with Horsemen as well as Footmen, until the Offender be taken.

2 *Hal. Hist.*  
*P. C.* 101.

## 4. What the Persons may justify doing who pursue it.

For the Understanding hereof we shall here insert what my Lord Chief Justice *Hale* apprehends to be the Law in this Matter.

1. That in Case of Hue and Cry once raised and levied upon Supposal of a Felony committed, tho' in Truth there was no Felony committed; yet those, who pursue Hue and Cry, may arrest and proceed as if a Felony had been really committed.

2 *Hal. Hist.*  
*P. C.* 101.

And therefore the Justification of an Imprisonment by a Person upon Suspicion, and by a Person, especially a Constable, upon Hue and Cry levied, do extremely differ; for in the former there must be a Felony averred to be done, and it is issuable, but in the latter, *viz.* upon Hue and Cry, it need not be averred, but the Hue and Cry levied upon Information of a Felony is sufficient, tho' perchance the Information were false; and therefore an Averment of a Felony committed, in case of a Justification of an Imprisonment upon Hue and Cry, is not necessary; the Reasons whereof are, 1. Because the Constable cannot examine the Truth or Falshood of the Suggestion of him who first levied it, for he cannot administer him an Oath; and if he should forbear his Pursuit of the Hue and Cry till it be examined by a Justice of Peace, the Felon might escape, and the Pursuit would be lost and fruitless. 2. By several Acts of Parliament compellable to pursue Hue and Cry, and is punishable, as those of the Vill, if they do it not. 3. Because he that first raised a Hue and Cry where no Felony is committed, *viz.* the Person that giveth the false Information, is severely punishable by Fine and Imprisonment, if the Information be false; and therefore if he raise a Hue and Cry upon a Person that is innocent, yet they that pursue the Hue and Cry may justify the Imprisonment of that innocent Person, and the Raifer is punishable; and by the same Reason, if he give Notice of a Felony committed when there was in Truth none.

5 *H.* 7. 5. a.  
 21 *H.* 7. 28. d.  
*ter. Rode.*  
 2 *E.* 4. 8. & 9.  
 29 *E.* 3. 39.  
 2 *Inst.* 173.  
 2 *Hal. Hist.*  
*P. C.* 102.

2 Hal. Hist.  
P. C. 102.

2. If Hue and Cry be raised against a Person certain for Felony, tho' possibly he is innocent, yet the Constables, and those that follow the Hue and Cry, may arrest and imprison him in the common Gaol, or carry him to a Justice of the Peace.

7 E. 3. 16. b.  
2 Hal. Hist.  
P. C. 102.

3. If the Person pursued by Hue and Cry be in a House, and the Doors are shut, and refused to be opened, upon Demand of the Constable, and Notice given of his Business, he may break open the Doors; and this he may do in any Case where he may arrest, tho' it be only a Suspicion of Felony, for it is for the King and Commonwealth, and (a) therefore a virtual *Non omittas* is in the Case; and the same Law is upon a dangerous Wound given, and a Hue and Cry levied upon the Offender.

1 Hal. Hist.  
P. C. 102.

And it seems in this Case, that if he cannot be otherwise taken, he may be killed, and the Necessity excuseth the Constable.

Dalt. cap. 28.  
2 E. 4. S. b.  
Cromp. de  
pace 178.  
2 Hal. Hist.  
P. C. 105.

4. Upon Hue and Cry levied against any Person, or where any Hue and Cry comes to a Constable, whether the Person be certain or uncertain, the Constable may search in suspected Places within his Vill, for the apprehending of the Felons.

2 Hal. Hist.  
P. C. 105.

But tho' he may search suspected Places or Houses, yet his Entry must be *per officia aperta*, for he cannot break open Doors barely to search, unless the Person against whom the Hue and Cry is levied be there, and then it is true he may; therefore in case of such a Search, the Breaking open the Door is at his Peril, *viz.* justifiable if he be there; but it must be always remembered, that in Case of Breaking open a Door, there must be first a Notice given to them within of his Business, and a Demand of Entrance, and a Refusal, before Doors can be broken.

2 Hal. Hist.  
P. C. 105.

5. If the Hue and Cry be not against a Person certain, but by Description of his Stature, Person, Clothes, Horse, &c. the Hue and Cry doth justify the Constable, or other Person, following it, in apprehending the Person so described, whether innocent or guilty, for that is his Warrant; it is a kind of Process that the Law allows, (not usual in other Cases) *viz.* to arrest a Person by Description.

2 Hal. Hist.  
P. C. 105.

6. But if the Hue and Cry be upon a Robbery, Burglary, Manlaughter, or other Felony committed, but the Person that did the Fact is neither known nor describable by Person, Clothes, or the like, yet such a Hue and Cry is good, as hath been said, and must be pursued, tho' no Person certain be named or described.

2 E. 4. S. b.  
2 Hal. Hist.  
P. C. 105.

And therefore in this Case, all that can be done is, for those who pursue the Hue and Cry, to take such Persons as they have probable Cause to suspect; as for Instance, such Persons as are Vagrants, that cannot give an Account where they live, whence they are, or such suspicious Persons as come late into their Inn or Lodgings, and give no reasonable Account where they had been, and the like.

2 Hal. Hist.  
P. C. 104.

And here the Justification of the Imprisonment is mixed partly upon the Hue and Cry, and partly upon their own Suspicion; and therefore, 1. In respect that it is upon Hue and Cry, there needs no Averment that the Felony was done, yet it must be averred that an Information was given that the Felony was done, if the Arrest be by that Constable that first received the Information, and so raised the Hue and Cry; or if the Arrest were made by that Constable, or those Villis to whom the Hue and Cry came at the second Hand, it must be averred that such a Hue and Cry came to them, purporting such a Felony to be done; but 2. Also in as much as the Hue and Cry neither names nor describes the Person of the Felon, but only the Felony committed; and therefore the Arrest of this or that particular Person, and so applied, is left to the Suspicion and Discretion of the Constable, or the People of the second or third Vill; he, that arrests any Person upon such general Hue and Cry, must aver that he suspected, and shew a reasonable Cause of Suspicion.

But now by the Statute of 7 Jac. 1. cap. 5. the Constable, or any <sup>2 Hal. Hist. P. C. 100.</sup> that come in his Assistance, even in this Case of Hue and Cry, may plead the general Issue, and give the whole Matter of the Justification in Evidence; for the Pursuit of Hue and Cry, tho' performed by others as well as the Constable, is principally the Act of the Constable of the Vill, and the others are but his Deputies or Assistants within the Precincts of his Constable-wick.

### 5. How the Omission or Neglect of not doing it is punished.

There can be no Doubt but that both by the Common Law, as also <sup>2 Hal. Hist. P. C. 104.</sup> by the several Statutes which enjoin the Levying of Hue and Cry, they who neglect to levy one, (whether Officers of Justice, or others) or who neglect to pursue it when rightly levied, are punishable by (a) Indictment, and may be fined and imprisoned for such Neglect. <sup>(a) That it is one of the Offences</sup> which may be inquired of and punished in the Sheriff's Torn or Lect. <sup>Dalt. Sheriff 394. 2 Hawk. P. C. 67.</sup>

And now by the 8 Geor. cap. 16. it is enacted, ' That every Constable of the Hundred, and every Constable, Bosholder, Headborough, or Tythingman of any Town, Parish, Village, Hamlet, or Tything, within the Hundred, or the Franchises within the Precinct thereof, wherein the Robbery shall happen, as soon as the same shall come to his Knowledge, either by Notice from the Party or Parties robbed, or from any other Person or Persons, to whom Notice shall be given thereof, pursuant to this or any other Statute, shall, with the utmost Expedition, make, and cause to be made, fresh Suit and Hue and Cry after the Felon or Felons by whom such Robbery shall be committed; and if any Constable, Bosholder, Headborough, or Tythingman, shall offend in the Premises, by refusing or neglecting to make, or cause to be made, such fresh Suit and Hue and Cry, every such Offender shall, for every such Refusal or Neglect, forfeit 5 l.

### (B) Of Raising Hue and Cry pursuant to the several Statutes which declare in what Manner the Hundred shall be chargeable for Robberies.

THE Levying of Hue and Cry is, as has been already observed, enjoined by several Acts of Parliament, and to this Purpose it is enacted by (b) Westm. 1. cap. 9. ' That all be ready and apparel'd at the Summons of the Sheriff & a cry de pais, to pursue and arrest Felons, as well within Franchises as without; and if they do it not, and be thereof Attaint, *le Roy prendra a eux grevement*, they are to be indicted and fined for the Neglect. <sup>(b) That tho' some imagined that Hue and Cry was grounded on this Statute, yet my Lord Coke says, that it was used long before, as appears even by this Statute, which, instead of introducing a new Law, enforces Obedience to that which was founded on the ancient Laws of the Realm. 2 Inst. 171.</sup>

‘ By the Statute of 4 *E. 1. de Officio Coronatoris*, Hue and Cry shall  
 ‘ be levied for all Murders, Burglaries, Men slain or in Peril to be slain,  
 ‘ as elsewhere is used in *England*; and all shall follow the Hue and Steps  
 ‘ as near as they can; and he that doth not, and is convict thereof, shall  
 ‘ be attached to be before the Justices in Eyre.

By the Statute of *Winton*, or 13 *E. 1. cap. 1.* it is Enacted, ‘ That  
 ‘ from thenceforth every Country shall be so well kept, that immediately  
 ‘ upon Robberies and Felonies committed fresh Suit shall be made from  
 ‘ Town to Town, and from Country to Country. And *cap. 2.* of the  
 ‘ said Statute, ‘ If the Country will not answer for the Bodies of such  
 ‘ manner of Offenders, the Pain shall be such, that every Country, that  
 ‘ is to wit, the People dwelling in the Country, shall be answerable for  
 ‘ the Robberies done, and also the Damages; so that the whole Hundred  
 ‘ where the Robbery shall be done, with the Franchises being within the  
 ‘ Precinct of the same Hundred, shall be answerable for the Robberies  
 ‘ done: And if the Robbery be done within the Division of two Hun-  
 ‘ dreds, both the Hundreds, and the Franchises within them, shall be  
 ‘ answerable: And after that the Felony or Robbery is done, the Country  
 ‘ shall have no longer Space than (a) Half a Year, within which Half-Year  
 ‘ it shall behove them to agree for the Robbery or Offence, or else that  
 ‘ they will answer for the Bodies of the Offenders.

(a) My Lord  
 Coke says,  
 that this Sta-  
 tute expressly

gives Half a Year, and not forty Days, as mentioned in an Edition of the Statutes then lately published; but that the forty Days are given by the Statute 28 *E. 3. cap. 11. 2 Inst. 569.* — But in 5 *Lev. 320.* it is said, that upon Search of the Parliament Roll it appears that the Statute of *Winton* gives only forty Days to the Country, and that the Statute 28 *E. 3.* is but a Confirmation thereof; and accordingly it was adjudged, where the Plaintiff brought an Action on the Statute of *Winton*, and declared that he was robbed, and none of the Robbers taken within forty Days, according to the said Statute; and with this the modern Precedents agree, as *Rast. Ent. 406. Co. Ent. 351. Herne 215. The. Brev. 141. 2 Sand. 376.*

(b) That this The (b) Statute of *Winton* (c) gives the Action against the Hundred;  
 is not a penal but by subsequent Statutes, such as 27 *Eliz. cap. 13. 8 Georg. 2. cap. 16.*  
 Law, so that several Alterations and Additions have been made therein, which we shall  
 the Statute consider under the following Heads.  
 of Jeofail extends to

Actions brought thereupon, but is a Law made for the Peace of the Kingdom, and Advancement of Justice, *Cro. Jac. 496.* (c) And therefore the best Way for the Plaintiff to conclude his Declaration is *contra Formam Statuti*, because the Statute of *Winton* only gives the Action, *Cro. Jac. 187-8. Telu. 116. Noy 125. 1 Show. 94.*

### 1. What kind of Robbery it must be so as to make the Hundred liable, and how far it is necessary that it be done on the Highway.

7 *Co. 6, 7.*  
 2 *Salk. 614.*  
 (d) Where a  
 Carrier's Son  
 and Servant  
 conspired to  
 rob him.  
*Styl. 427.*

It seems to be admitted, that no kind of Robbery will make the Hundred liable, but that which is done openly, and with Force and Violence; and that therefore the (d) private stealing or taking any Thing from the Party does not come within the Statutes which make the Hundred liable, because the Hundred is not liable because they did not prevent the Robbery, but because they did not apprehend the Robbers, which in private Felonies, and of which they had no Notice, it would be difficult, if not impossible, for them to do.

7 *Co. 6. a.*  
*Sendil's Case.*  
*Moor 620.*  
 3 *Leon. 262.*  
*Cro. Jac. 496.*  
*Cro. Eliz. 753.*  
 1 *Bulf. 146.*  
 2 *Inst. 569.*  
 2 *Salk. 614.*

Also it hath been adjudged, and is admitted in all the Books which speak of this Matter, that a Robbery in a House, whether it be by Day or by Night, does not make the Hundred liable: The Reasons whereof are, that every Man's House is in Law esteemed his Castle, which he himself is obliged to defend, and into which no Man can enter, to see what is doing there, without his Leave; also being done in a House, the Inhabitants of the Hundred cannot be presumed to have Notice of it, so as to be able to apprehend the Offenders.

But if a Person be assaulted in the Highway, and carried into a House, and there robbed, it seems the Hundred shall be liable; for otherwise the Provision made by the Statute would be eluded.

Also it does not seem necessary that the Robbery should be committed in the Highway, nor alledged to have been so by the Plaintiff in his Declaration.

a Coppice; and in both Cases the Hundred shall be chargeable.

Therefore where upon the Statute of Hue and Cry the Plaintiff declared, *quod quædam Personæ ignotæ, &c. apud quendam locum ex Australi parte cujusdam Januæ, vocat' Fair-Mile Gate, infra Parochiam, &c. vi & armis* assaulted him, and robbed him of so much Money, and there being a Verdict for the Plaintiff, it was moved in Arrest, that *apud quendam Locum* might be meant of a Robbery committed in a House, Garden, or Wood, for which the Hundred is not liable, being only obliged to guard the Highways: But it was held, that the Declaration was good, especially after Verdict, because it must be intended that this was given in Evidence, otherwise the Plaintiff would have been nonsuited: Also the Court held, that without the Help of a Verdict, this Declaration had been good, and that it was not necessary for the Plaintiff to alledge, that the Robbery was committed on the Highway, more than that it was committed by Day, and not by Night, and that all the antient Precedents were accordingly.

1 Sid. 263.  
28 side  
1 Salk. 614.  
Farell. 157.  
Farell. 159.  
may be in a  
private Way,  
—may be in  
2 Salk. 614.

Carth. 71.  
3 Mid. 258.  
1 Show. 60.  
Comb. 150.  
S. C. adjudged between  
Tung and  
the Inhabitants of the  
Hundred of  
Tulcomb.

## 2. On what Day or Time of the Day it must be committed.

It hath been resolved by three Judges against one, that a Robbery on the Sabbath Day should charge the Hundred, and that the Pursuing of Robbers who violate the Sabbath was so far from being a Profanation of that Day, that it was a Work of Charity and Justice; also that several Persons, such as Physicians, Chirurgeons, Midwives, &c. were necessitated to travel on that Day, and it was but reasonable that they should be protected in their Journey.

But now by the 29 Car. 2. cap. 7. par. 5. it is Enacted, ' That if any Person or Persons whatsoever, which shall (a) travel upon the Lord's Day, shall be then robbed, that no Hundred, or the Inhabitants thereof, shall be charged with, or answerable for, any Robbery so committed; but the Person or Persons so robbed shall be barred from bringing any Action for the said Robbery, any Law to the contrary notwithstanding. Nevertheless the Inhabitants of the Counties and Hundreds (after Notice of any such Robbery to them or some of them given, or after Hue and Cry for the same to be brought,) shall make or cause to be made fresh Suit and Pursuit after the Offenders with Horsemen and Footmen, as by the 27 Eliz. is provided, upon Pain of forfeiting to the King's Majesty, his Heirs and Successors, as much Money as might have been recovered against the Hundred by the Party robbed, if this Law had not been made.

It is clearly agreed, that for a Robbery committed in the Night the Hundred is not chargeable, because they cannot be presumed to have Notice thereof, so as to be able to apprehend the Robbers.

But yet it is not necessary that the Robbery should be committed after Sun-rise, and before Sun-set, and that therefore if there be as much Day-light at the Time that a Man's Countenance might be discerned thereby, tho' it be before Sun-rise or after Sun-set, the Hundred shall be liable.

Also it is not necessary for the Plaintiff to alledge in his Declaration, that the Robbery was committed in the Day-time, and not in the Night:

But

Cro. Jac. 496.  
Waite versus  
The Hundred  
of Stoke.  
1 Brown 156.  
S. P. admitted.

(a) This Statute does not seem to extend to Persons in the Country riding or going to Church, nor to Physicians, Chirurgeons, &c. who are under a Necessity of travelling on this Day.

7 Co. 6. b.  
Milthorn's Ca.  
2 Inst. 569.

7 Co. 6. a.  
Apsley's Case.  
Cro. Jac. 106.  
1 And. 158.  
1 Leon. 57.  
Savil 83.

Carth. 71.  
Comb. 150.  
3 Mid. 258.

1 *Show.* 60.  
S. P. admit-  
ted.  
*Sid.* 263.  
*Farell.* 159.

But it seems, that if upon the Evidence it turns out to have been committed in the Night, he cannot have a Verdict.

Also it hath been held, that if Robbers drive or oblige the Waggoner to drive his Waggon from the Highway by Day, but do not rob or take any Thing till Night, that yet this is a Robbery in the Day-time so as to charge the Hundred.

### 3. What Hundred shall be said to be liable.

By the Statute of *Winton* it is Enacted, ' That if the Robbery be done  
(1) An Action ' within the Division of two Hundreds, both the (a) Hundreds and the  
may be ' Franchises within them shall be answerable.  
brought a-  
gainst the Inhabitants in *Dimidio Hundredi de W.* and this Half Hundred the Court will intend a Hun-  
dred of itself, especially after Verdict; and that if it were otherwise, it should have been so pleaded  
or given in Evidence; and that it is the same Thing as an Action brought against the Inha-  
bitants of the Hundred of *W.* commonly called the Half-Hundred of *W.* *Hob.* 246. *Constable's Case.*  
1 *Brown* 156. S. C.

*Hutton* 125.  
*Dean's Case,*  
*per Cur.*

If Robbers assault a Person with an Intent to rob him in one Hundred, and he escapes and flies into another, whither he is pursued by the Robbers, and there robbed, the last Hundred shall be liable.

2 *Salk.* 614.  
*Farell.* 157.  
S. C. *Cowper*  
versus *The*  
*Hundred of*  
*Basingstoke.*

So where by special Verdict it was found, that the Plaintiff was travelling in the Highway in the Hundred of *A.* where he was set upon and carried into the Hundred of *B.* and robbed in a Copse in the Highway of this Hundred, and it was adjudged that the Hundred of *B.* should be liable, for that there the Robbery was committed, and not before.

2 *Salk.* 615.

If one be taken in the Hundred of *A.* and carried into the Hundred of *B.* into a House there, viz. a Mansion-House, and robbed, or taken in the Day-time in *A.* and carried to *B.* and there robbed in the Night, it is said that there is no Remedy against either Hundred, these Cases not being provided for by the Statute.

By the 27 *Eliz.* cap. 13. par. 2. reciting that the Inhabitants of Hundreds do not prosecute the Hue and Cry brought to them, because those Hundreds only are liable in which the Robberies have been committed, it is Enacted, ' That the Inhabitants and Resiants of every or any such  
' Hundred (with the Franchises within the Precinct thereof,) wherein  
' Negligence, Fault or Defect of Pursuit and fresh Suit after Hue and  
' Cry made shall happen to be, shall answer and satisfy the one Moiety  
' or Half of all and every such Sum or Sums of Money and Damages,  
' as shall be recovered or had against or of the said Hundred, with the  
' Franchises therein, in which any Robbery or Felony shall at any time  
' hereafter be committed or done; and that the same Moiety shall and  
' may be recovered by Action of Debt, Bill, Plaint, or Information in  
' any of the Queen's Majesty's Courts of Record at *Westminster*, by and  
' in the Name of the Clerk of the Peace for the Time being, of or in  
' every such County within this Realm, where any such Robbery and  
' Recovery by the Party or Parties robbed shall be, without naming the  
' Christian Name or Surname of the said Clerk of the Peace; which  
' Moiety so recovered shall be to the only Use and Behoof of the Inha-  
' bitants of the said Hundred where any such Robbery or Felony shall be  
' committed or done.'

4. What Person is to bring the Action, and make Oath of the Robbery.

If a Servant be robbed, in the Absence of his Master, of his Master's Money, it is clear that the Master may maintain an Action for it against the Hundred; but then the Servant must make Oath that he knew not any of the Robbers.

S. P. adjudged, and that the Servant was the proper Person to make the Oath. *Styl.* 156. S. P. admitted. *Latch* 127. S. P. and that the Master or Servant may bring the Action.— But the Oath must be by the Servant, when robbed in the Absence of his Master. *Cro. Eliz.* 142. *Green's Case*, adjudged 1 *Leon.* 323. S. C. adjudged.— For the Statute of 27 *Eliz.* cap. 13. which requires that the Party robbed shall make Oath within twenty Days next before the Action brought, that he knew not the Robbers, &c. was made, 1<sup>st</sup>, That the Person robbed should enter into a Recognizance to prosecute the Robbers, if he knew them, or any of them. 2<sup>dly</sup>, That the Hundred might be excused upon the Conviction of such Person or Persons. 3<sup>dly</sup>, To prevent a Robbery by Fraud. 3 *Mod.* 288.— For if the Robbery be by Combination, the Party cannot recover. 1 *Show.* 94.

Also the Servant being robbed in his Master's Absence, may himself maintain an Action against the Hundred, and may (a) declare that he was possessed *ut de Bonis suis propriis*, &c. And tho' the Jury find that he was robbed of his Master's Money, yet shall he recover; for the Servant is possessed *ut de Bonis propriis* against all, and in respect of all, but him that hath the very Right.

The same Law if a Carrier be robbed. (a) Where a Carrier being robbed declared of Goods and Chattels taken out of his Possession; and for Want of alledging that he had a Property in them, adjudged that as to those Goods he could not recover. 2 *Sand.* 379. *Pinkney versus The Inhabitants of East Hundred in Com' Roteh.*

The Servant being robbed, may bring an Action against the Hundred: And tho' the Jury find that Part of the Things belonged to the Master, and Part to the Servant, yet shall he recover for the whole.

If a Servant be robbed in the Presence of the Master, the Master must sue; and the Oath of the Master is sufficient.

By special Verdict it was found, that the Plaintiff sent his Servant to *Smithfield* Market with fat Cattle, where he sold them for 108 *l.* and sealed up 106 *l.* in four Bags, and delivered them to J. S. a Quaker, who travelled with him towards home, and they were both robbed; that the Servant made Oath of the Robbery, according to the Statute; but that the Quaker refused to be sworn; and in Action brought by the Master it was held, that as to the 40 *s.* taken from the Servant, he should recover; but that as to the 106 *l.* taken from the Quaker, he could not, for Want of an Oath according to the Statute; and that the Oath being enjoined merely for the Benefit of the Hundreds, who were oppressed by pretended Robberies, the Court could not depart from the express Words of the Statute.

But it seems, the Servant who delivered the 106 *l.* to the Quaker, and was present at the Robbery, might maintain the Action in his own Name for all the Money; and that his own Oath would be sufficient; and that he might declare upon the taking away the Money from the Quaker as his Servant, who, in Truth, was so for this Time.

Chief Justice's Advice; but in 3 *Mod.* 288 9. tho' the S. P. is admitted, yet it is said that it could not have been done, because the Year was expired within which the Action must be brought.

One *Jones*, and his Wife and Servant, travelling together, were all robbed of his Money, and *Jones* alone brought the Action for the whole Money against the Hundred, as well for what was taken from his Wife and Servant as from his own Person, and he alone, without his Wife or Servant, made Oath of the Robbery; all which Matter being found on

*Cro. Car.* 37.  
*Raymond ver.*  
*Hundred of*  
*Okings*, ad-  
judged.

*Cro. Car.* 336.

*Styl.* 156. S. P.

*ad-*

*mitted.*

*Latch* 127. S. P.

and that the Master or Servant may bring the Action.— But the Oath must be by the Servant, when robbed in the Absence of his Master.

*Cro. Eliz.* 142. *Green's Case*, adjudged

1 *Leon.* 323. S. C. adjudged.— For the Statute of 27 *Eliz.* cap. 13. which requires that the Party robbed shall make Oath within twenty Days next before the Action brought, that he knew not the Robbers, &c. was made, 1<sup>st</sup>, That the Person robbed should enter into a Recognizance to prosecute the Robbers, if he knew them, or any of them. 2<sup>dly</sup>, That the Hundred might be excused upon the Conviction of such Person or Persons. 3<sup>dly</sup>, To prevent a Robbery by Fraud. 3 *Mod.* 288.— For if the Robbery be by Combination, the Party cannot recover. 1 *Show.* 94.

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a special Verdict, it was adjudged, that his Oath alone was sufficient within the Intent of the Statute; and altho' it was further found, that the Servant of *Jones*, who was robbed with his Master, knew one of the Robbers, whose Name was *Lenoe*, yet *Jones* had his Judgment.

*Carth. 147.*  
*Bird versus*  
*Hundred of*  
*Offulstree,*  
*cited.*

So where one *Bird*, a Laceman of *Colliton* in *Devonshire*, in coming to *London*, with his Servant, they left the usual great Road between *Brentford* and *Hammer-smith*, and rode thro' a By-Lane near Serjeant *Maynard's* House, to avoid the Dust, and in that Lane the Servant was robbed, in the Presence of his Master, of a Box of Lace which was behind him on the Back of the Horse, to the Value of 1200*l.* and *Bird* the Master alone made Oath of the Robbery, and brought the Action; and by the Opinion of the C. J. *Holt* the Oath of the Master was sufficient, because being present, the Goods were in his Possession; for the Possession of the Servant in the Presence of his Master, is the Master's Possession; and in this Case *Bird* recovered 1000*l.* and had Execution.

*Dyer 370. a.*  
*pl. 59.*

If *A.* and *B.* travelling together are robbed of a Sum of Money, to which they are both jointly intitled, they may both join in an Action against the Hundred; *secus* if they had separate and distinct Interests.

### 5. Of the Notice to be given of the Robbery.

By the 27 *Eliz. cap. 13. par. 11.* it is Enacted, ' That no Person or  
' Persons that shall happen to be robbed shall have or maintain any  
' Action, or take any Benefit of the Statutes which make the Hundred  
' liable, except the same Person and Persons so robbed shall, with as  
' much convenient Speed as may be, give Notice and Intelligence of the  
' said Felony or Robbery so committed unto some of the Inhabitants of  
' some Town, Village, or Hamlet, near unto the Place where any such  
' Robbery shall be committed.'

In the Construction of this Clause of the Statute it hath been holden,

*Cro. Jac. 675.*  
*Foster versus*  
*The Hundreds*  
*of Speckor*  
*and Isleworth,*  
*adjudged.*

That if a Person be robbed in a Highway *in Divisis Hundredorum*, he need not give Notice to the Inhabitants of each Hundred, but Notice to either of them is sufficient.

*Cro. Car. 41.*  
*adjudged.*  
(a) Or in a  
different  
Hundred.

That alledging Notice to have been given at a Village near to where the Robbery was committed is sufficient, tho' such Village happens to be in a different (a) County; for that Strangers are not obliged to take Notice of the Division of Counties.

*Cro. Car. 379.*  
*adjudged.*

*Cro. Car. 41.*  
*adjudged.*

That tho' it be the best Course to alledge, that Notice was given at the Place where the Robbery was committed, or at some Village near the Place, yet that Notice near the Hundred, or near the Division of the Hundreds where the Robbery was committed, is sufficient; and that ths shall not be intended the most remote Part of the Hundred, especially after a Verdict.

1 *Show. 94.*

If several Persons are in Company at the Time of the Robbery, it is said, that Notice given by any one of them is sufficient.

*March 11.*  
*Sir John*  
*Compton's*  
*Case.*

It hath been resolved, that tho' the Notice given be five Miles from the Place where the Robbery was committed, that it is sufficient; the Reason whereof is, because that the Party, who is a Stranger to the Country, cannot have Conuzance of the nearest Place or Town.

(b) *March 11.*  
*2 Leon. 82.*  
*S.P. agreed*  
*per Cur.*

Also if the Party robbed give Notice with as much convenient Speed as may be, tho' he be otherwise remiss in (b) not pursuing the Robbers, or refuses to lend his Horse for that Purpose, yet shall he not lose his Action for this, nor the Hundred be excused.



And now by the 8 *Georg. 2. cap. 16.* it is further Enacted, ‘ That no Person shall have or maintain any Action against any Hundred, or take any Benefit by Virtue of the Statutes of *Winton* or 27 *Eliz.* or either of them, unless he, she, or they shall, over and besides the Notice already required by the last of the above-mentioned Statutes to be given of any Robbery, with as much convenient Speed as may be, after any Robbery on him, her, or them committed, give Notice thereof to one of the Constables of the Hundred, or to some Constable, Borsholder, Headborough, or Tithingman of some Town, Parish, Village, Hamlet, or Tithing, near unto the Place wherein such Robbery shall happen, or shall leave Notice in Writing of such Robbery at the Dwelling-House of such Constable, &c. describing in such Notice to be given or left as aforesaid, so far as the Nature and Circumstances of the Case will admit, the Felon or Felons, and the Time and Place of the Robbery, and also shall, within the Space of twenty Days next after the Robbery committed, cause publick Notice to be given thereof in the *London Gazette*, therein likewise describing, so far as the Nature and Circumstances of the Case will admit, the Felon or Felons, and the Time and Place of such Robbery, together with the Goods and Effects, whereof he, she, or they was or were robbed.’

**6. Where the Party must give Bond for Payment of Costs, in case he does not prevail.**

To this Purpose by the 8 *Georg. 2. cap. 16.* it is Enacted, ‘ That before any Action commenced the Party shall go before the chief Clerk, or Secondary, or the Filazer of the County wherein such Robbery shall happen, or the Clerk of the Pleas of that Court wherein such Action is intended to be brought, or their respective Deputies, or before the Sheriff of the County wherein the Robbery shall happen, and enter into a Bond to the High Constable or High Constables of the Hundred in which the Robbery shall be committed, in the penal Sum of 100*l.* with two sufficient Sureties to be approved of by such chief Clerk, Secondary, Filazer, or Clerk of the Pleas, or their respective Deputies, or the Sheriff of the said County, with Condition for securing to such High Constable or High Constables (who are hereby empowered and required to enter or cause to be entered an Appearance, and also to defend such Action,) the due Payment of his or their Costs, after the same shall be taxed by the proper Officer, in case that he, she, or they (the Plaintiff or Plaintiffs in such Action) shall happen to be nonsuited, or shall discontinue his, her, or their Action, or in case that Judgment shall be given against such Plaintiff or Plaintiffs on Demurrer, or that a Verdict shall be given against him, her, or them.

And it is further Enacted by the said Statute, ‘ That when any such Bond as abovementioned shall be entered into before the said Sheriff, such Sheriff shall immediately certify the same in Writing to the chief Clerk or Secondary in the Court of King’s Bench, or his or their Deputy, or to the Filazer of that County wherein such Robbery shall be committed, or his Deputy; in case the Action be intended to be brought in the Court of Common Pleas; or if in the Court of Exchequer, to the Clerk of the Pleas, or his Deputy; which Certificate shall be delivered by the Party or Parties robbed to the said chief Clerk or Secondary, or his or their Deputy, or to such Filazer, or his Deputy, before any Process shall issue for the Commencement of such Suit as aforesaid; and such chief Clerk, Secondary, Filazer, or Clerk of the Pleas, or their respective Deputies, or the said Sheriff, shall not take any greater Fee or Reward for making such Bond than five Shillings

over

‘ over and above the Stamp-Duties, nor shall any Sheriff take any greater  
 ‘ Fee or Reward for making, nor shall any such chief Clerk, Secondary,  
 ‘ Filazer, or Clerk of the Pleas, or their respective Deputies, take any  
 ‘ greater Fee or Reward for receiving and filing such Certificate, than  
 ‘ Two Shillings and Sixpence; and such chief Clerk, Secondary, Filazer,  
 ‘ or Clerk of the Pleas, or their respective Deputies, and Sheriff, as  
 ‘ aforefaid, are hereby required to deliver over *gratis* (upon reasonable  
 ‘ Request made for that Purpose) all and every such Bonds to be by  
 ‘ them respectively taken pursuant to this present Act, to the High  
 ‘ Constable or High Constables to whose Use the same shall be taken as  
 ‘ aforefaid.’

7. Of the Oath to be taken of the Robbery, and before whom the same must be.

By the 27 *Eliz. cap. 13. par. 11.* it is Enacted, ‘ That the Party  
 ‘ robbed shall not have any Action except he or they shall first, within  
 ‘ twenty Days next before such Action to be brought, be examined upon  
 ‘ his or their corporal Oath, to be taken before some Justice of the  
 ‘ Peace of the County where the Robbery was committed, inhabiting  
 ‘ within the said Hundred where the Robbery was committed, or near  
 ‘ unto the same, whether he or they do know the Parties that commit-  
 ‘ ted the said Robbery, or any of them; and if, upon Examination, it  
 ‘ be confessed that he or they do know the Parties that committed the  
 ‘ said Robbery, or any of them, that then he or they so confessing shall,  
 ‘ before the said Action be commenced or brought, enter into sufficient  
 ‘ Bond by Recognizance before the said Justice before whom the said  
 ‘ Examination is hid, effectually to prosecute the same Person and Per-  
 ‘ sons so known to have committed the said Robbery, by Indictment or  
 ‘ otherwise, according to the due Course of the Laws of this Realm.’

In the Construction of this Clause of the Statute the following  
 Points have been holden,

*March 11.* That if the Party does not know the Robbers at the Time of the  
 Robbery committed, tho’ he happens to know them afterwards, it is not  
 material.

*Nov. 21. Bateman’s Case.* It was holden by three Judges against one, that the Party’s swearing  
 that he did not know the Robbers, without adding, nor any of them, is  
 not sufficient; because not pursuant to the Statute, and because on such  
 equivocal Oath the Party cannot be punished for Perjury.

*3 Lev. 328. S. P. by J. Porvel versus J. Rokeshy,* who held, that if a Person swears that he was robbed by four Persons unknown to him, all  
 the four must be unknown to him.

*1 Jones 239. Helier versus Hundred de Benburst.* It hath been adjudged, that the Oath may be taken before a Justice  
 of the County, tho’ not in the County at the Time of administering it;  
 as where a Robbery was committed in *Berks*, and a Justice of that  
 County residing in *London*, the Party was sworn before him according  
 to the Statute in *London*, and it was held sufficient; for the Justice acts  
 only as (a) a ministerial Officer, and as appointed by the Statute, and  
 not in a judicial Capacity as a Justice of the Peace.

(a) And as his Office herein is purely ministerial, it is said, that if he refuses to take the Oath or Examination of the Party, an  
 Action on the Case will lie against him. *1 Leon. 323.*

*Vide 2 Sid. 45.* If in an Action on the Statute of Hue and Cry it be alledged, that  
 the Oath was taken before a Justice of Peace of *Torkshire*, this will be  
 sufficient, altho’ objected, that there is no such Justice; because that in  
 every Riding they have several Commissions.

## 8. At what Time the Action is to be brought.

By the 27 *Eliz. cap. 13. par. 9.* it is enacted, ' That no Person or  
' Persons robbed shall take Advantage of the Statutes, to charge any  
' Hundred where any such Robbery shall be committed, except he or  
' they so robbed shall commence his or their Suit or Action within one  
' Year next after such Robbery committed.

In the Construction whereof it hath been holden :

That if a Person be robbed the 9th of *Octob. 13 Jac.* and so laid, and the Teste of the Writ be the 9th of *Octob. 14 Jac.* that this is not pursuant to the Statute; and that in this Action, which is Penal against the Hundred, there is no Reason to exclude the Day on which the Fact was done, nor to make such Construction as is done in Protections and the Inrolment of Deeds, which have always received a benign Interpretation.

In an Action on the Statute of Hue and Cry, the Plaintiff made Oath according to the Statute, and within twenty Days brought a Writ, and because it was vicious, let it fall; and after the twenty Days took out a new one, without making any Oath a-new, or entering any Continuances between the said Writ and that; and the Court held clearly, that the second Writ was not brought according to the Statute; for so they said, that Provision in the Statute would be to no Manner of Purpose.

An Action was brought by the Master, on the Statute of *Winton*, for a Robbery committed on his Servant, in which he declared of an Assault and Battery done to himself, (tho' then 50 Miles from the Place,) also that he made Oath that he did not know any of the Persons; the Issue was entred of Record, and the Jury appeared at the Bar ready to try it; but being for other Business adjourned to another Day, the Plaintiff observing his Mistake moved to amend, by declaring of a Robbery on his Servant, &c. and it appearing that the Year in which the Action must be brought was expired, and consequently the Action must be lost if not allowed, the Court, after long Debate and Consideration of former Precedents, admitted him to amend.

*Hob. 139, 140.*  
*Moor 878 pl.*  
*1233.*  
*1 Brownl.*  
*156. S. C.*  
*Norris ver.*  
*Hundred of*  
*Gawtry.*

*1 Sid. 139.*  
*1 Keb. 495.*  
*S. C. New-*  
*man ver. In-*  
*habitants of*  
*Strofford.*

*3 Lev. 347.*  
*Beare vsf*  
*ver. Hun-*  
*dred of Bern-*  
*ham and*  
*Stone.*

## 9. What Evidence will maintain the Action; and therein of the Witnesses for and against it.

It seems that from the Necessity of the Case, the Party himself that was robbed is to be admitted as a Witness, but then his Testimony must be corroborated by collateral Proof and Circumstances, and such as may induce a Jury to believe that a Robbery was actually committed, that the Party lost what he declared for.

But it was held, that in an Action against the Hundred, no Inhabitant of the Hundred could be a Witness, because he was concerned in Interest.

But now by the 8 *Geor. 2. cap. 16.* reciting, that by the Laws then in being, the Person or Persons robbed may be admitted, in any Action to be brought against the Hundred, as a Witness to prove the Robbery, and the Money, Goods or Effects whereof he, she, or they, was or were robbed; and yet no Person inhabiting within the said Hundred, can be admitted as a Witness for or on Behalf of the said Hundred, by reason of the Interest he or she may have in the Consequences of the said Ac-

*2 Leon. 12.*

*1 Vent. 351.*  
*1 Mod. 73.*  
*2 Keb. 73.*

tion, which is commonly very inconsiderable; therefore it is enacted,  
 ' That in any Action already brought, or to be brought, against any  
 ' Hundred, any Person inhabiting within the said Hundred, or any  
 ' Franchise thereof, shall be admitted as Witness for or on Behalf of the  
 ' said Hundred, in the same Manner as if he or she were not an Inhabi-  
 ' tant thereof, but resided in any other Hundred whatsoever.

### 10. What shall excuse the Hundred; and therein of apprehending the Robbers.

2 *Inf.* 569.  
 3 *Lev.* 320.  
*Dyer* 370. a.  
 7 *Co.* 7.  
 1 *Sid.* 11.

By the Statutes of *Winton* 13 *E. 1. cap. 1.* & 28 *E. 3. cap. 11.* the Robbers must be taken within forty Days after the Robbery committed; also by the said Laws it was necessary that all the Robbers should be taken, to excuse the Hundred.

But now as to this latter Matter, by the 27 *Eliz. cap. 13. par. 8.* it is enacted, ' That where any Robbery is, or shall be hereafter committed  
 ' by two, or a greater Number of Malefactors, and that it happen any  
 ' one of the said Offenders to be apprehended by Pursuit, to be made ac-  
 ' cording to the said former mentioned Laws and Statutes, or according  
 ' to this Act, that then, and in such Case, no Hundred or Franchise  
 ' shall in any wise incur or fall into the Penalty, Loss or Forfeiture  
 ' mentioned either in this present Act, or in any the said former Sta-  
 ' tutes, altho' the Residue of the said Malefactors shall happen to escape  
 ' and not be apprehended, any Thing in this Statute, or in the said  
 ' former Statutes, to the contrary notwithstanding.

1 *Vent.* 118,  
 325.  
*Raym.* 221.  
 2 *Lev.* 4. S. C.  
*Methwin*  
*ver. Hundred*  
*of Thistle-*  
*worth.*

If a Robbery be committed, and Hue and Cry made, and afterwards, within the forty Days, an Inhabitant of the Hundred finds one of the Robbers in the Presence of a Justice of the Peace, who charges him with the Robbery, and the Justice promises that he shall appear and be forthcoming, this is a Taking within the Statute; for being in the Presence of the Justice, it must be understood that he was in his Custody and Power, and therefore not necessary to lay hold on him.

1 *Vent.* 118.  
 119. *per Hale*  
 C. J.

If Hue and Cry be made towards one Part of the County, and an Inhabitant of the Hundred apprehends one of the Robbers within another, this is a Taking within the Statute.

By the 8 *Georg. 2. cap. 16.* it is enacted, ' That no Hundred, or Fran-  
 ' chise therein, shall be chargeable, by Virtue of any of the Statutes, if  
 ' any one or more of the Felons, by whom such Robbery shall be com-  
 ' mitted, be apprehended within the Space of forty Days next after pub-  
 ' lick Notice given in the *London Gazette*, as by the Statute is provided.

And by the said Statute 8 *Geor. 2.* to the Intent that Hue and Cry may be made with more Diligence and Effect, and other Persons encouraged to take such Felon or Felons, it is enacted, ' That any Person or  
 ' Persons, who shall apprehend such Felon or Felons within the Time  
 ' herein before limited for that Purpose, whereby the Hundred hath  
 ' been actually indemnified or discharged from any such Action as afore-  
 ' said, shall, upon due Proof thereof, upon Oath made before two  
 ' Justices of the Peace, (which Oath the said Justices are hereby also  
 ' empowered and required to administer,) be intitled to the Reward of  
 ' 10*l.* which Sum shall be raised upon the Hundred by a Taxation and  
 ' Assessment, to be made, and to be levied, and collected in the same  
 ' Manner as the other Sums of Money, by this present Act appointed to  
 ' be raised upon the Hundred, are directed to be assessed, levied and  
 ' collected; and such Sum of 10*l.* which shall be so rated, assessed, le-  
 ' vied and collected as aforesaid, shall be paid unto such two Justices of  
 ' the Peace, within ten Days next after the same shall be so levied and  
 ' collected, to the Use of the Person or Persons who shall be thereunto  
 ' intitled, as a Reward for having so apprehended such Felon or Felons

‘ as aforesaid; and such Justices shall, upon reasonable Request made for  
 ‘ that Purpose, pay over and deliver the said Sum to such Person or  
 ‘ Persons accordingly, in such Shares and Proportions as the said Justices  
 ‘ shall think reasonable; Provided always, that such Person or Persons so  
 ‘ intitled to such Reward, shall not thereby be rendered incapable to be  
 ‘ a Witness in any such Action.

## II. How the Money is to be levied, and each Hundred to contribute to the Charges.

By the 27 *Eliz. cap. 13 par. 14.* reciting, that altho’ the whole Hun-  
 dred, where Robberies and Felonies are committed, with the Liberties  
 within the Precinct thereof, are charged by the former Statutes with the  
 answering to the Party robbed his Damages; yet nevertheless the Reco-  
 very and Execution, by and for the Party or Parties robbed, is had a-  
 gainst one or a very few Persons of the said Inhabitants, and he and  
 they so charged have not heretofore had any Means or Ways to have  
 any Contribution of or from the Residue of the said Hundred where the  
 said Robbery is committed, to the great Impoverishment of them against  
 whom such Recovery or Execution is had;

*Par. 5.* of the said Statute it is enacted, ‘ That after Execution of  
 ‘ Damages by the Party or Parties so robbed had, it shall and may be  
 ‘ lawful (upon Complaint made by the Party or Parties so charged) to  
 ‘ and for two Justices of the Peace (whereof one to be of the *Quorum*)  
 ‘ of the same County, inhabiting within the said Hundred, or near unto  
 ‘ the same where any such Execution shall be had, to Assess and Tax  
 ‘ rateably and proportionably, according to their Discretions, all and  
 ‘ every the Towns, Parishes, Villages and Hamlets, as well of the said  
 ‘ Hundred where any such Robbery shall be committed, as of the Liber-  
 ‘ ties within the said Hundred, to and towards an equal Contribution,  
 ‘ to be had and made for the Relief of the Inhabitant or Inhabitants, a-  
 ‘ gainst whom the Party or Parties robbed before that Time had his or  
 ‘ their Execution; and that after such Taxation made, the Constables,  
 ‘ or Constable, Headboroughs, or Headborough, of every such Town,  
 ‘ Parish, Village and Hamlet, shall, by Virtue of this present Act, have  
 ‘ full Power and Authority, within their several Limits, rateably and  
 ‘ proportionably, to tax and assess, according to their Abilities, every  
 ‘ Inhabitant and Dweller in every such Town, Parish, Village and  
 ‘ Hamlet, for and towards the Payment of such Taxation and Assess-  
 ‘ ment, as shall be so made upon every such Town, Parish, Village and  
 ‘ Hamlet, for and towards the Payment of such Taxation and Assessment  
 ‘ as shall be so made upon every such Town, Parish, Village and Hamlet;  
 ‘ as aforesaid, by the said Justices: And that if any Inhabitant of any  
 ‘ such Town, Parish, Village or Hamlet, shall obstinately refuse and  
 ‘ deny to pay the said Taxation and Assessment, so by the said Con-  
 ‘ stables, Constable, Headboroughs, or Headborough, taxed and assessed,  
 ‘ that then it shall and may be lawful to and for the said Constables and  
 ‘ Headboroughs, and every of them, within their several Limits and  
 ‘ Jurisdictions, to distrain all and every Person and Persons so refusing  
 ‘ and denying, by his and their Goods and Chattels, and the same Distress  
 ‘ to sell, and the Money thereof coming to retain to the Use aforesaid;  
 ‘ and if the Goods or Chattels so distrained and sold shall be of more  
 ‘ Value than the said Taxation shall come unto, that then the Residue of  
 ‘ the said Money over and above the said Taxation shall be delivered  
 ‘ unto the said Person or Persons so distrained.

And it is further enacted, *par. 6.* ‘ That all and every the said Con-  
 ‘ stables and Headboroughs, after that they have within their several  
 ‘ Limits

‘ Limits and Jurisdictions levied and collected their said Rates and  
 ‘ Sums of Money so taxed, shall, within ten Days after such Collection,  
 ‘ pay and deliver the same over unto the said Justices of Peace, or one  
 ‘ of them, to the Use and Behoof of the said Inhabitant or Inhabitants,  
 ‘ for whom such Rate, Taxation and Assessment shall be had or made as  
 ‘ aforesaid; which Money so paid shall by the Justices, or Justice, so  
 ‘ receiving the same, be delivered over (upon Request made) unto the  
 ‘ said Inhabitant or Inhabitants, to whose Use the same was collected.

And it is further enacted, *par. 7.* ‘ That the like Taxation, Assess-  
 ‘ ment, Levying by Distress and Payment as aforesaid, shall be had and  
 ‘ done within every Hundred where Default or Negligence of Pursuit;  
 ‘ and fresh Suit shall be for and to the Benefit of all and every Inhabi-  
 ‘ tant and Inhabitants of the same Hundred where such Default shall be,  
 ‘ that shall at any Time hereafter, by Virtue of this present Act, have  
 ‘ any Damages or Money levied of them, for or to the Payment of the  
 ‘ one Moiety, or Half of the Money, recovered against the said Hun-  
 ‘ dred where any Robbery shall be committed.

2 Sand. 423.  
 1 eigh ver.  
 Chapman.

It hath been adjudged, that a Person occupying Lands in an Hun-  
 dred, altho’ he hath no House nor Dwelling there, is an Inhabitant  
 within the Meaning of the Statute, for that otherwise the Statute might  
 be eluded.

March 11.  
 but Hunt.  
 125. S. P.  
 cont.

It is said, that a Person, tho’ not an Inhabitant at the Time of the  
 Robbery committed, but becoming one before the Judgment, shall con-  
 tribute to the Charges.

And now for the more equal Rating and Levying the Money, for  
 which the Hundreds are chargeable, by the 8 *Geor. 2. cap. 16.* it is enact-  
 ed, ‘ That no Procefs for Appearance in any Action to be brought upon  
 ‘ the said Statutes, or either of them, against any Hundred, shall be  
 ‘ served on any Inhabitant thereof, save only upon the High Constable,  
 ‘ or High Constables of the Hundred wherein the Robbery shall happen,  
 ‘ who is and are hereby required to cause publick Notice thereof to be  
 ‘ given in one of the principal Market-Towns within such Hundred, on  
 ‘ the next Market-Day, after he or they shall be served with such Pro-  
 ‘ cess; or if there shall happen to be no Market-Town within such Hun-  
 ‘ dred, then in some Parish Church within the Hundred, immediately  
 ‘ after Divine Service, on the *Sunday* next after his or their being served  
 ‘ with such Procefs; and he or they is and are also impowered and re-  
 ‘ quired to enter, or cause to be entered, an Appearance in the said Ac-  
 ‘ tion, and also to defend the same for and on Behalf of the Inhabitants  
 ‘ of the said Hundred, as he or they shall be advised; and in case the  
 ‘ Plaintiff or Plaintiffs in such Action shall recover and obtain Judgment  
 ‘ therein, that then no Procefs of Execution shall be served on any par-  
 ‘ ticular Inhabitant or Inhabitants of the said Hundred, or any Franchise  
 ‘ within the Precinct thereof, nor on the said High Constable, or High  
 ‘ Constables; but the Sheriff, or his Officer, shall, upon the Receipt of any  
 ‘ Writ or Writs of Execution to him directed, in Pursuance of the said  
 ‘ Judgment, (instead of serving the said Writ or Writs on any Inhabitant  
 ‘ or Inhabitants) cause the same to be produced, and shewn *gratis*, unto  
 ‘ two Justices of the Peace of the County, Riding or Division, (whereof  
 ‘ one to be of the *Quorum*) and residing within the said Hundred, or near  
 ‘ unto the same, who shall thereupon, with all convenient Speed, cause  
 ‘ such Taxation and Assessment to be made, and to be levied and col-  
 ‘ lected in such Manner as is prescribed in and by the Statute 27 *Eliz.*  
 ‘ in which Taxation and Assessment there shall be provided for and in-  
 ‘ cluded, over and above what the Costs and Damages, recovered by the  
 ‘ Plaintiff or Plaintiffs in such Action, shall amount to, all such just and  
 ‘ necessary Expences, which any High Constable, or High Constables of  
 ‘ any Hundred, hath, or have been, or shall be at, in having defended  
 ‘ any such Action as aforesaid, Claim being made thereto by such High  
 Constable,

‘ Constable, or High Constables, before the said Justices, upon due Notice being given to him or them by the said Justices for that Purpose; and the Sums of Money so to be levied and collected shall be paid over and delivered, (by such Officer or Officers as by the said Statute 27 Eliz. are to levy and collect the same,) within ten Days after such Collection, to the Sheriff of the County wherein the Robbery shall happen, to the Use and Behoof of the Plaintiff or Plaintiffs in such Action, for so much as the Costs and Damages by him, her, or them recovered shall amount to, and to the Use and Behoof of the said High Constable or High Constables, for so much as his or their Expences in defending the said Action shall amount to, of which the said High Constable or High Constables shall give in an Account, and make due Proof upon Oath, to the Satisfaction of the said Justices, before any such Taxation and Assessment shall be made for the Reimbursing such High Constable or High Constables, (which Oath the said Justices are hereby impowered and required to administer,) and shall in such Expences have no further Allowance toward paying an Attorney to defend the said Action, than what such Attorney’s Bill shall be taxed at by the proper Officer of that Court where such Action shall be brought, which the said High Constable or High Constables shall cause to be taxed for that Purpose.

And it is further Enacted by the said Statute, ‘ That the Sum or Sums of Money which shall be paid over and delivered to the Sheriff of the County, as herein before mentioned, shall (upon reasonable Request made) be by him paid and delivered over to the several Parties who shall be intitled to receive the same, without any Deduction, Fee, or Reward whatsoever.

And that sufficient Time may not be wanting for such Taxation and Assessment to be duly made, and for the Money to be collected and levied thereupon, after such Writ or Writs of Execution shall be shewn to such Justices, and before the Sheriff shall be obliged to make a Return thereof, it is Enacted, ‘ That no Sheriff shall be called upon or required to make any Return to any such Writ or Writs of Execution, as shall issue or be made out upon any Judgment which shall be recovered in any Action brought against any Hundred by virtue of the above-mentioned Statutes, or either of them, until after the Expiration of sixty Days next after the Day whereupon such Writ or Writs shall be delivered to the said Sheriff, who is hereby required to indorse on the Back thereof the Day on which he received the same.

And whereas it is reasonable that the said High Constable or High Constables should be indemnified as to all Charges, which he or they shall necessarily expend in defending any Suit in Pursuance of this present Act, and that Provision should be made for Reimbursing him or them not only of such Expences as shall be over and above the taxed Costs, to be paid by the Plaintiff or Plaintiffs, in case of a Nonsuit, Discontinuance, or Judgment on Demurrer against him, her, or them, or Verdict for the Defendants as aforesaid, but even such taxed Costs also, in case the Plaintiff or Plaintiffs, and his, her, or their Sureties who shall be bound for the Payment thereof, shall happen to become insolvent; it is therefore Enacted, ‘ That if any Plaintiff or Plaintiffs in any Action to be brought against any Hundred shall be nonsuited, or shall discontinue his, her, or their Action, or shall have a Judgment on Demurrer given, or a Verdict pass against him, her, or them, it shall and may be lawful for any two Justices of the Peace, (such as herein before-mentioned) upon Complaint to them made for that Purpose, and upon an Account given in by such High Constable or High Constables, and Proof made upon Oath, to the Satisfaction of the said Justices, of such Expences necessarily laid out as aforesaid, (which Oath the said Justices are hereby impowered and required to administer,) to make and cause such Taxation and Assessment to be made, and to be levied and collected

‘ in such Manner, as is directed in and by the above-mentioned Statute  
 ‘ of 27 *Eliz.* in order thereby to reimburse such High Constable or  
 ‘ High Constables all such Charges, as he or they shall have necessarily  
 ‘ expended in defending such Action, wherein such Plaintiff or Plaintiffs  
 ‘ shall have been nonsuited, or shall have discontinued his, her, or their  
 ‘ Action, or against whom Judgment shall have been given upon De-  
 ‘ murrer, or a Verdict shall have been given, over and above the Costs  
 ‘ in those Cases to be taxed as aforesaid; and in case it shall be made  
 ‘ appear upon Oath to the said Justices of the Peace, (which Oath the  
 ‘ said Justices are hereby also impowered and required to administer,)  
 ‘ to their Satisfaction, that such Plaintiff or Plaintiffs, and also his or  
 ‘ their Sureties, is and are insolvent, so that the said High Constable or  
 ‘ High Constables can have no Relief as to such taxed Costs by them  
 ‘ expended in such Defence as aforesaid, (save only by the Power here-  
 ‘ in after given to the said Justices,) it shall and may be lawful to  
 ‘ and for such two Justices of the Peace to make and cause a Taxation  
 ‘ and Assessment to be made, and to be levied and collected in the same  
 ‘ Manner, as is directed in and by the aforesaid Statute made 27 *Eliz.*  
 ‘ in order thereby to reimburse such High Constable or High Constables  
 ‘ such taxed Costs, as by reason of such Insolvency he or they shall not  
 ‘ be able to recover and receive of and from the Plaintiff or Plaintiffs in  
 ‘ the Action, or his or their Sureties, as aforesaid.’

And it is further Enacted, ‘ That the several Sum or Sums of Money,  
 ‘ which shall be so rated and assessed, and levied and collected as afore-  
 ‘ said, for the Reimbursement of the Expences necessarily sustained by  
 ‘ any High Constable or High Constables in Defence of any Action  
 ‘ brought against the Hundred upon the Statutes above-mentioned, or  
 ‘ either of them, in case of any Judgment given against the Plaintiff or  
 ‘ Plaintiffs, shall be paid within ten Days after such Collection, unto the  
 ‘ said Justices, or one of them, to the Use and Behoof of such High  
 ‘ Constable or High Constables, to whom the said Justices shall, upon  
 ‘ Request, pay and deliver over the same.

And it is further Enacted, ‘ That the Justices of Peace, by whom  
 ‘ such Taxations and Assessments as aforesaid shall, in Pursuance of the  
 ‘ said Statute made in 27 *Eliz.* and also of this present Act, be made,  
 ‘ shall limit and appoint, at their Discretion, some certain reasonable  
 ‘ Time within which such Taxations and Assessments shall be levied and  
 ‘ collected, which Time shall not exceed thirty Days; and also that if  
 ‘ any such Officer or Officers, who are to levy and collect such Taxations  
 ‘ and Assessments as aforesaid, shall refuse or neglect to levy and collect  
 ‘ the same within such Time, as shall be limited and appointed by the  
 ‘ said Justices of the Peace for their doing thereof, or shall refuse or  
 ‘ neglect to pay and deliver over the Sums of Money so levied and col-  
 ‘ lected to the said Sheriff, and also to the said Justices, in such Manner  
 ‘ as the same in the several Cases herein before mentioned are respec-  
 ‘ tively directed to be paid, within the respective Times herein before  
 ‘ limited for such Payment thereof, every such Officer shall for every  
 ‘ such Refusal or Neglect forfeit double the Sum appointed to be by him  
 ‘ levied and collected as aforesaid.



## Ideots and Lunaticks.

- (A) What Persons are esteemed such, so as to come within the Protection of the Law.
- (B) How they are to be found such.
- (C) Who hath an Interest in, and Jurisdiction over them; and therein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.
- (D) How far their Want of Understanding shall be said prejudicial to them in Civil Respects.
- (E) How far the Want of Understanding will excuse in Criminal Cases.
- (F) How far their Acts are good, void, or voidable.
- (G) How they are to sue and defend.

### (A) What Persons are esteemed such, so as to come within the Protection of the Law.

**T**HE more general Description of a Person, who, from his Want of Reason and Understanding, comes within the Protection of the Law, is that of *Non Compos Mentis*. Co. Lit. 246.  
4 Co. 124.  
Skin. 177.

There are, says my Lord Coke, four Kinds of Men who may be said *Non compos*: 1. An Ideot, who is *Non compos* from his Nativity. Co. Lit. 247.  
4 Co. 124.  
2. One made such by Sickness. 3. A Lunatick, *qui aliquando gaudet lucidis Intervallis*, who is *Non compos* only for the Time that he wants Understanding. Vide 1 Hale  
Hist. P. C.  
30 to 37.  
4. One that is drunk; which last is so far from coming within the Protection of the Law, that his Drunkenness is an (a) Aggravation of whatever he does amiss. (a) Plew. 19.  
Omne crimen  
ebrietas inen-  
dit esse detegit.

1. An Ideot is a Fool or Madman from his Nativity, and one who never has any lucid Intervals; therefore the King has the Protection of him and his Estate, during his Life, without rendering any Account; because it cannot be presumed that he will be ever capable of taking Care of himself or his Affairs: And such a one is described a Person that cannot number twenty, tell the Days of the Week, does not know his Father or Mother, his own Age, &c. But these are mentioned as Instances only; for Ideot or not, being a Question of Fact, must be tried by Jury or Inspection. Dyer 25.  
Moor 4. pl. 12.  
Bro. Ideot 1.  
F. N. B. 233.

But tho' an Ideot must be so *a Nativitate*, yet if by Inquisition it be found, that *A.* is an Ideot not having any lucid Intervals *per spatium octo Annorum*, this is a sufficient Finding; for the Inquisition having found the Party an Ideot, the Adding *per spatium octo Annorum* is Superfluous, and shall be rejected. 3 Med. 43, 44.  
2 Show. 171.  
Skin. 5. 177.  
S. C. Producers  
and Lady  
Frazier.

2. One

1 Hale Hist.  
P. C. 30.

2. One made such by Sicknefs, which my Lord Hale calls *Dementia accidentalis vel adventitia*, and which he again distinguishes into a total and a partial Infanity, from its being more or less violent, is such a Madnefs as excuseth in Criminal Cafes; and tho' the Party also in every thing else be intitled to the fame Protection with an Ideot, and tho' his Diforder feem permanent and fixed, yet as he had once Reason and Understanding, and as the Law fees no Impossibility but what he may be restored to them again, it makes the King only a Trustee for the Benefit of such a one, without giving him any Profit or Interest in his Estate.

4 Co. 125.  
Co. Lit. 247.  
1 Hale Hist.  
P. C. 31.

3. A Lunatick; this is also *Dementia accidentalis vel adventitia*, and takes its Name from the great Influence which the Moon has in all Disorders of the Brain; and tho' such a one hath Intervals of Reason, yet during his Phrenzy he is intitled to the same Indulgency as to his Acts, and stands in the same Degree with one whose Diforder is fixed and permanent.

Plow. 19. a.  
Crompt. Just.  
29. a.  
Co. Lit. 247.  
1 Hale Hist.  
P. C. 32.

4. One made mad by Drunkennefs, which is called *Dementia effectata*; and tho', as has been said, such a Person be not intitled to the Protection of the Law, yet if a Person by the Unskilfulness of his Physician, or by the Contrivance of his Enemies, eat or drink such a Thing as causeth Phrenzy, this puts him in the same Condition with any other Phrenzy, and equally excuseth him; also if by one or more such Practices an habitual or fixed Phrenzy be caused, tho' this Madnefs was contracted by the Vice and Will of the Party, yet this habitual and fixed Phrenzy thereby caused puts the Man in the same Condition, as if the same was contracted involuntarily at first.

But tho' this Subject of Madnefs may be spun out to a greater Length, and branched into several Kinds and Degrees, yet it appears that the prevailing Distinction herein in Law is between Ideocy and Lunacy; the first a Fatuity *a Nativitate, vel Dementia naturalis*, which excuseth the Party as to his Acts, and intitles the King to the Receipt of the Rents and Profits of his Estate during his Life, without being obliged to render any Account for the same; the other accidental or adventitious Madnefs, which, whether permanent and fixed, or with lucid Intervals, goes under the general Name of Lunacy, and (a) equally excuseth with Ideocy, as to Acts done during the Phrenzy; but herein they differ, that in the latter Case the King, as has been said, is only a Trustee for the Lunatick, and accountable to him, if he happens to be restored to his Understanding, or to his Representatives, if it happen otherwise: But in what Things they further differ, will be seen by that which follows.

(a) 4 Co. 125. a.

## (B) how they are to be found such.

1 Hale Hist.  
P. C. 33.

EVERY Person of the Age of Discretion is in Law presumed to be of sound Mind and Memory, unless the contrary appear; and this Rule holds as well in Civil as Criminal Cafes.

9 Co. 31. a.  
4 Co. 126.  
And for this  
Writ of Idi-  
ota inquiren-  
do, vide Fitz.  
N. B. 232 3.

The Trial of Ideocy, Madnefs, or Lunacy in Civil Cafes, and in order to the Commitment or Custody of the Person and his Estate, which belongs to the King, either to his own Use and Benefit, as in Case of Ideocy, or to the Use of the Party, in case of accidental Madnefs or Lunacy, is by Writ or Commission to the Sheriff, or Escheator, or particular Commissioners, both by their own Inspection and by Inquisition to inquire, and return their Inquisition into the Chancery; and thereupon a Grant or Commitment of the Party and his Estate ensues: And in case the Party or his Friends find themselves injured by the finding him a Lunatick or Ideot, a special Writ may issue to bring the Party before the

the Chancellor, or before the King, to be inspected; and if, on Examination, it appear that the Party is no (a) Ideot, the whole Commission (a) That Ideocy may be tried by Inquisition, and Office shall be discharged without any Traverse or *Monstrans de Droit*.

because it may be discerned; but not Lunacy without taking out a Commission of Lunacy, *Skin. 5*.

Also the Party found an Ideot or Lunatick may traverse the Inquisition, as may any other Person having a Title to the Land; and therefore it is said, that by the Statute 18 H. 6. there ought to be a Month's Time between the Return of the Inquisition and the Grant of the Custody and Lands, in order for the Parties to come in and tender such Traverse. *Skin. 178.*

If by Inquisition a Person be found a Lunatick, and the Custody granted to J. S. and the Party thus found brings a *Scire Facias* to set aside the Inquisition, the Committee of the Lunatick cannot plead nor join Issue in such *Scire Facias*; for he can have no Interest in the Estate of the Lunatick, being only in the Nature of a Bailiff to the King; and therefore his Duty is to inform the King's Attorney General of the Nature of the Affair, who is the proper Person to contest the Matter in Behalf of the King. *2 Sid. 124. Susan Thron ver. Coward.*

As to Ideocy, Lunacy, or Madness, which excuses in capital Cases, it is not necessary that it was found by Inquisition that the Party was a Madman, Ideot, or Lunatick previous to the Commitment of the Fact; for if he was actually mad at the Time of the Fact committed, this shall excuse; and this regularly is to be tried by an Inquest of Office to be returned by the Sheriff of the County wherein the Court sits for the Trial of the Offence; and if it be found that he was actually mad, he shall be discharged without any other Trial; but if they find that the Party only feigns himself mad, and he refuses to answer or plead, he shall be dealt with as one who stands mute. *26 Aff. pt 27. Bro. Cer. 101. 1 And. 107. 154. Sav. 57, 57. 1 Hawk P. C. 2 1 Hale Hist. P. C. 55.*

Also in case a Man in a Phrenzy happen by some Oversight, or by means of the Gaoler, to plead to his Indictment, and is put upon his Trial, and it appears to the Court upon his Trial that he is mad, the Judge in Discretion may discharge the Jury of him, and remit him to Gaol to be tried after the Recovery of his Understanding, especially in case any Doubt appear upon the Evidence touching the Guilt of the Fact, and this *in Favour of Life*; and if there be no Colour of Evidence to prove him guilty, or if there be a pregnant Evidence to prove his Insanity at the Time of the Fact committed, then, upon the same Favour of Life and Liberty, it is fit it should be proceeded in the Trial, in order to his Acquittal and Enlargement. *1 Hale Hist. P. C. 55, 56.*

So if a Person during his Insanity commit a capital Offence, and recover his Understanding, and being indicted and arraigned for the same, pleads Not guilty, he ought to be acquitted; for, by reason of his Incapacity, he cannot act *jellco animo*. *1 Hale Hist. P. C. 36.*

### (C) Who hath an Interest in, and Jurisdiction over them: And therein of appointing them proper Curators and Committees, and the Power and Duty of such Committees.

IT seems to be agreed at this Day, that the King as *Parens Patriæ* hath the Protection of all his Subjects, and that in a more peculiar manner he is to take Care of all those who, by reason of their Imbecility

*Stat. Prer. g. cap. 9. fol. 33. 2 Inst. 14. 4 Co. 126. a. and Dyer 25.*

and Want of Understanding, are incapable of taking Care of themselves; this, in some Books, is called a Prerogative in the Crown, and in others a *Regium Munus*, or Duty which the King owes his Subjects in Return to their Subjection and Allegiance to him.

2 *Inst.* 14.  
4 *Co.* 126.

My Lord *Coke* in his 2 *Inst.* is of Opinion, that by the Common Law the King had no Prerogative in the Custody of an Ideot's Lands, but that the same belonged to the Lords of whom the Lands were holden, and that the same was given to the King by some Act of Parliament after the making of *Magna Charta*, and before the Statute *de Prærogativa Regis* 17 *E. 2. cap. 9.* but in 4 *Co. Beverlye's Case*, he says, that this Prerogative was by the Common Law, and that the Statute *de Prærogativa Regis* is only Declarative thereof.

(a) And also  
of their  
Goods and  
Chattels.  
4 *Co.* 148.

But however that may be, now, by the Statute *de Prærogativa Regis*, or 17 *E. 2. cap. 9.* it is enacted, ' That the King shall have the Custody of the (a) Lands of natural Fools, raking the Profits of them, without Waste or Destruction, and shall find them their Necessaries of whose Fee soever the Lands be holden; and after the Death of such Ideots, he shall render it to the right Heirs, so that such Ideots shall not alien, nor their Heirs shall be disinherited.

And *cap. 10.* of the said Statute, ' Also the King shall provide when any (that before Time hath had his Wit and Memory) happen to fail of his Wit, and there are many *per Lucida Intervalla*, that their Lands and Tenements shall be safely kept without Waste and Destruction, and that they and their Household shall live and be maintained competently with the Profits of the same, and the Residue, besides their Sustentation, shall be kept to their Use, to be delivered unto them when they come to right Mind; so that such Lands and Tenements shall in no wise be aliened, and the King shall take nothing to his own Use; and if the Party die in such Estate, then the Residue shall be distributed for his Soul, by the Advice of the Ordinary.

(b) Bro. Ideot  
4, 5.  
*Dyer* 25.  
*Moor* 4. pl. 12.  
1 *And.* 23.  
4 *Co.* 127.  
*Co. Lit.* 247.

This Distinction, established by this Statute, between the King's Interest in the Lands of an Ideot and Lunatick, is laid down and admitted in all the (b) Books which speak of this Matter; and on this Foundation it hath been (c) resolved, that the King may grant the Custody of an (d) Ideot and his Lands to a Person, his Heirs and Executors, and that he had the same Interest such a one as he had in his Ward by the Common Law.

(c) 3 *Mod.* 43 4. *Skin.* 5, 177. 2 *Shew.* 171. 1 *Vern.* 9. *Prodgers* and *Lady Frazier.* (d) But the King cannot grant the Custody of the Body and Lands of a Lunatick to one to take the Profits to his own Use. *Moor* 4. pl. 12. adjudged.

4 *Co.* 127.  
2 *Chan. Ca.*  
259.

But tho' a Lunatick is by Commission to be under the Care of the Publick, and such Committee is to be appointed for him by the Lord Chancellor, whose Acts are subject to the Controul and Correction of the Court of Chancery; yet such a one, whether so appointed, or whether he of his own Head take upon him the Care and Management of the Estate of a Lunatick, is but in Nature of a Bailiff or Trustee for him, and accountable to him, his Executors or Administrators.

1 *Vern.* 262.  
*Foster ver.*  
*Merchant.*

And as the Committees of a Lunatick have no Interest, but an Estate during Pleasure, it hath been ruled, that they cannot make Leafes, nor any ways incumber the Lunatick's Estate, without a special Order from the Court of Chancery, where the Profits are not sufficient to maintain the Lunatick.

1 *Vern.* 262,  
263.

Also where a Lunatick, before he became such, made a Mortgage of good Part of his Estate for 50*l.* and the Committee transferred this Mortgage, and took up 3 or 400*l.* more upon it, and it was held, by my Lord Keeper, that the Mortgage should stand but a Security for the 50*l.* only.

And as to Improvements and Buildings on the Lunatick's Estate, it has been held, that upon his Death the Heir must be let into the Estate without making any Allowance for such Improvements. <sup>1 Vern. 263.</sup>

The Committee of a Lunatick having invested Part of the Lunatick's Personal Estate in a Purchase of Lands, made in the Lunatick's Name to him and his Heirs, the Question was, whether the Committee had not exceeded his Power by changing the Personal Estate into a Real Estate, and thereby defeating the next of Kin, in Favour of the Heirs at Law; and after great Debate, and upon Reading the Statute made touching the granting the Custody of the Lunatick, whereby it is provided, that the Surplus shall be safely kept and delivered to him, if he recover; if not, upon his Death, to be employed for the Benefit of his Soul, &c. the Court decreed an Account of the Personal Estate, and the Lands purchased to be sold, and the Money to go and be divided, as Personal Estate, amongst the next of Kin. <sup>2 Vern. 192. Audley ver. Audley.</sup>

Also the Care and Management of all Affairs relating to Idiots and Lunatics is so peculiarly under the Power and Direction of the Court of Chancery, that all Abuses in Relation to them, as taking them out of the Custody of their Committees, Marrying them, &c. are punishable as Contempts to that Court. <sup>Preced. Ch. 17. 203. Abr. Eq. 278.</sup>

But it seemeth, that the 17 E. 2. which giveth the Wardship of Idiots Lands to the King, he finding them convenient Maintenance out of the Profits thereof, extends not to Copyhold Lands, for the Prejudice that would thereby ensue to the Lord; but yet all Alienations made by an Idiot of his Copyhold Lands after Office found, shall be avoided by the King. <sup>4 Co. 126. b. Co. Copyhold. 152.</sup>

And yet it hath been held, that tho' the King cannot have the Custody of an Idiot or Lunatick Copyholder, by reason of the Prejudice that might accrue to the Lord thereby, that yet the Lord of a Manor *de communis jure* hath not the Custody of a Lunatick's Lands, but that there must be a Custom to warrant it. <sup>Noy 27. Hob. 215. per Hobart.</sup>

But it hath been resolved, that the Lord should have the Custody of one that is *Mutus & furdus*, without alledging any Custom for it; and the Reason given why the Lord should have the Custody is, because otherwise he would be prejudiced in his Rents and Services, which Reason extends as well where there is no Custom, as where there is; and if the Custody of one that is *Mutus & furdus* of common Right belongs to the Lord, by the same Reason of one that is a Lunatick. <sup>Cro. Jac. 105. Leers and Skinner.</sup>

And tho' the King, as has been said, has the sole Direction and Management of Idiots, &c. yet a private Person may confine a Friend who is mad, and bind and beat him, &c. in such a Manner as is proper in such Circumstances. <sup>2 Rol. Abr. 546.</sup>

Also by the 12 Ann. cap. 23. reciting, that whereas there are sometimes in Parishes, Towns and Places, Persons of little or no Estates, who by Lunacy, or otherwise, are furiously Mad, and dangerous to be permitted to go Abroad, and by the Laws in Being, the Justices of Peace and Officers have not Authority to restrain and confine them, it is enacted, ' That it shall and may be lawful for any two or more Justices of the Peace where such Lunatick, or mad Person, shall be found, by ' Warrant under their Hands and Seals, directed to the Constables, ' Church-wardens and Overseers of the Poor of such Parish, Town or ' Place, or some of them, to cause such Person to be apprehended and ' kept safely locked up in such secure Place within the County where ' such Parish or Town shall lie, as such Justices shall, under their Hands ' and Seals, direct and appoint; and (if such Justices find it necessary) ' to be there chained, if the last legal (a) Settlement of such Person (a) That an Idiot gains a Settlement ' shall be in any Parish, Town or Place within such County; and if such

like any other poor Child, and that the Father ought to maintain him; but if he cannot, the Parish or Place where he is settled. <sup>2 Salk. 427.</sup>

‘ Settlement shall not be there, then such Person shall be sent to the Place  
 ‘ of his or her last legal Settlement, as Vagrants by this Act are directed  
 ‘ to be sent, (Whipping excepted) and shall be kept safely locked up or  
 ‘ chained, as aforesaid; and the Charges of Keeping and Maintaining such  
 ‘ Person during such Restraint, (which shall be for and during such  
 ‘ Time only as such Lunacy or Madnes shall continue,) shall be satisfied  
 ‘ and paid by Order of two or more Justices of the Peace for the County,  
 ‘ Town or Place where such Settlement shall be, out of the Estate of  
 ‘ such Person, if such Person hath an Estate to pay and satisfy the same  
 ‘ over and above what shall be sufficient to maintain his Wife and Chil-  
 ‘ dren, if he hath any; and if he hath not such an Estate, then the  
 ‘ Charges of keeping and maintaining such Person, during such Re-  
 ‘ straint, shall be satisfied and paid by such Ways and Means as the  
 ‘ Poor of such Parish, Town or Place, are by the Laws in Being to  
 ‘ be provided for.

‘ Provided that this Act, or any Thing contained therein, shall not  
 ‘ extend, or be construed to extend, to restrain or abridge the Preroga-  
 ‘ tive of the Queen, or the Power or Authority of the Lord Chancellor,  
 ‘ Lord Keeper, or Commissioners of the Great Seal for the Time being,  
 ‘ or of the Chancellor, or Vice-Chancellor of the County Palatine of  
 ‘ *Lancaster* for the Time being, or of the Chamberlain, or Vice-Cham-  
 ‘ berlain of the County Palatine of *Chester* for the Time being, touching  
 ‘ or concerning the Premises.

### (D) How far their Want of Understanding shall be said prejudicial to them in Civil Respects.

*Co. Lit. 2. 8.* **A**N Idiot, or Person *Non compos*, may inherit, because the Law, in  
 Compassion to their natural Infirmities, presumes them capable of  
 Property.

*Co. Lit. 2.* Also an Idiot, or Person of *Non sane* Memory, may purchase, because  
*2 Vent. 203.* it is intended for their Benefit; and if after Recovery of their Memory  
 they agree thereto, they cannot avoid it; but if they die during their  
 Lunacy, their Heirs may avoid it, for they shall not be subject to the  
 Contracts of Persons who wanted Capacity to contract; so if after their  
 Memory recovered, the Lunatick, or Person *Non compos*, die without  
 Agreement to the Purchase, their Heirs may avoid it.

*Co. Lit. 31. a.* If an Idiot or Lunatick marry, and die, his Wife shall be endowed;  
*4 Co. 124, 125.* for this works no Forfeiture at all, and the King has only the Custody  
 of the Inheritance in one Case, and a Power of providing for him and  
 his Family in the other; but in both Cases the Freehold and Inheritance  
 is in the Idiot or Lunatick; and therefore (a) if Lands descend to an  
 Idiot or Lunatick after Marriage, and the King, on Office found, takes  
 those Lands into his Custody, or grants them over to another, as Com-  
 mittee, in the usual Manner; yet this seems no Reason why the Husband  
 should not be Tenant by the Curtesy, or the Wife endowed, since their  
 Title does not begin to any Purpose till the Death of the Husband or  
 Wife, when the King's Title is at an End.

*Perk. 365.* A Lunatick shall be Tenant by the Curtesy, and shall have Dower;  
 so tho' a Woman, being a Lunatick, kill her Husband, or any other, yet  
 she shall be endowed, because this cannot be Felony in her, who was de-  
 prived of her Understanding by the Act of God.

If a Person *Non compos* be disseised, and a Descent cast, this, it is said, takes away his Entry, but not the Entry of his Heir; for regularly, the *Non compos* in this Case cannot alledge the Disability in himself, because he cannot be supposed conscious of it, nor is he allowed ever, at any Time, to alledge it, for when he is once *Non compos*, there is no certain Time when he can be adjudged to recover that Disability, unless where he is legally committed, and then the Acts during his Lunacy will be set aside and discharged, and afterwards the Commission superseded; for in no other way can the *Non compos* be legally restored to his Right, and to his Capacity of acting. Lit. Sect. 405. Co. Lit. 247.

A Person *Non compos*, being Lord of a Copyhold Manor, may make Grants of Copyhold Estates, for such Estates do not take their Perfection from any Power or Interest in the Lord, but from the Custom of the Manor, by which they have been demised and demisable Time out of Mind. 4 Co. 23. b. Co. Copyholder 79, 107.

Ideots and Lunaticks are both by the Civil Law, and likewise by the Common Law, incapable of being Executors or Administrators; for these Disabilities render them not only incapable of executing the Trust reposed in them, but also by their Insanity, and Want of Understanding, they are incapable of determining whether they will take upon them the Execution of the Trust or not. Godolph. Orph. Leg. 36.

Therefore it hath been agreed, that if an Executor become *Non compos*, that the Spiritual Court may, on Account of this natural Disability, commit Administration to another. 1 Salk. 36.

An Ideot, or Person *Non compos*, being robbed, shall be (a) bound by a Sale of his Goods in a Market-Overt. 2 Inst. 713. (a) Not bound by a

Fine and Non-claim, *vid. Tit. Fines and Recoveries*, and 2 Inst. 516.— Cannot bring an Appeal of the Death of his Ancestor. 2 Hawk. P. C. 152.

## (E) how far the Want of Understanding will excuse in Criminal Cases.

IT is laid down as a general Rule, that Ideots and Lunaticks, being by reason of their natural Disabilities incapable of judging between Good and Evil, are punishable by no Criminal Prosecution whatsoever. 1 Hawk. R. C. 2.

And therefore a Person, who (b) loses his Memory by Sickness, Infirmit, or Accident, and kills himself, is not a *Felo de se*. 3 Inst. 54. (b) But if a Lunatick in

a lucid Interval kill himself, he is a *Felo de se*. 1 Hal. Hist. P. C. 412.

So if a Man give himself a mortal Stroke while he is *Non compos*, and recovers his Understanding, and then dies, he is not *Felo de se*; for tho' the Death compleat the Homicide, the Act must be that which makes the Offence. 1 Hal. Hist. P. C. 412.

But it is not (c) every Melancholy or Hypochondriacal Distemper that denominates a Man *Non compos*, for there are few who commit this Offence, but are under such Infirmities; but it must be such an Alienation of Mind that renders them to be Madmen, or Frantick, or destitute of the Use of Reason. 1 Hal. Hist. P. C. 412. (c) In 3 Mod. 100. it is said to be the prevailing Opinion,

that a Person who kills himself must be *Non compos* of Course; on this Supposition, that it is impossible a Man in his Senses should do a Thing so repugnant to Reason and Nature. — But in 1 Hawk. P. C. 67. this Notion is exploded. — And so in Comb. 2, 3. 1 Hawk.

1 Hal. Hist. P. C. 30. And as a Person *Non compos* cannot be a *Felo de se* by killing himself; so neither can he be guilty of Homicide in killing another, nor of Petit Treason; also if one who has committed a Capital Offence become *Non compos* before Conviction, he shall not be arraigned; and if after Conviction, he shall not be executed.

(a) Fitz. Con. 351. It seems to have been (a) anciently holden, in respect of that high regard which the Law has for the Safety of the King's Person, that a Madman might be punished as a Traitor for killing, or offering to kill the King; but this is now (b) contradicted by better and later Opinions.

4 Co. 124. b. 2 Rol. Rep. 524. (b) 3 Inst. 46. Co. Lit. 247. H. P. C. 10, 43. 1 Hawk. P. C. 2. and herewith my Lord Hale seems to agree, 1 Hal. Hist. P. C. 36, 37. For he says, that the Reason is the same between Homicide and Treason, and that he that cannot act *felonice*, or *Animo felonice*, cannot act *Preditorie*. — But as this Exception laid down by my Lord Coke, 4 Co. 124. tho' contradicted by himself, 3 Inst. 46. tends so much to the Safety of the King's Person, he is not willing to question it.

1 Hal. Hist. P. C. 30. 'The great Difficulty in these Cases, is to determine where a Person shall be said to be so far deprived of his Sense and Memory, as not to have any of his Actions imputed to him; or where, notwithstanding some Defects of this Kind, he still appears to have so much Reason and Understanding as will make him accountable for his Actions, which my Lord Hale distinguishes between, and calls by the Names of 'Total and Partial Insanity; and tho' it be difficult to define the indivisible Line that divides perfect and partial Insanity, yet, says he, it must rest upon Circumstances, duly to be weighed and considered both by the Judge and Jury, lest on the one Side there be a kind of Inhumanity towards the Defects of Human Nature, or on the other Side too great an Indulgence given to great Crimes; and the best Measure he can think of is this: Such a Person, as labouring under melancholy Distempers, hath yet ordinarily as great Understanding as ordinarily a Child of fourteen Years hath, is such a Person as may be guilty of Treason or Felony.

Vid. *supra*, Letter (B). It hath been already observed, that he who is guilty of any Crime whatsoever thro' his voluntary Drunkenness, shall be punished for it as much as if he had been sober.

Keil. 53. Dalt. cap. 95. 1 Hawk. P. C. 2. Also he who incites a Madman to do a Murder, or other Crime, is a principal Offender, and as much punishable as if he had done it himself.

2 Rol. Abr. 547. Heb. 134. Co. Lit. 247. 1 Hawk. P. C. 2. And here we must observe a Difference the Law makes between Civil Suits that are terminated *in compensationem damni illati*, and Criminal Suits, or Prosecutions, that are *ad Panam* & *in Vindictam criminis commissi*; and therefore it is clearly agreed, that if one who wants Discretion commits a Trespass against the Person or Possession of another, he shall be compelled in a Civil Action to give Satisfaction for the Damage.

P. C. 15, 16, 38.

## (F) How far their Acts are good, void, or voidable.

4 Co. 124. 2 And. 145. Co. Lit. 247. (c) A Purchase at a great Under-value by Deed, Fine and Recovery, obtained from a Lunatick, but previous to his being found such, said to be set aside in Chancery. 2 Vern. 678.

HOW we must first distinguish between Acts done by Ideots and Lunaticks *in Pais*, and in a Court of Record; that as to those solemnly acknowledged in a Court of Record, as (a) Fines and Recoveries, and the Uses declared on them, they are good, and can neither be avoided by themselves nor their Representatives; for it is to be presumed, that had they been under these Disabilities, the Judges would not have admitted them to make these Acknowledgments.

Therefore



Therefore if a Person *Non compos* acknowledges a Fine, it shall stand against him and his Heirs; for tho' the Judges ought not to admit of a Fine from a Madman under that Disability, yet when it is once received it shall never be reversed, because the Record and Judgment of the Court being the highest Evidence that can be, the Law presumes the Conuzor at that Time capable of contracting; and therefore the Credit of it is not to be contested, nor the Record avoided by any Averment against the Truth of it.

4 Co. 124.  
2 Inf. 483.  
Evo. Tit.  
Fines 75.  
Co. Lit. 247.

So in case of a Fine levied by an Ideot, it shall stand against him and his Heirs; for no Averment of Ideocy can vacate the Fine; nor will an Office, finding him an Ideot *a nativitate*, be sufficient to reverse the Fine, for that were to lessen the Credit of Judgments in Courts of Record, by trying them by other Rules than themselves.

2 And. 103.  
4 Co. 124.

As to Acts done by them *in Pais*, they are distinguished into void and voidable, tho' as to themselves they are regularly unavoidable, because no Man is allowed to disable himself, for the Insecurity that may arise in Contracts from counterfeit Madness and Folly; besides, if the Excuse were real, it would be repugnant that the Party should know or remember what he did; but their Heirs and Executors may avoid such Acts *in Pais*, by Pleading the Disability; because if they can prove it, it must be presumed real, since no Body can be thought to counterfeit it, when he can expect no Benefit from it himself.

4 Co. 124-5.  
Brewerley's  
Case.  
Bro. Tit.  
Fait 62.  
F. N. B. 202.  
Cro. Eliz. 398.

The Feoffment of an Ideot, or *Non compos*, is not void, but voidable; but it cannot be avoided by himself by Entry, &c. and the Reason hereof given in some Books is, as before observed, because no Man by Law is permitted to disable himself; but the better Reason in this Case seems to be, that anciently these Feoffments were made not only for the Benefit of the Parties, but of the Realm, being annually paid for by the Attendance of the Tenants in Military Service, or in Tillage, and so were presumed to be equally for the Benefit of the Lord and Tenant, and therefore they were not held to be void in themselves; and tho' an Infant, at the Age of Discretion, defined by the Law, might avoid them, and choose which is most for his Benefit; yet as to a Person of *Non sane Memory*, there being no Time defined when he recovers his Senses, he cannot avoid such Acts of his own by any subsequent Act of his; but the King, who is the universal Curator of all Madmen, may by Writ *de Ideota Inquirendo* avoid such Alienation or Office found; for the Office, being of equal or greater Solemnity than the Feoffment, gives Notice to all Men in whom the Freehold is vested; and after such Office, if the Commission of Lunacy be discharged, the Lunatick is restored to his Lands, because the King is the proper Person to judge whether such Alienations are for the Benefit of the Lunatick, and at what Time he is to be looked upon to be restored to his Senses; also the Heir may avoid such Alienations by Entry or Writ of *Dum fuit non compos*, for the Reasons before given; but the Fine or Recovery of a Lunatick cannot be avoided, because they are Acts of Record, and the Judges are supposed to take Care that no such Alienations be allowed, and if they be, there is no way of rectifying the Error by a Matter of equal Notoriety.

4 Co. 123, 26.  
Shew. P. C.  
152.  
Cartb. 435.

But tho' the King, or Heir, may avoid the Feoffment of a *Non compos*, yet if such a one be by Inquisition found an Ideot *a nativitate*, or a Lunatick, from such a Time, tho' the Inquisition hath Relation to the Nativity, or Time of his becoming a Lunatick, so as to avoid mesne Acts, yet it shall not have Relation to these Times to intitle the King to the mesne Profits, for these the Tenant is intitled to in Consideration of the Services which he is obliged to do to those of whom the Land is holden; (a) also tho' the King's Title must appear by Matter of Record, which cannot be before the Inquisition found.

Ley 25, 26.  
8 Co. 170.  
Toussion's  
Case.

Also such Heirs and Representatives, as can take Advantage of the voidable Acts of those they represent, must be Privies in Blood as Heirs are,

(a) Vid. Pkew.  
488. b.

4 Co. 124.

are, or by Representation as Executors; but Privies in Estate, as those in Remainder or Reversion, or by Tenure, as the Lord by Escheat, cannot take Advantage of the Disability of him who made the Feoffment.

2 Rol. Abr.  
728.  
4 Co. 124, 125.

But the Release, Surrender, Letter of Attorney to give Livery, Warranty, or any other Deed or Writing obligatory, tho' they regularly at Law, as has been said, bind the *Non compos*, are mere Nullities with respect to others, and differ from a Feoffment, which is a Matter of greater Solemnity, being antiently transacted *Coram paribus curtis*, who signed their Attestation to the same, which, it is presumed, they would not have done, had the Indiscretion been apparent.

Carth. 435.  
2 Salk. 427,  
476.  
Show. Par.  
Ca. 152. 3.  
3 Med. 501.  
Comb. 409.  
3 Lev. 284.  
S.C. Thompson  
versus Leach,  
adjudged in  
B. R. and  
affirmed in  
the House of  
Lords.

Therefore where a Person *Non compos* being Tenant for Life, with Remainder to his first and other Sons, Remainder over, did before the Birth of any Son surrender to him in Remainder, with an Intent to destroy the contingent Remainders, and died, leaving Issue a Son; and in this Case it was holden, 1<sup>st</sup>, That the Surrender was void *ab initio*, and not barely voidable; for had it been voidable only, yet if at any Time it had been effectual to merge the Estate for Life before the Birth of a Son, it could not have been revived again by any Act *ex post Facto*. 2<sup>dly</sup>, That the Surrender being void *ab initio*, the Son, tho' he did not claim as Heir, but by way of Remainder, may take Advantage of it: And this Resolution seems agreeable to the strictest Rules of Reason and Law; for if the Surrender had been allowed good or voidable only, it would have been prejudicial to all his Sons after born, who were Strangers, and third Persons, and there could no Use be made of the Surrender but to do them Mischief, which the Acts of a Madman ought not to be allowed to do, when, by a reasonable Construction, it is in the Power of the Court to help them: And in this Case a Difference was taken between a Feoffment and Livery made *propriis manibus* of an Ideot, and the bare Execution of a Deed by sealing and Delivery thereof, as in Cases of Surrenders, Grants, Releases, &c. which have their Strength only by executing them, and in which the Formality of Livery and Seisin is not so much regarded in the Law; and therefore the Feoffment is not merely void, but voidable; but Surrenders, (a) Grants, &c. by an Ideot are

(a) Therefore if a Man void *ab initio*.  
of non sane

Memory, being seised of a Carve of Land, grant a Rent issuing out of the same Land in Fee, and die, and his Heir enters, and the Grantee distrains for the Rent behind, the Heir shall have an Action of Trespass; but if the Grantee had distrained in the Life of the Grantor for the Rent behind, the Grantor should not have an Action of Trespass; for he cannot avoid his Deed by disabling himself. Perk. sect. 21.

4 Co. 124. a.  
10 Co. 42. b.  
2 Inst. 483.  
Bro. East Invol.  
14.

If an Ideot or Lunatick enter into a Recognizance, or acknowledge a Statute, neither they themselves, nor their Heirs nor Executors can avoid them; for these are Securities of a higher Nature to Specialties and Obligations, which yet they themselves cannot avoid, and being Matters of Record, and equivalent to Judgments of the superior Courts, neither they themselves, their Heirs nor Executors, can avoid them.

Qr. Lit. 166. a. If Parceners of *Non sane Memory* make Partition, unless it be equal, it shall only bind the Parties themselves, but not their Issue: And the Reason it binds the Parties themselves is the same that all other Contracts bind them, viz. because no Man is admitted to stultify himself: And the Reason their Issue may avoid such Partition is the same likewise for which they may avoid all other Contracts made by such Ancestors during their Infanity, viz. because they may be admitted to shew the Incapacity of their Ancestor, and so avoid all Acts done by them during that Time.

4 Co. 125.

And altho', as has been observed, according to the strict Rules of Law no Person is allowed to stultify himself, yet it seems that even at Law the Contracts of Ideots and Lunaticks, after Office found, and the Party legally committed, are void, and it must be at the Peril of him who deals with such a one; and that if afterwards the Commission of

Lunacy

Lunacy be superseded or discharged, the *Non compos* shall be restored to his legal Right: But this, it seems, must be at the Suit and Application of his Committee.

Also there are frequent Instances in Equity, where not only Idcots and Lunaticks, who come within the Protection of the Law, but also Persons of weak Understandings have been relieved, when they appeared to have been imposed upon in their Dealings and unreasonable Purchases, and Securities obtained from them set aside in their Favour.

But for this  
vide 1 Chan.  
Cr. 113, 153.  
1 Vern. 155.  
2 Vern. 189.  
4:4, 678.  
Eo vide Tit.  
Agreements.  
Abv. Eq. 279.  
Ridder versus  
Ridder.

A Bill was brought by a Lunatick and his Committee, to set aside a Settlement which had been obtained from him by the Defendant before the issuing out the Commission of Lunacy, but subsequent to the Time wherein by the Commission he was found to have been a Lunatick, and the Bill charged several Acts of Infanity and Distraction previous to the making of the Settlement, and the issuing out of the Commission; and charged likewise, that the Commission of Lunacy was still in Force: To this Bill the Defendants demurred, for that it was against a known Maxim in Law, that any Person should be admitted to stultify himself; because during the Continuance of the Lunacy he cannot be supposed to know what he did. But my Lord Chancellor over-ruled the Demurrer, and said, that Rule was to be understood of Acts done by the Lunatick to the Prejudice of others, that he should not be admitted to excuse himself on Pretence of Lunacy, but not as to Acts done by him to the Prejudice of himself; besides, here the Committee is likewise Plaintiff, and the several Charges of Lunacy are by him in Behalf of the Lunatick; and it has been always held, that the Defendant must answer in that Case; and so he was ordered to do here, tho' the Settlement was not unreasonable in itself, being only to limit the Estate in Question to the Defendants the Uncles, in case of Failure of Issue Male of the Lunatick, with Power for the Lunatick to charge the same with considerable Portions for his three Daughters, with a Power of Revocation.

Idcots and Lunaticks, during their Lunacy, are incapable of making (a) any Will or Testament; as are also Persons grown childish by reason of extreme Old Age; so one actually drunk, if he be so drunk as to have lost the Use of his Reason: But tho' a Person who wants Understanding cannot make a Will, yet the Rule herein is not to be taken from his not being able to measure an Ell of Cloth, tell twenty, or the like; but whether he have Sense enough to dispose of his Estate with (b) Understanding.

Swinb. 71.  
Godolph. Orph.  
Leg. 25.  
(a) The Statute of 32  
H. 8. gives  
a Power to  
dispose of  
Lands by  
Will, except  
Infants, Inc-

ots, Feme Coverts, and Persons of *non sane Memory*. (b) That it is sufficient that they be able to answer to familiar and usual Questions. Cro. Jac. 497. 6 Co. 23. a.

But every Person making a Will is presumed to be of sound Understanding, until the contrary be proved; so that the *Onus probandi* lies on the other Side: If the Testator used to have Fits and lucid Intervals, and it cannot appear whether the Will be made in the one or the other Time, it shall be presumed to be made in the lucid Intervals, if there be no Argument of Folly in the Will; nay tho' the Testator had no lucid Intervals, yet if it cannot be proved that he was mad at the Time of making the Will, it shall be presumed there was an Intermission of Madness at the Time of making the Will, if the Will be a sensible orderly Will; but the least Word of Folly in such a Will will overthrow it: On the other hand, if one be a very Idiot and make a good sensible Will, yet the Will shall not stand.

Swinb. 72.  
Godolph. 23.  
Dyer 203.  
8 Co. 147.

If a Person of sound Memory makes his Will, and afterwards becomes *Non compos*, this is no Revocation of the Will; yet (c) a Bill will not lie in the Life-time of the *Non compos*, to establish the Testimony of the Witness *in perpetuam rei Memoriam* to such a Will.

Godolph. 26.  
4 Co. 1:6.  
(c) 1 Vern.  
105.

By the 4 *Georg. 2. cap. 10.* it is Enacted, ' That it shall and may be lawful to and for any Person or Persons being Idiot, Lunatick, or *Non Compos Mentis*, or for the Committee or Committees of such Person or Persons, in his, her, or their Name or Names, by the Direction of the Lord Chancellor of *Great Britain*, or the Lord Keeper, or Commissioners of the Great Seal for the Time being, signified by an Order made upon hearing all Parties concerned, on the Petition of the Person or Persons for whom such Person or Persons being Idiot, Lunatick, or *Non compos Mentis*, shall be seised or possessed in Trust, or of the Mortgagor or Mortgagors, or of the Person or Persons intitled to the Monies secured by or upon any Lands, Tenements, or Hereditaments, whereof any such Person or Persons being Idiot, Lunatick, or *Non compos Mentis* is, or are, or shall be seised or possessed by way of Mortgage, or of the Person or Persons intitled to the Redemption thereof, to convey and assure any such Lands, Tenements, or Hereditaments in such Manner as the Lord Chancellor, &c. shall by such Order so to be obtained direct, to any other Person or Persons, and such Conveyance or Assurance so to be had and made as aforesaid shall be as good and effectual in Law, to all Intents and Purposes whatsoever, as if the said Person or Persons being Idiot, Lunatick, or *Non compos Mentis* was or were at the Time of making such Conveyance or Assurance of sane Mind, Memory, and Understanding, and not Idiot, Lunatick, or *Non compos Mentis*, or had by him, her, or themselves executed the same; any Law, &c.

' And it is further Enacted, That all and every such Person and Persons being Idiot, &c. and only Trustee or Trustees, Mortgagee or Mortgagees as aforesaid, or the Committee or Committees of all and every such Person and Persons being Idiot, Lunatick, or *Non compos Mentis*, and only such Trustee or Mortgagee as aforesaid, shall and may be impowered and compelled, by such Order so as aforesaid to be obtained, to make such Conveyance or Conveyances, Assurance or Assurances as aforesaid, in like Manner as Trustees or Mortgagees of sane Memory are compellable to convey, surrender, or assign their Trust-Estates, or Mortgages.'

### (G) How they are to sue and defend.

*Co. Lit. 135. b.* **W**HEN an Idiot doth sue or defend he shall not appear by Guardian, (a) *Prochein Amy*, or Attorney, but he must be ever in proper Person.  
*J. N. B. 27.*  
 (a) The Statute *West. 2. cap. 15.* extends not to an Idiot, 2 *Inst. 390.*

4 *Co. 124. b.* But otherwise of him who becomes *Non compos Mentis*; for he shall appear by Guardian if within Age, or by Attorney if of full Age.  
*Palm. 520. 2.*  
*2. 2 Sand 535.*

2 *Sid. 125.* If a Trespass be committed in the Lands of a Lunatick who is legally committed, (b) the Committee cannot bring an Action of Trespass; but this must be brought in the Name of the Lunatick.  
 (b) Where the Committee of a Lunatick brought a Bill to be relieved against a Debt assigned by the Lunatick without Consideration, and it was held not necessary that the Lunatick should be made a Party. 1 *Chan. Ca. 115.*— But that it is otherwise of an Idiot. 1 *Chan. Ca. 153.*

1 *Verr. 106.* If a Lunatick be sued, he must have a Committee assigned to him to defend the Suit.

# Indictment.

**A**N Indictment is defined an Accusation at the Suit of the King, *2 Hawk. P.C.* by the Oaths of twelve Men, of the same County wherein the *209.* Offence was committed, returned to inquire of all Offences in general in the County, determinable by the Court in which they are returned, and finding a Bill brought before them to be true: But when such Accusation is found by a Grand Jury, without any Bill brought before them, and afterwards reduced to a formed Indictment, it is called (a) a Presentment: And when it is found by Jurors returned to inquire of that particular Offence only which is indicted, it is properly called an Inquisition. (a) A Presentment is a more comprehensive

Term than Indictment; for regularly an Indictment is an Accusation given in against a Person by the Grand Inquest for some Misdemeanor, whereunto he is put to answer; but Presentments do not only include such Indictments, but also some other Informations, whereunto the Party is not put to answer, as Presentments of *Felo de se*, of *Egum se it*, of *Deodands*, of *Deaths per Infortunium*, &c. *2 Hal. Hist. P. C. 152 3.* — That regularly all Presentments and Indictments are traversable, and conclude not the Party, or those claiming under him. *2 Hal. Hist. P. C. 153-4.*

For the better understanding the Law herein, the same hath been reduced to the following Heads:

- (A) Of the Nature of an Indictment, and how far it is considered as a Prosecution at the Suit of the King.
- (B) Where it is necessary, or the Party may be tried for a Capital Offence without it.
- (C) By whom it is to be found; and therein who may and ought to be Indictors.
- (D) Whether the Indictors or Grand Jury may find Part of a Bill brought before them true, and Part false.
- (E) What Matters are indictable.
- (F) Within what Place the Offence inquired of must arise.
- (G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact.
2. How the Persons mentioned or referred to in it.
3. How the Thing wherein the Offence was committed.
4. How the Circumstances of Time and Place.
5. Where the Offence indicted may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment.
6. Whether the Words *Vi & Armis* be in any Case necessary.

7. Whe-

7. Whether it be necessary to lay the Words *contra Pacem*.
8. Whether it be necessary to lay it *contra Coronam & Dignitatem Regis*.
9. Whether it be necessary to lay it *in Contemptum Regis*.
10. Whether necessary to lay it *illicite*.
11. Whether a Defect in any of these Particulars be amendable.

(H) What ought to be the Form of an Indictment upon a Statute: And herein,

1. Whether it be necessary that such Indictment recite the Statute whereon it is grounded.
2. What Misrecitals of such Statutes are fatal.
3. How far it is necessary to bring the Offence indicted within the very Words of the Statute.
4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.
5. How far it is necessary to conclude *contra Formam Statuti*.

(I) What ought to be the Form of a Caption of an Indictment.

(K) Where an Indictment may be quashed.

## (A) Of the Nature of an Indictment, and how far it is considered a Prosecution at the Suit of the King.

<sup>2</sup> Hal. Hist. P. C. 169.

<sup>2</sup> Hawk. P. C. 210.

<sup>2</sup> Hawk. P. C. 210.

<sup>1</sup> Rol. Abr. 220.

<sup>2</sup> Rol. Abr. 83.

<sup>Cro. Car. 531.</sup>

<sup>558. 2 Hawk. P. C. 210.</sup>

<sup>1</sup> Jones 380.

<sup>Cro. Car. 448.</sup>

<sup>1</sup> Rol. Abr. 220.

<sup>2</sup> Hawk. P. C. 210.

<sup>2</sup> Hal. Hist. P. C. 171.

<sup>3</sup> Fac. cap. 5. vide Cro. Jac. 643 4.

AN Indictment is a brief Narrative of an Offence committed by any Person, which the Publick Good requires should be punished; and therefore it is said to be a Prosecution at the Suit of the King merely.

Hence also, from its being the King's Suit, it is every Day admitted that the Party, who prosecutes it, is a good Witness to prove it.

And from its being the King's Suit it is agreed, that no Damages can be given the Party grieved upon an Indictment, or any other criminal Prosecution; notwithstanding the King, by his Commission erecting a new Court, expressly direct that the Party shall recover his Damages by such a Prosecution.

Also where by Statute Damages are given to the Party grieved by the Offence intended to be redressed, it seems that they cannot be recovered on an Indictment grounded on such Statute, unless such Method of recovering them be expressly given by the Statute; but that they ought to be sued for in an Action on the Statute, in the Name of the Party grieved.

But if a Statute prohibit any Act to be done, and by a Substantive Clause gives a Recovery by Action of Debt, Bill, Plaint, or Information, but mentions not Indictment, the Party may be indicted upon the Prohibitory Clause, and thereupon fined, but not to recover the Penalty, as upon the Statute of 3 Fac. cap. 5. prohibiting Recusants to baptize their Children by a Popish Priest; but then it seems the Fine ought not to exceed the Penalty.

But if the Act be not prohibitory, but only that if any Person shall do such a Thing he shall forfeit 5 l. to be recovered by Action of Debt, Bill, Plaint, or Information, he cannot be indicted for it; but the Proceeding must be by Action, Bill, Plaint, or Information. <sup>2 Hal. Hist. P. C. 171.</sup>

And altho' Damages cannot be recovered on an Indictment, yet the Court of King's Bench, having the King's Privy Seal for that Purpose, may give to the Prosecutor the third Part of the Fine assessed on a criminal Prosecution for any Offence whatsoever. <sup>1 Kerb. 487. 2 Hawk. P. C. 210.</sup>

Also it is every Day's Practice of that Court to induce Defendants to make Satisfaction to Prosecutors for the Costs of the Prosecution, and also for the Damages sustained by the Injury, whereof the Defendants are convicted, by intimating an Inclination on that Account to mitigate the Fine due to the King. <sup>2 Hawk. P. C. 210.</sup>

## (B) Where it is necessary, or the Party may be tried for a Capital Offence without it.

IN all criminal Causes the most regular and safe Way, and most conformant to the Common Law, and the Statutes of *Magna Charta*, cap. 29. 5 E. 3. cap. 9. 25 E. 3. cap. 4. 28 E. 3. cap. 3. and 42 E. 3. cap. 3. is by Presentment or Indictment of twelve sworn Men; yet at Common Law there were several Means of putting the Party to answer for a criminal Offence without any Indictment, some whereof are still in Force, and others either grown obsolete or wholly taken away by Statute. <sup>2 Hal. Hist. P. C. cap. 22.</sup>

1. If a Thief or Robber had, on fresh Pursuit, been taken with the Mainour, and the Goods found upon him brought into the Court with him, he might have been tried immediately, without any Indictment: And this is said to have been the proper Method of proceeding in such Manors which had the Franchise of Infangthefe, but is (a) obsolete at this Day. <sup>2 Hawk. P. C. 211. (a) That this Proceeding upon the</sup>

*Mainour* is wholly taken away by the Statutes 25 E. 3. cap. 4. 28 E. 3. cap. 3. 42 E. 3. cap. 3. <sup>2 Hal. Hist. cap. 20.</sup>

2. Another kind of proceeding in Cases capital without Indictment is, where an Appeal is brought at the Suit of the Party, and the Plaintiff is (b) Nonfuit upon that Appeal, yet the Offender shall be arraigned at the King's Suit upon such Appeal; and so it is in case the Appellant die, or release; and in such Case, altho' the Party be indicted as well as appealed, yet upon the Nonfuit of the Plaintiff, the Proceeding for the King shall not be upon the Indictment, but upon the Appeal. <sup>(b) That such Nonfuit, &c. must be after the Appellant has declared, and that such Appeal must have been well commenced: But for this vide 2 Hawk P. C. 212, 213.</sup>

3. If a Person indicted of Treason or Felony confesses the Fact, and accuses others of being guilty of the same Offence with him, by which he becomes and is admitted an Approver, the Parties accused may, on his Appeal, be tried without other Indictment or Presentment. <sup>2 Hal. Hist. P. C. cap. 20. But for the Learning hereof, vide 2 Hawk P. C. 204. 2 Hal. Hist. P. C. 225, &c.</sup>

4. There were before the Statute of 1 H. 4. cap. 14. Appeals by particular Persons, especially of Treason, in Parliament, which are said to have been very frequent in antient Times, and especially in the Reign of Ricb. 2. but are now wholly taken away by the said Statute; and therefore (c) where in the Reign of Char. 2. the Earl of Bristol preferred Articles against him by a Grand Jury of Commoners. <sup>2 Hal. Hist. P. C. cap. 20. (c) State Trials vol. 2. p. 550. — And note; That tho' in all Capital Offences a Peer is to be tried by his Peers, yet it must regularly be upon an Indictment found against him by a Grand Jury of Commoners. 2 Hawk. P. C. 424.</sup>

cles of High Treason, and other Misdemeanors, against the Earl of *Clarendon*, it was resolved by all the Judges, that such Articles were within the said Statute 1 H. 4.

2 Hal. Hist.  
P. C. cap. 20.

But Impeachments by the House of Commons of High Treason, or other Misdemeanors, in the Lords House, have been frequently in Practice, notwithstanding the Statute of 1 H. 4. and are neither within the Words nor Intent of that Statute; for it is a Presentment by the most solemn Grand Inquest of the whole Kingdom.

2 Hawk P.C.  
211. and several  
Authorities there  
cited.

2 Hal. Hist.  
cap. 20.

5. If in a Civil Action in the King's Bench *de Muliere abducta cum bonis viri*, upon Not guilty pleaded, the Defendant be convicted and found Guilty of having carried away the Woman and Goods with force and feloniously, he may be put to answer the Felony without farther Accusation; for such a Charge, by the Oaths of twelve Men, on their Inquiry into the Merits of a Cause, in a Court which has Jurisdiction over the Crime, is equivalent to an Indictment; and the King being always, in Judgment of Law, present in Court, may take Advantage of any Matter therein properly disclosed for his Benefit.

2 Hawk P.C.  
211.

2 Hal. H. B.  
cap. 20.

So if upon a special Verdict, in a common Action of Trespas brought in the King's Bench, it be found that the Defendant took them feloniously, this may serve for an Indictment.

2 Hal. Hist.  
P. C. cap. 20.

So if in an Action of Slander, for calling a Man Thief, the Defendant justifies that he stole Goods, and Issue thereupon taken, it be found for the Defendant; if this be in the King's Bench, and for Felony in the same County where the Court sits, or if it be before Justices of Assize, who have also a Commission of Gaol-Delivery, he shall be forthwith arraigned upon this Verdict, as on an Indictment; and the Reason is, because here is a Verdict of twelve Men in these Cases, and so the Verdict, tho' in a Civil Action, serves the King's Suit as an Indictment, and is not contrary to the Acts of 25, 28 and 42 E. 3. which enact, that no Man shall be put to answer, &c. but by Indictment or Presentment.

2 Hawk P.C.  
211.

But such a finding, in a Court which hath not Criminal Jurisdiction, is of no Force.

2 Hawk P.C.  
212.

Neither shall a Jury's finding *A.* guilty on the Trial of an Indictment against *B.* amount to an Indictment against *B.* because the finding of one Man guilty on the Trial of another is extrajudicial, except only in the Case of a Coroner's Inquest of Death, taken on View; for the finding a Stranger guilty, upon the Acquittal of a Defendant, on the Trial of such an Inquest, is not wholly extrajudicial, because the Jury acquitting the Man on such an Inquest, must inquire what other Person did the Fact.

2 Hawk P.C.  
212.

Also if on a Declaration in the King's Bench against *A.* for having been guilty of a Misdemeanor *simul cum B.* the Jury find *B.* guilty; it is said, that such a finding is equivalent to an Indictment, because it is not wholly extrajudicial.

2 Hal. Hist.  
P. C. cap. 20.

2 Hawk P.C.  
214.

(a) But an  
Abuse offer-

ed to the Process of a Court, is such a Contempt as is punishable by Imprisonment; for tho' by the Statute of *Magna Charta*, &c. no Man is to be imprisoned *sine Judicio Parion, vel per legem terre*; yet it is one Part of the Law of the Land to commit for Contempts, not taken away by any Statute, *vid. Tit. Attachment.*

2 Hal. Hist.  
P. C. cap. 20.  
*vid. 5 Mod.*  
459, &c.

And altho' Informations are practised oftentimes in the Crown-Office in Cases Criminal, and by many Penal Statutes, the Prosecution upon them is by the Acts themselves limited to be by Bill, Complaint, Information, or Indictment, yet the Method of Prosecution of Capital Offences is still to be by Indictment, except in the Cases abovementioned.



(C) By Whom it is to be found; and therein who may and ought to be Indictors.

EVERY Indictment is to be found by (a) twelve lawful Liege Free- But for this  
men of the (b) County wherein the Crime was committed, return- v d. Head of  
ed by the proper Officer, without the Nomination of any other Person. *Juries.*  
(a) That if  
it appears by the Caption of the Indictment, or otherwise, that it was found by less than  
twelve Men, the Proceedings upon it will be erroneous. 2 Hawk. P. C. 215. — But if there be  
thirteen, or more, of the Grand Jury, and twelve agree, it is sufficient, tho' the Rest dissent. 2 Hal.  
Hist. P. C. 161. (b) For they are sworn *ad Inquirendum pro Corpore Comitatus*, and cannot regularly in-  
quire of a Fact done out of that County for which they are sworn, unless specially enabled by Act of  
Parliament. 2 Hal. Hist. P. C. 163.

They must be *Probi & Legales Homines*; therefore it is a good Excep- 2 Hal. Hist.  
tion to one returned on a Grand Jury, that he is an Alien, or Villain, P. C. 155.  
attainted in a Conspiracy, or *decies tantum*, or of Perjury, or (c) Out- (c) Tho' it be  
lawed, or Attaint of Felony or *Premunire*. a Personal  
Action.

2 Hal. Hist. P. C. 155. — But this is left a *Quere* in 2 Hawk. P. C. 216.

(D) Whether the Indictors, or Grand Jury, may find Part of a Bill brought before them true, and Part false.

IT seems to be generally agreed, that a Grand Jury must find either 2 Rot. Rep. 52.  
*Billa vera*, or *Ignoramus* for the Whole; and that if they take upon 3 Bulf. 206.  
them to find it specially or conditionally, or to be true for Part only, and 1 Rot. Rep.  
not for the Rest, the whole is void, and the Party cannot be tried upon 407.  
it, but ought to be indicted a-new. 2 Hawk. P. C.  
210.

Hence it hath been held, that if a Grand Jury indorse a Bill of Mur- 3 Bulf. 206.  
der *Billa vera se defendendo*, or *Billa vera* for Manslaughter, and not for 2 Rot. Rep. 52.  
Murder, the Whole is void; and the Reason hereof given is, that the 1 Sid. 23.  
Grand Jury are not to distinguish betwixt Murder and Manslaughter, 2 Keb. 180.  
for it is only the Circumstance of Malice that makes the Difference, and *Keil. 52.*  
that may be implied by the Law without any Fact at all, and so it lies  
not in the Judgment of a Jury, but of the Judge; also the Intention of  
their finding Indictments is, that there may be no malicious Prosecution;  
and therefore if the Matter of the Indictment be not framed of Malice,  
but is *Verisimilis*, tho' it be not *vera*, yet it answers their Oaths to pre-  
sent it.

But it seems to be now agreed, that the Grand Jury may, without *Vide 2 Hal.*  
subjecting themselves to any Punishment, find Part of a Bill true, and 161. & vide  
Part false, and that against the Direction of the Court. *Tit. Juries.*

And it is said by *Hale*, that if a Bill of Indictment be for Murder, and 2 Hal. Hist.  
the Grand Jury return it *Billa vera quoad* Manslaughter, and *Ignoramus* 162.  
*quoad* Murder, the usual Course is, in the Presence of the Grand Jury;  
to strike out *Malitiose*, and *ex Malitia sua præcogitata*, and *Murdrum*,  
and leave in so much as makes the Bill to be but bare Manslaughter.

But yet the safest Way is to deliver them a new Bill for Manslaughter; 2 Hal. Hist.  
and they to indorse it generally *Billa vera*, for the Words of the Indorse- 162.  
ment make not the Indictment, but only evidence the Assent or Dissent  
of

of the Grand Inquest; it is the Bill it self is the Indictment, when affirmed.

2 Hal. Hist.  
158.

But notwithstanding this Discretionary Power in the Grand Jury, yet by the same Author, if *A.* be killed by *B.* so that it doth *consiare de Persona occisi & occidentis*, and a Bill of Murder be presented to them regularly, they ought to find the Bill for Murder, and not for Manslaughter, or *se defendendo*; because otherwise Offences may be smothered without due Trial, and when the Party comes upon his Trial, the whole Fact will be examined before the Court and the Petty Jury; and in many Cases it is a great Disadvantage to the Party accused; for if a Man kill *B.* in his own Defence, or *per Infortunium*, or possibly in executing the Process of Law, upon an Assault made upon him, or in his own Defence upon the Highway, or in Defence of his House against those who come to rob him, (in which three last Cases it is neither Felony nor Forfeiture, but upon Not guilty pleaded, he ought to be acquitted,) yet if the Grand Inquest find *Ignoramus* upon the Bill, or find the special Matter, whereby the Prisoner is dismissed and discharged, he may nevertheless be indicted for Murder seven Years after.

2elv. 99.  
2 Hawk. P.C.  
210.

If the Grand Jury indorse an Indictment on the Statute of News *Billa vera*, but whether *Ista verba prolata fuerunt maliciose, seditiose, vel contra, Ignoramus*; or if they indorse an Indictment of forcible Entry and forcible Detainer, *Billa vera* as to the forcible Entry, and *Ignoramus* as to the forcible Detainer; or if they indorse, that if the Freehold were in *J. S.* or the Possession were in *J. S.* then they find *Billa vera*, the whole is void.

### (E) What Matters are indictable.

2 Hawk. P.C.  
210.

NOT only Capital Offences, such as Treasons and Felonies, are indictable, but likewise all other Crimes being of a publick Nature, and *Mala in se*, tho' of an inferior Kind, as Misdemeanors, and all other Contempts, all Disturbances of the Peace, all Oppressions, and all other

(a) Where  
one was in-  
dicted for

(a) Misdemeanors whatsoever of a publick evil Example against the Common Law, may be indicted.

hiring a Man to kill the Master of the Rolls, and for wearing a Sword with an Intent to kill the Master of the Rolls, &c. or to that Effect; and it was moved in Arrest, that an Attempt only is not punishable in our Law, & *non efficit Conatus nisi sequitur effectus*; but the Court held clearly, that tho' in Cases of Felony the Law be not as it was heretofore, when *Voluntas reputabatur pro facto*, yet as to Matters of Misdemeanors, Attempts and Conspiracies are punishable. 1 Sid. 230. 1 Lev. 146. 1 Keb. 309. *Bacon's Case*.

27 Aff. pl. 20.  
Bro. Indict-  
ment 16.

But no Injuries of (b) a private Nature, unless they some way concern the King, can be punished by way of Indictment at Common Law.

Carth. 277. Presentment 26. (b) And therefore where one was indicted for these Words, *viz.* The Justices of Peace have no Power to set up a Watch-house where the old one stood; and the Indictment was quashed, because the Words are not indictable, for it is a Question touching a Right. Trin. 27 Car. 2. Captain Cane's Case.

2 Inst. 55, 163.  
Cro. Jac. 577.  
1 Mod. 34  
1 Sid. 209.

Also generally where a Statute either prohibits a Matter of publick Grievance, or commands a Matter of publick Convenience, as the Repairing the common Streets of a Town, &c. every such Disobedience of such Statute is indictable; but if the Party hath once been fined on an Action of the Statute, such Fine is, it seems, a good Bar to the Indictment, because by the Fine the End of the Statute is satisfied.

Also if a Statute extend only to (a) private Persons, or if it extend to all Persons in general, but chiefly concern Disputes of a private Nature, (b) as those relating to Distresses made by Lords on their Tenants, it is said, that Offences against such Statute will hardly bear an Indictment.

(a) 1 Sid. 209.  
2 Mod. 34.  
(b) 1 Mod.  
71, 288.  
1 Lev. 299.  
Raym. 205.  
1 Vent. 104.

2 Inst. 121, 232. 2 Hawk. P. C. 211.

Also where a Statute makes a new Offence, which was no way prohibited by the Common Law, and appoints a particular Proceeding against the Offender, as by Commitment, or Action of Debt, or Information, &c. without mentioning an Indictment, it seems to be settled at this Day, that it will not maintain an Indictment, because the mentioning the other Methods of proceeding only seems impliedly to exclude that of Indictment.

1 Slow. 398.  
3 Keb. 34,  
273.  
Cro. Jac. 643,  
644.  
3 Mod. 79.  
Palm. 388.  
1 Sid. 434.  
6 Mod. 86.

2 Rol. Rep. 247, 398. 2 Hawk. P. C. 211.

Yet it hath been adjudged, that if such a Statute give a Recovery by Action of Debt, Bill, Plaint or Information, or otherwise, it authorizes a Proceeding by way of Indictment.

Trin. 3 Geor.  
1. Rex ver.  
Dixon.  
2 Hawk. P. C.  
211.

Also where a Statute adds a new Penalty to an Offence prohibited also by the Common Law, it is in the Election of the Prosecutor to proceed either at Common Law, or on the Statute; and if he conclude his Indictment *cont. formam Statuti*, and cannot make it good as an Indictment on the Statute, yet if the Indictment be good as an Indictment at Common Law, it shall stand as such, and the Words *contra formam Statuti* shall be rejected.

2 Hawk. P. C.  
211. but for  
this *vide infra*, Letter  
(1).

## (F) Within what Place the Offence inquired of must arise.

THE Grand Jury are sworn *ad Inquirendum pro Corpore comitatus*, and therefore by the Common Law cannot regularly indict or present any Offence which does not arise within the County or Precinct for which they are returned.

2 Hal. Hif.  
P. C. 163.  
2 Hawk. P. C.  
220.

And therefore it is a good Exception to an Indictment, that it doth not appear that the Offence arose within such County or Precinct.

2 Hawk. P. C.  
220. and several  
Authorities there  
cited.

Also it hath been holden, that the finding of a Collateral Matter expressly alledged in the Indictment, in a different County or Precinct, is void.

1 Hawk. P. C.  
220.

Also it hath been generally holden, that the Want of an express Allegation of the Precinct where the Offence happened, is not supplied by putting it in the Margent of the Indictment, unless it go farther, as by adding *in Comitatu prædicto*, &c. which seems to be sufficient, where in the Body of the Indictment no other County is named before.

2 Hawk. P. C.  
220.

Also if a Fact be alledged in *B. juxta D. in comitatu E.* it is said, that hereby it sufficiently appears that *B.* is in the County of *E.*

Cro. Jac. 41.  
Band's Calc.

So if an Arrest be alledged in the County of *A.* and one be indicted for rescuing the Party arrested, without saying in what County, it shall be intended to have been in the County of *A.* where the Arrest was.

2 Hawk. P. C.  
220.

It seems also, that by the Common Law, if a Fact done in one County prove a Nuisance to another, it may be indicted in either.

2 Hawk. P. C.  
221.

2 Hal. Hist. P. C. 164. So if *A.* by reason of Tenure of Lands in the County of *B.* be bound to repair a Bridge in the County of *C.* if the Bridge be in Decay, he may be indicted in the County of *C.* that he is bound *ratione tenure* of Lands in the County of *B.* to repair the Bridge.

2 Hawk. P. C. 221. Also by the Common Law, if one guilty of (a) Larceny in one County carry the Goods stolen into another, he may be indicted in either.

(a) But if *A.* rob *B.* in the County of *C.* and carry the Goods into the County of *D.* *A.* cannot be indicted of Robbery in the County of *D.* because the Robbery was in another County; but he may be indicted of Larceny, or Theft, in the County of *D.* because it is Theft wherever he carries the Goods; the like Law in an Appeal. 7 Co. 2. a. 2 Hal. Hist. P. C. 165.

2 Hawk. P. C. 221. If a Man marry two Wives, the first in a foreign Country, and the second in *England*, he may be indicted and tried for it in *England* upon the Statute of 1 Jac. 1. cap. 11. which makes it Felony, because the second Marriage alone was Criminal, and the first had nothing unlawful in it, and was meerly of a transitory Nature; and by (b) *Hawkins*, if the second Marriage had been in a foreign Country, the Party might have been indicted here within the Purview of the said Statute 1 Jac. 1.

(b) 1 Hawk. P. C. 111. But for this *vid.* 1 Sid. 171. *Kel.* 79. Also if a Woman be taken by force in one County and carried into another, and there married, the Offender may be indicted, &c. in the second County on the Statute of 3 H. 7. cap. 2. because the Continuance of the Force amounts to a forcible Taking.

2 Hawk. P. C. 221. But if an Offence in stealing a Record, &c. contrary to 8 H. 6. be committed, partly in one County, and partly in another, so as not to amount to a compleat Offence within the Statute in either, it is said, that the Party cannot be indicted for a Felony in either, but only for a Misprision.

2 Hawk. P. C. 220. But notwithstanding the above Instances, it seems agreed as a general Rule, that let the Nature of the Offence indicted be what it will, if it appear upon Not guilty, to have been committed in a different County from that in which the Indictment was found, the Party shall be acquitted.

2 Hawk. P. C. 220. 1. And therefore at the Common Law, if a Man had died in one County of a stroke received in another, it was holden, that the Homicide was indictable in neither, because the Offence was not compleat in either; but to remedy this Inconvenience, it is enacted by 2 & 3 E. 6. cap. 24. 'That where any one shall be feloniously stricken or poisoned in one County, and die thereof in another, an Indictment thereof found by the Jurors of the County where the Death shall happen, whether before the Coroner, on View of the Body, or whether before Justices of the Peace, or other Justices, &c. shall be as (c) effectual, as if the Stroke, &c. had been in the County where the Party shall die, or where the Indictment shall be so found.

(c) The Offender must be tried where the Death happened; but an Appeal may be brought in either County. 7 Co. 2. *Bulwer's Case.* 2 Hal. Hist. P. C. 163.

2 Hal. Hist. P. C. 165. but for this *vide Tit. Principal and Accessory.* So if *A.* had committed a Felony in the County of *D.* and *B.* had been Accessory before or after in the County of *C.* *B.* could not have been indicted as Accessory in either County at Common Law; but by the above Statute he is indictable, and shall be tried in the County where he so became Accessory.

2 Hal. Hist. P. C. 165. 2 Hawk. P. C. 222. 3. It appears to have been a great Doubt at Common Law, how Treason done out of the Realm was triable; some holding, that it was only triable by Appeal before the Constable and Marshal; others, that it was indictable in any County where the King pleased; and some, that it was indictable where the Offender had Lands: But for a plain Remedy, Order and Declaration of this Matter, it is enacted by 35 H. 8. cap. 2. 'That all Offences then or after made or declared to be Treasons, Misprisions of Treason, or Concealments of Treasons, done out of this Realm of

*England,*

‘ *England*, shall be inquired of, heard and determined, by the King’s Bench, by lawful Men of the Shire where the same Bench shall sit; or else before such Commissioners, and in such Shire of the Realm, as shall be assigned by the King’s Commission, and by lawful Men of the same Shire, in like Manner to all Intents and Purposes, as if such Treasons, &c. had been done within the same Shire, where they shall be so inquired of, &c.

In the Construction hereof it hath been resolved,

1. That if after an Indictment has been taken in Pursuance to this Statute, the Court, or Commissioners appointed by the King, remove into a different County, the Trial shall be by Jurors returned from the first County, (a) being most agreeable to the general Course of the Common Law, which requires that Indictments shall be tried by Jurors of the same County in which they were found.

2 Hawk. P.C. 223.  
(a) 5 Inst. 24.  
H. P.C. 203.  
Stanf. P.C. 90.  
Dyer 286.

2. That the Commissioners and County for the Trial are well assigned by the King’s Writing his Name to the Commission, or by his Signing the Warrant for it.

5 Inst. 11.  
2 Hawk. P.C. 223.

3. That an Offence in *Ireland*, that is Treason here as well as there, is triable here by Virtue of this Statute, unless it were committed by a Peer of *Ireland*; in which Case it is not triable here, because the Party would lose the Benefit of a Trial by his Peers.

2 Hawk. P.C. 223.

That this Statute is not repealed by 1 & 2 Ph. & M. which enacts, That all Trials for Treason shall be according to the Common Law.

2 Hawk. P.C. 205.  
2 Hal. Hist. P.C. 164.

By the 28 H. 8. cap. 15. it is enacted, ‘ That Treasons, Felonies and Robberies, &c. upon the Sea, &c. shall be inquired, &c. in such Places in the Realm as shall be limited by the King’s Commission, in like Manner as if such Offences had been committed on the Land.

But for this vide Tit. Piracy, & 11 & 12 W. 3. cap. 7. which

enacts, that all Piracies and Felonies upon the Sea, &c. may be tried, or upon the Majesty’s Plantations, &c.

Land in his

‘ By the 27 H. 8. cap. 6. for the Punishment and speedy Trial, as well of the Counterfeiters of any Coin current within this Realm, as of all Felonies and Accessories of the same, and other Offences feloniously done within any (b) Lordship Marchers of *Wales*, the Justices of Gaol-Delivery and of the Peace in the Shire or Shires of *England*, where the King’s Writ runneth, next adjoining to the Lordship Marchers, or other Place in *Wales*, where such Counterfeiting, &c. shall be committed, shall have Power, at their Sessions and Gaol-Delivery, to inquire, by Verdict of twelve Men of the same Shire, &c. in *England*, there to cause all such Counterfeiters, &c. to be indicted, &c. in like Manner as if the same Petit Treasons, &c. had been done within any of the said Shires within the said Realm; also such Justices shall try all foreign Pleas pleaded by such Offenders; neither shall an Acquittal, &c. or Fine making in the Lordships Marchers, be (c) a Bar for a Person indicted in the said Shire within two Years after the Felony.

(b) This Statute extends as well to the old Welsh Counties, as to the Lordship Marchers. Pasch. 12 Georg. 1. Athor’s Case.

(c) But an Acquittal at the Grand

Sessions is a good Bar of an Indictment for the same Crime in *England*. 2 Hawk. P. C. 221.

By the 27 Eliz. cap. 2. Treasons by Priests or Jesuits coming into *England*, and Felony for receiving them, are inquirable and determinable where the Offender is apprehended.

2 Hal. Hist. P. C. 164.

(G) What ought to be the Form of the Body of an Indictment at Common Law: And herein,

1. How the Body of an Indictment at Common Law ought to set forth the Substance and Manner of the Fact.

2 Hal. Hist.  
169.

AN Indictment, as defined by my Lord *Hale*, is nothing else but a plain, brief and certain Narrative of an Offence committed by any Person, and of those necessary Circumstances that concur to ascertain the Fact, and its Nature, in which, in favour of Life, great (a) Strictnesses have at all Times been required.

(a) To that Degree as to become the Disgrace and Reproach of the Law. 2 Hal. Hist. P. C. 193. — That before the 4 *Geor.* 2. cap. 26. & 6 *Geor.* 2. cap. — all Parts of it ought to be in *Latin*, and how far it was vitious for false, or improper *Latin*, vide 2 *Hawk.* P. C. 238 9.

*Cro. Eliz.*

147, 201.

2 *Hawk.* P. C.  
225.

2 *Hawk.* P. C.

224. and several

Authorities there

cited. 2 Hal.

Hist. P. C. 183,

184. accord.

(b) And

therefore an

Indictment

against *A.*

*quod Felonice*

*abduxit unum equum*,

without saying *cepit* &

*abduxit*, is not good,

for he might have the

Horse by Bailment, and then it is no Felony. 2 Hal. Hist. P. C. 184. (c) For if *A.* is indicted, that

*furvatus est unum equum*,

it is but a Trespass, for Want of the Word *Felonice*. 2 Hal. Hist. P. C. 184.

(d) In Petit Treason it must be laid *Felonice* & *proditorie*; for tho' he be acquitted of the Petit Treason, he may be convicted of the Manlaughter or Murder. 2 Hal. Hist. P. C. 184.

2 *Hawk.* P. C.

224.

(e) But an

Indictment

of Rape,

*quod Felonice*

& *carnaliter cognovit*,

without the Word *rapuit*, is not good, tho' it conclude *contra formam Statuti*. 2 Hal. Hist. P. C. 184.

2 *Hawk.* P. C.

225.

And from this Certainty required in Indictments, it hath been holden,

that an Indictment for a felonious Breach of Prison, without shewing the Cause of the Imprisonment, is not good.

So of an Indictment for refusing to serve the Office of Constable,

being *Legitimo modo electus*, without shewing the Manner of the Election.

*Allen* 78.

1 *Mod.* 24.

5 *Mod.* 96,

129.

*Cro. Eliz.* 485.

pl. 12.

2 *Rel. Rep.*

245.

*Palm.* 368,

574.

So it hath been adjudged, that an Indictment of Burglary is insufficient, without shewing that it was *Noctanter*.

Also it is agreed, that an Indictment, charging a Man with a Nuisance,

in respect of a Fact which is lawful in it self, as the Erecting of an Inn,

&c. and only becomes unlawful from particular Circumstances, is insuffi-

cient, unless it set forth some Circumstances that make it unlawful.

So it hath been adjudged, that an Indictment for traiterously coining *2 Hawk. P.C. Alkenii* like to the King's Money, without shewing what Money, *viz.* <sup>225.</sup> whether Gold, Silver, or Copper, is insufficient; for if the latter of these, the Offence could not amount to Treason.

So an Indictment of Perjury not shewing in what Manner, and in what Court the false Oath was taken, is insufficient; because, for ought appears, it might have been extrajudicial. *Cro. Eliz. 137.*

But an Indictment of Extortion charging *J. S.* with the taking of 50 s. <sup>1 Sid. 91.</sup> as Bailiff of an Hundred *colore Officii*, without shewing for what he took <sup>2 Hawk. P.C. 225.</sup> it, is good, at least after Verdict; for perhaps he might claim it generally, as being due to him as Bailiff, in which Case the taking could not be otherwise expressed.

An Indictment charging a Man disjunctively is void; as *murdravit, vel 5 Mod. 157, murdrari causavit*, or that *A. verberavit B. vel verberari causavit*, or that *A. fabricavit talem chartam, vel fabricari causavit, &c.* for here are distinct Offences, and it appears not of which of them the Party is <sup>138. Salk. 371. 11. 8. 2 Hawk. P.C. 225.</sup> accused.

Also an Indictment accusing a Man in general Terms, without ascertaining the particular Fact laid to his Charge, is insufficient; for no one can know what Defence to make to a Charge which is uncertain, nor can he plead it in Bar or Abatement of a subsequent Prosecution; neither can it appear that the Facts given in Evidence against a Defendant on such a general Accusation are the same of which the Indictors have accused him; nor can it judicially appear to the Court what Punishment is proper for an Offence so loosely expressed. <sup>1 Lev. 203. 1 Keb. 278. 1 Sh. 389. 2 Hawk. P.C. 226.</sup>

As where the Indictment charges the Party with having spoken divers false and scandalous Words against *J. S.* being Mayor of *A.* &c. or with being a common Defamer, Vexer, and Oppressor, &c. or with being a common Disturber of the Peace, and having stirred up divers Quarrels among his Neighbours, or with being a Person of evil Behaviour, a common Deceiver, a common Publisher of the King's Secrets, &c. or with being a common Foreteller, a common Thief, a common Champertor, &c. <sup>2 Hawk. P.C. 226 and several Authorities there cited.</sup>

But Barrettry being an Offence of a complicated Nature, consisting in the Repetition of frequent Acts, all of which it would be too prolix to enumerate, Experience has settled it to be sufficient to charge a Man in general as a common Barretor. <sup>2 Hawk. P.C. 226. vide Tit. Barrettry.</sup>

And for the same Reason an Indictment against a common Scold is sufficient, without shewing any Particulars. <sup>2 Hawk. P.C. 227.</sup>

Neither is it necessary for an Indictment of either of these two last mentioned Offences to conclude *in Nocumentum omnium Ligeorum, &c.* for it appears from the Nature of the Thing, that it could not but be so. <sup>2 Hawk. P.C. 227.</sup>

An Indictment must lay the Charge against the Defendant positively, and not by way of Recital, as with a *Quod cum, &c.* and it must expressly alledge every Thing material in the Description of the Substance, Nature, and Manner of the Crime; for no Intendment shall be admitted to supply a Defect of this kind. <sup>Salk. 371. Cro. Jac. 20. 4 Co. 42. 5 Co. 150. 2 Hawk. P.C. 227.</sup>

Therefore if an Indictment of Murder want the Words *ex Malitia præcogitata*, it is no Answer that it has the Words *felonice murdravit*, which imply as much. <sup>Dyer 99. pl. 63. 2 Hawk. P.C. 227.</sup>

So if any Indictment of Death want an express Allegation that the Party received the Hurt laid as the Cause of his Death, and also that he died thereof, no Implication will help it. <sup>2 Hawk. P.C. 227.</sup>

Also if an Indictment for a feloniously breaking of Prison, and commanding *J. S.* there imprisoned, &c. to escape, do not expressly alledge that *J. S.* did escape, it is no Answer that it is fully implied in calling the Offence a felonious breaking. <sup>Keilw. 87. 2 Hawk. P.C. 227.</sup>

Yet strained and over-nice Exceptions of this kind are not to be regarded; as that an Indictment of Death, laying the Assault to have been <sup>4 Co. 41. 2 Hawk. P.C. 227.</sup>

with Malice prepense, doth not expressly repeat it in the Clause immediately following, and joined with a Copulative shewing the giving of the Wound at the same Time and Place.

*Cro. Jac. 473.* Or that an Indictment setting forth that *J. S.* was lawfully arrested by Virtue of a Plaint before such a Sheriff, &c. doth not expressly shew that there was a good Warrant.

*9 Co. 67.* Or that an Indictment setting forth an Arrest in such a Parish and Ward in *London*, by Virtue of a Warrant, to arrest the Party within the Liberties of *London*, doth not expressly lay such Parish and Ward within the Liberties of *London*.

*Cro. Jac. 610.* Or that an Indictment finding that *J. S. existens* of such a Trade, &c. as will bring him within the Law whereon the Indictment is founded, committed such a Fact, does not expressly alledge that he was of such Trade, &c. at the Time of the Fact; for it fully appears from the natural Construction of the Participle *existens* going before the Verb, to which it is the Nominative Case.

*2 Med. 128.* Yet it is a good Exception to an Indictment of forcible Entry finding that *A.* disseised *B.* of such Land *existens liberum Tenementum* of *B.* that it is not expressed at what Time it was his Freehold; for it stands indifferent, according to the common Rules of Construction, whether it was his Freehold at the Time of the Disseisin, or at the Time of finding the Indictment, the Word *existens* being applied only to the Thing which was the Subject of the Action, and not being the Nominative Case of the Verb, as in the former Case.

*2 Hawk. P. C. 228 9.* If one material Part of an Indictment be repugnant to another, or if the Fact as laid be impossible or absurd, the Indictment is void; as where one is indicted for having forged a Writing, in which *A.* was bound to *B.* which is impossible if the Writing were forged; or for having disseised *J. S.* of Land; wherein it appears, by the Indictment itself, that he had no Freehold, or for having entered peaceably on *J. S.* and then and there forcibly disseised him; or for having disseised him of Land then being, and for ever since continuing to be, his Freehold; or for having murdered *J. S.* at *B.* where by the Indictment it appears that *J. S.* was only wounded at *B.* and died at *C.* or for selling Iron with false Weights and Measures, which is not only absurd, as supposing that Iron could be sold by Measure, but inconsistent, in supposing that it was so sold, and yet at the same time sold by Weight; or for being absent from Church six Months, between such and such a Time, which appears to have contained only the Space of eleven Days; or for feloniously cutting down Trees, &c. Yet where the Sense is clear, a small Impropriety may be dispensed with; as where one is indicted for having mowed *unam acram Fenu*, which is said to be sufficient, and yet that which was mowed could not, at the Time of the mowing, in Strictness be called Hay, but Grass only.

*2 Hawk. P. C. 229.* Also a Repugnancy in an Indictment in setting forth the Offence of the Accessory, is as fatal as it is in setting forth that of the Principal; as where an Indictment of Death having laid the Stroke on one Day, and the Death at another, charges the Accessory with having abetted the Principal at the Time of the Felony only.

*9 Co. 67.* But where several are present and abet a Fact, and one only actually does it, an Indictment may, in the same Manner as an Appeal, either lay it as done by the one, and abetted by the rest.

*2 Hawk. P. C. 229.* But if it barely charge a Man with having been present, it is void; because a Man may be innocently present.

*2 Hawk. P. C. 229.* An Indictment of *J. S.* as Accessory to four by these Words, *Sciens ipsos quatuor feloniam predictam fecisse apud B. felonice receperunt*, without adding *eos* is naught; for it appears not clearly how many of them he is charged to have received.



Also an Indictment of a Constable for having voluntarily and feloniously suffered a Person arrested by him on Suspicion of Felony to escape, without shewing what the Felony was, and that it was actually committed, is said to be void for the Uncertainty: But an Indictment for knowingly suffering Persons convicted of Felony to escape, is said to be good, without finding expressly what the Felony was, or that it was committed, if the Record of Conviction be set forth with convenient Certainty; for that shews what the Felony was, and that it was committed.

It is holden by some, that an Indictment finding that *J. S. scienter* *receptavit J. D.* being a Felon, is not good, without expressly finding that he knew him to be a Felon; but by others, such Indictment is good, because the plain Construction of the Word *scienter* carries it thro' the whole Sentence.

*2 Hawk. P. C. 229, 230.*  
*2 Hawk. P. C. 230. and the Authorities there cited.*

## 2. How the Indictment must set forth the Persons mentioned or referred to in it.

The Name and Addition of the Party indicted ought regularly to be inserted, and inserted truly, in every Indictment; but if the Party be indicted by a wrong Christian Name, Surname, or Addition, and he plead to that Indictment Not guilty, or answer to that Indictment upon his Arraignment by that Name, he shall not be received after to plead Misnomer or Falsity of his Addition; for he is concluded and estopped by his Plea by that Name, and of that Estoppel the Gaoler and Sheriff that doth Execution shall have Advantage.

But it is said, that an Indictment that the King's Highway in such a Place is in Decay, thro' the Default of the Inhabitants of such a Town, is good without naming any Person in certain.

Also it is said, that no Indictment can take any Advantage of a mistaken (a) Surname in the Indictment, either by Plea in Abatement, or otherwise, notwithstanding such Surname have no manner of Affinity with his true one, and he was never known by it.

Plea of Misnomer, both as to his Surname and as to his Christian Name; for he that pleads Misnomer of either, must in the same Plea set forth what his true Name is, and then he concludes himself; and if the Grand Jury be not discharged, the Indictment may be presently amended by the Grand Jury, and returned according to the Name he gives himself.

*2 Hal. Hist. P. C. 175.*  
*2 Rel. Abr. 79.*  
*2 Hawk. P. C. 230.*  
*2 Hawk. P. C. 230.*  
*(a) But per Hale it is the safest Way to allow his*

And in this Respect an Indictment (b) differs from an Appeal, where of it is certain that a Misnomer of a Surname may be pleaded in an Abatement as well as any other Misnomer whatsoever.

(b) But that every other Misnomer of the Defendant, as also every defective Addition, are as fatal in an Indictment as an Appeal; for which *vide 2 Hawk. P. C. 187, &c.*

Not only the Misnomer of the Name of Baptism will abate an Indictment, but also the Naming the Defendant Knight, &c. who is a Baronet, and no Knight, &c. or the Omission of a Name of Dignity; as where Garter King at Arms is not named Garter in the Indictment; and so of any other Name of Dignity, (c) if Process of Outlawry lie upon it.

against a Peer of the Realm is good without an Addition, because no Process of Outlawry lies against him. *Cro. Eliz. 148. Lord Dacre's Case.*

*2 Hal. Hist. P. C. 176.*  
*2 Hawk. P. C. 230.*  
*2 Hawk. P. C. 230. and several Authorities there cited.*  
*(c) But an Indictment*

By the Common Law the Party indicted could not take Advantage of a Misnomer or the Want of Addition, because the Fact being sworn against the Party present, and appearing to their View, there could be no Injury by the Misnomer; also as Felons generally go by no certain Name, and have no fixed Habitation, it was thought hard to find out their real Names or Professions; but this was altered by the Statute

*1 H. 5.*

1 *H. 5. cap. 5.* which requires that in all Indictments, &c. the Party indicted ought to have the Addition of his Mystery, Degree, Place, and County.

2 *Hal. Hist.* The Additions required by the Statute are, that of his Degree, as *Yeoman, Gentleman, Esquire*; of his Mystery, as *Husbandman, Sailor, Spinster*, &c. therefore if the Addition be only general, as *Servant, Farmer, Citizen*, &c. or of Crimes and Misdemeanors only, as *Extortioner, Vagabond, Heretic*, &c. these are no good Additions.

2 *Hal. Hist.* The Addition ought to be to the Substantive Name, and not to that which comes after the *Alias dictus*, because regularly the Addition refers to the last Antecedent.

2 *Hal. Hist.* If several Persons be indicted for one Offence, Misnomer, or Want of Addition of one, quasheth the Indictment only against him, and the rest shall be put to answer; for they are in Law as several Indictments; and so in Trespass.

2 *Hal. Hist.* But in 2 *Hawk. P. C.* 231. it is said, that where several are indicted, and there is an Omission of an Addition as to one, it makes the Indictment vicious as to all; for which is cited 1 *Bulf.* 183.

2 *Hawk. P. C.* 231. Not only the Defendant, but regularly all other Persons also mentioned in an Indictment, must be described with convenient Certainty; and therefore it seems to be generally agreed at this Day, that an Indictment for suffering divers Bakers to bake, &c. against the Assise, or for distraining divers Persons without Cause, or for taking divers Sums of Money of divers Persons for such a Toll, &c. without naming any Bakers, &c. in particular, is insufficient.

*Plow. 85. b.* But an Indictment of Murder *cujusdam ignoti* is good; and so for stealing the Goods *cujusdam ignoti*; so of an Assault *in quendam ignotum*; and if he be acquitted or convicted, and be afterwards indicted for an Assault or Murder of such a Man by Name, he may plead the former Conviction or Acquittal, and aver it to be the same Person.

2 *Hal. Hist.* But an Indictment *quod invenit quendam hominem mortuum, ac felonice furatus est duas Tunicas*, without saying *de Bonis & Catallis cujusdam ignoti* is not good.

2 *Hal. Hist.* If the Goods of a Chapel be stolen, the Indictment shall say *Bona & Catalla Capellæ in custodia Præpositorum*; if it be done in Time of Vacation, *Bona & Catalla Capellæ tempore Vacationis*; but if the Goods of a Parish Church be stolen, as the Bell, the Books, &c. it shall run *Bona Parochianorum de S. in custodia Gardianorum Ecclesiæ*, and shall not suppose them *Bona Ecclesiæ*.

2 *Hal. Hist.* If the Goods which *A.* hath as Executor of *B.* be stolen, the Offender may be indicted *quod Bona Testatoris in custodia A. Executoris ejusdem B.* or it may be general *Bona ipsius A.*

2 *Hal. Hist.* If *A.* dying be buried, and *B.* opens the Grave in the Night-time, and steals the Winding-sheet, the Indictment cannot suppose them the Goods of the dead Man, but of the Executors, Administrators, or Ordinary, as the Case falls out.

*Cro. Eliz.* 490. An Indictment *quod felonice, &c. cepit quandam peciam Panni cujusdam J. S.* without saying *de Bonis & Catallis cujusdam J. S.* was therefore quashed.

2 *Hal. Hist.* There is no Need of an Addition of the Person robbed or murdered, &c. unless there be a Plurality of Persons of the same Name; neither then is it essential to the Indictment, tho' sometimes it may be convenient, for Distinction sake, to add it; for it is sufficient if the Indictment be true, viz. that *J. S.* was killed or robbed, tho' there are many of the same Name.

*Keilw.* 25. And it hath been adjudged, that an Indictment of an Assault on *John*, Parish Priest of *D.* in the County of *C.* is good without mentioning his Surname; for the Certainty of the Person sufficiently appears.

2 *Hawk. P. C.* 232.

But it seems that if such Indictment had only described him by his Name of Baptism without any farther Addition, it had been too uncertain; yet the contrary seems to be held in *(a) Moor*: However, it seems agreed that a Repugnancy or Absurdity in the Description of the Person injured will vitiate an Indictment; as where one is indicted for stealing *Bona prædicti J. S.* where no *J. S.* was mentioned before.

It is not necessary to alledge in an Indictment of Death, that the Party killed was in the Peace of God.

### 3. How the Indictment ought to set forth the Thing wherein the Offence was committed.

An Indictment, which doth not with sufficient Certainty set forth the Thing wherein the Offence was committed, is insufficient; as where one is indicted for having forged a Lease of certain Lands, without naming some one certain Parcel, or for having stolen *Bona & Catalla J. S.* without shewing any in particular, or for having trespassed on two Clofes of Meadow or Pasture, or for having diverted *quandam partem Aquæ* running from such a Place to such a Place, without any farther Description, or for having ingrossed *magnam quantitatem Straminis & Feni*, or *diversos cumulos Tritici*, without shewing how much of each, or for having carried away *duas centenas Casei*, without adding *Libras* or *Uncias*, &c. or for having erected several Cottages *contra Formam Statuti*, without shewing how many.

It is said to be most proper in Indictments of Larceny and Trespafs on a living Thing to shew to whom the Property of it belonged, by calling it the Ox or Horse, &c. of *J. S.* without using the Words *Bona & Catalla*: Yet there are many Precedents in Books of good Authority, wherein this Nicety is not observed.

If Theft be alledged in any Thing, the Indictment must set down the Value, that it may appear whether it be Grand or Petit Larceny.

If the Thing be moveable, as a Horse, Cow, &c. it is said to be most proper to shew its Worth by the Word *Pretium*; but if the Thing be immoveable, and consists of divers dead Things, it ought to be *ad Valentiam*; *(b)* yet this Nicety seems not necessary; neither is it clear that the Worth of the Thing stolen is required to be set forth in an Indictment of Larceny for any other Purpose, than to shew that the Crime amounts to Grand Larceny, and the better to ascertain the Crime, in order for a Restitution, or in an Indictment of Trespafs, for any other Purpose, than to aggravate the Crime.

*tiam*, or *e Converso*, it doth not vitiate the Indictment; and so it is if one *Pretii* or *ad Valentiam* be added to several Things, where in true Clerkship it should be applied severally, it is good if the Party be convict of all; but possibly, if the Party be convict but of Part, it is not good, because it will be uncertain whether Grand or Petit Larceny.

An Indictment *quod felonice cepit 20 Oves, Matrices & Agnos*, or *Matrices & Verveces*, is not good, because it doth not appear how many of one Sort, and how many of another; but 20 *Oves* generally might have been good without distinguishing *Matrices & Verveces*, as in Case of Replevin or Trespafs.

But an Indictment *de quatuor Riscis & Cistis, Anglice* Chests and Coffers, is good, because synonymous. It is said, that regularly the same or more Certainty is required in an Indictment of Goods, than in Trespafs for Goods.— And note, That it is agreed as a general Rule, that if an Indictment be uncertain as to some Particulars only, and certain as to the rest, it is void only as to those which are uncertainly expressed, and good for the Residue.

#### 4. How the Indictment must set forth the Circumstances of Time and Place.

2 Hawk. P. C. 235. and several Authorities there cited. It is laid down as an undoubted Principle in all the Books that treat of this Matter, that no Indictment whatsoever can be good without precisely shewing a certain Year and (a) Day of the material Facts alledged in it.

—And this the Law requires, not only because the Party may be the better prepared to make his Defence, but also because that in Indictments, on which, upon a Conviction, there incurs a Forfeiture of Lands, it may appear to what Day the Forfeiture is to have Relation; as also that if it be an Indictment of Murder or Manslaughter, it may appear that the Death was within the Year and Day after the Stroke. 2 Hal. Hist. P. C. 179. — But it is not necessary upon the Evidence to prove the Crime to have been committed on the very Day laid in the Indictment; but if it be proved to have been at any Time before or after, the Party is to be convicted. 2 Hal. Hist. P. C. 179. (a) But it is not necessary to mention the Hour in an Indictment, 2 Hawk. P. C. 235. — Unless the Time of the Day is material to ascertain the Nature of the Offence, and then it must be expressed; as in an Indictment of Burglary it ought to say, *tali Die circa Horam decimam in Nocte ejusdem Diei, felonice & burglariter fregit*; yet it is said that by some Opinions *burglariter* carries a sufficient Expression that it was done in the Night. 2 Hal. Hist. P. C. 179. — So upon breaking a House in the Day-time, to oust the Offender of his Clergy upon the Statute of 39 Eliz. cap. 15. it is usual to add *tempore Diurno*; for the Statute expresseth it so; otherwise, tho' the Indictment be good, yet he shall not be ousted of his Clergy. 2 Hal. Hist. P. C. 179.

2 Hawk. P. C. 235. As if an Indictment of Death laying the Assault at a certain Time, &c. do not repeat in the Clause of the Stroke, or if it do not set forth the Time of the Death as well as of the Stroke. 2 Hal. Hist. P. C. 178.

2 Hawk. P. C. 235. So if any Indictment lay the Offence on an impossible Day, or on a Day that makes the Indictment repugnant to itself, or if it lay one and the same Offence at different Days, it is insufficient.

2 Hal. Hist. P. C. 178. As if *A.* be indicted *quod primo die Maii & secundo die Maii apud D.* he made an Assault upon *B.* & *quandam togam ipsius B. adtunc & ibidem invent' felonice cepit*, &c. this Indictment is not good, because there are several Days mentioned before, and it is uncertain to which the felonious Taking shall relate.

2 Hal. Hist. P. C. 178. So if *A.* be indicted that he *Festo Sancti Petri anno 20 Car.* killed *J. S.* this is not good, because there are two Feasts of *St. Peter*, and neither without Addition, *viz. St. Peter ad Vincula*, and *St. Peter in Cathedra*.

2 Hawk. P. C. 235 6. The Words *adtunc & ibidem* in the subsequent Part of an Indictment are as effectual, as if the Year and Day mentioned in the former Part had been expressly repeated.

2 Hawk. P. C. 236. Also if it lay the Fact on the *Thursday* after the Feast of *Pentecost* in such a Year, or on the *Utis* of *Easter*, &c. (which shall be taken for the very eighth after the Feast) or on the tenth of *March* last, (being ascertained by the Stile of the Sessions, &c.) it is as good as if it had expressly named the Day of the Month, &c.

2 Hawk. P. C. 236. Also if an Indictment charge a Man with an Omission, &c. as not scowring such a Ditch, it needs not shew any Time.

2 Hawk. P. C. 236. So if an Indictment charge a Man with having done such a Nuisance such a Day and Year, and on divers other Days, it is void only as to the Facts alledged on the Days uncertainly set forth; but if it charge a Man generally with several Offences at several Times between such a Day and such a Day, without laying any one at a certain Day, it hath been adjudged to be wholly void.

2 Hawk. P. C. 236. Yet it hath been solemnly adjudged, that a Conviction of Deer-stealing, setting forth the Offence between the 8th and 12th of *July*, &c. is sufficient.

And in these Cases it is said to be most regular to set forth the Year, <sup>2 Hawk. P. C. 236.</sup> by shewing the Year of the King; yet this may be dispensed with, for special Reasons, if the very Year be otherwise sufficiently expressed, for that only is material.

Every Indictment at Common Law must expressly shew some (a) Place <sup>2 Hawk. P. C. 236.</sup> wherein the Offence was committed, which must appear to have been within the Jurisdiction of the Court in which the Indictment was taken, and must be alledged without any Repugnancy; for if one and the same Offence be alledged at two different Places, or at *B.* aforesaid, where *B.* was not before mentioned, or if the Stroke be alledged at *A.* and the Death at *B.* and the Indictment conclude that the Defendant *sic felonice murderavit* the Deceased at *A.* the Indictment is void. <sup>(a) That regularly the Vill or Hamlet and County must be expressed in the Indictment, and where the</sup>

Time must be repeated again upon several Acts done regularly, the Place also must be repeated, *viz. tunc & ibidem.* <sup>2 Hal. Hist. P. C. 180.</sup>

So it is also if it lay not both a Place of the Stroke and Death, or if any Place so alledged be not such from whence a Visne may come; as to which it hath been adjudged, that if a Fact be alledged in a Parish in *London*, with some other Addition which sufficiently ascertains it, or in the Parish of *St. Lawrence Jewry*, it needs not shew the Ward. <sup>2 Hawk. P. C. 236. 9 Co. 66.</sup>

Also in some Crimes no Vill need be named, as upon an Indictment of Barretry, because he is a Barretor every where, and it shall be tried *de Corpore Comitatus.* <sup>2 Hal. Hist. P. C. 180.</sup>

*Suff.* in the Margin, the Indictment supposing a Fact done *apud S. in Com' prædict'* is good; for it refers to the County in the Margin. <sup>2 Hal. Hist. P. C. 180.</sup>

But if there be two Counties named, one in the Margin, another in the Addition of any Party, or in the Recital of an Act of Parliament recited in the Premises of the Indictment, the Fact laid *apud S. in Com' prædict'* vitiates the Indictment; because two Counties are named before, and it is uncertain to which it refers. <sup>Cro. Eliz. 739. 2 Hal. Hist. P. C. 180.</sup>

Indictment against *A. B.* that he *apud N. in Com' prædict'* made an Assault upon *C. D.* of *E. in Com' prædict'* & *ipsum adtunc & ibidem cum quodam gladio, &c. percussit, &c.* this Indictment is not good, because two Places named before; and if it refers to both, it is impossible; and if only to one, it must refer to the last, and then it is insensible. <sup>2 Hal. Hist. P. C. 180.</sup>

It hath been holden, that an Indictment on a Statute, prohibiting such and such Persons to do such a Thing, needs not shew where the Facts happened which bring the Defendant within the Prohibition; as where it is enacted, that it shall be Treason for a Person born within the Realm and in Popish Orders to remain here, &c. in which Case it is said, that the Indictment needs not shew a Visne for the (b) Birth or Ordination. <sup>2 Hawk. P. C. 237.</sup>

didied for that *ratione Tenura* of certain Lands he is bound to repair a Bridge, and that it is in Decay, it must be alledged where those Lands lie. <sup>(b) But if a Man be in- 2 Hal. Hist. P. C. 181.</sup>

Also a Mistake in Evidence of the Place laid is no Case material, on Not guilty pleaded, if the Fact be proved in any other Place in the County; but if there be no such Place in a County, as that wherein an Offence is laid in an Appeal or Indictment, all Procefs thereon is void by the Statutes of 9 H. 5. cap. 1. and 18 H. 6. cap. 12. <sup>2 Hawk. P. C. 237.</sup>

5. Where the Offence indicted may be laid jointly, and where severally, and where both jointly and severally; and where the Offences of several Persons may be laid in one Indictment.

2 Hawk. P. C. 240. Altho' the Offence of several Persons cannot but be several, because one Man's Offence cannot be another's, but every Man must answer for himself; yet if it wholly arise from (a) a joint Act, which is in itself criminal, as where several join in keeping a Gaming-house, or in Deer-stealing, or Maintenance, &c. the Defendants may be indicted jointly and severally; as thus, *quod custodiverunt & uterque eorum custodivit*, or jointly only; for it sufficiently appears, that if all are joined in such Act, each must be guilty; and therefore some of them may be convicted, and some acquitted.

(a) So if several commit a Robbery, Burglary, Murder, &c.

2 Hal. Hist. P. C. 173. — And as several Persons may be joined in the same Indictment, so several Offences committed by the same Party may be joined in one Indictment; as Burglary and Larceny, Larcenies committed of several Things, tho' at several Times, and from several Persons, may be joined in one Indictment. 2 Hal. Hist. P. C. 173.

2 Hawk. P. C. 240-1. But where the Offence arises from a joint Act which in itself is not criminal, but may be so by reason of some personal Defect peculiar to each Defendant, as where divers follow a joint Trade, for which the Law requires a seven Years Apprenticeship, in which Case each Trader's particular Defect, and not the joint Act, makes him guilty, it seems most proper to indict them severally, and not jointly, because each Man's Offence is grounded on a Defect peculiar to himself.

2 Hal. Hist. P. C. 174. accord.

2 Hawk. P. C. 241. and several Authorities there cited. And for this Reason Indictments have been quashed for jointly charging several Defendants (b) for not repairing the Streets before their Houses, or for taking Inmates, or for neglecting a Day of Fasting appointed by Proclamation; and this is agreeable to the Rule of Law as to bringing Actions on penal Statutes, wherein several Defendants shall not be joined, except it be in respect of some one Thing in which all are jointly concerned, as where several join in a Suit in the Admiralty on a Contract on Land, or in procuring or giving an untrue Verdict, &c.

(b) So an Indictment against several Officers, *quod colore separatum Officiorum suorum separaliter extorsive ceperunt*, was quashed. 2 Hal. Hist. P. C. 174.

2 Hal. Hist. P. C. 174. But yet where A. B. C. and D. were indicted for erecting four several Inns *ad commune Nocumentum*, it was ruled, that for several Offences of the same Nature several Persons may be indicted in the same Indictment; but then it must be laid *separaliter erexerunt*, and for Want of that Word (*separaliter*) the Indictment was quashed.

2 Hal. Hist. P. C. 174. Also it is said in Hale to be common Experience, that twenty Persons may be indicted for keeping Disorderly Houses or Bawdy Houses, and they are daily convicted upon such Indictments; for the Word *separaliter* makes them several Indictments.

Indictments against several Persons for several Offences, as Recusancy, following a Trade without serving an Apprenticeship, mentioned without any Exception on this Account; therefore this Matter doth not seem to be fully settled. 2 Hawk. P. C. 241.

6. Whether the Words *Vi & Armis* be in any Case necessary.

Cro. Jac. 473. At Common Law the Words *Vi & Armis* were necessary in Indictments for Offences which amount to an actual Disturbance of the Peace, as Rescous and Assaults, &c. but it seems that they were never necessary

2 Lev. 221.  
Skin. 426.  
2 Hawk. P. C. 241.

fary where it would be absurd to use them; as in Indictments for Conspiracies, Slanders, (a) Cheats, Escapes, and such like, or for Nufances in the Defendant's own Ground, &c.

(a) As an Indictment for cheating

another *per quendam Lusum, Angl' vocat.* Trick at Cards; it was held, that it need not be laid *l' & Armis*, because cheating is clandestine. 1 *Keb.* 652.

But however material these Words might have been by the Common Law, yet now it is enacted by 37 *H. 8. cap. 8.* ' That the Words *l' & Armis, viz. cum baculis, cultellis, arcubus & sagittis*, shall not of Necessity be put in any Indictment or Inquisition, nor shall the Parties indicted have any Advantage by Writ of Error, or Plea, or otherwise, to avoid any such Indictment or Inquisition, for the Want of these, or the like Words; but the said Indictments, &c. taking the said Words, or any of them, shall be adjudged as effectual to all Intents, Constructions and Purposes, as the same Indictments, &c. having the same Words in them.

Yet since this Statute, Exceptions to Indictments of Trespafs, and such like, for want of the Words *l' & Armis*, where they have not been implied by other Words, as *Rescussit manu forti*, &c. have sometimes prevailed; and the Necessity of them is (b) said to be owing to this, that without them there can be no *Capiatur* entred, nor Fine to the King.

2 *Hawk. P. C.* 242.

(b) 2 *Lev.* 221;

Yet, says *Hawkins*, they have been often over-ruled, and it is not easy to shew how they ever could prevail, since the said Statute, consistently with the manifest Purport of it; however, it is certainly safe and advisable to make use of them where they are proper and pertinent, if it be to no other Purpose than to aggravate the Offence.

2 *Hawk. P. C.* 242. and herewith 2 *Hal. Hist. P. C.* 187. seems to agree.

## 7. Whether it be necessary to lay the Words *contra Pacem*.

In as much as all Offences, which are punishable by a publick Prosecution, tend to the Disturbance of the quiet and peaceable Government of the King over his People, it seems a good (c) general Rule, that all Indictments and Criminal Informations ought to conclude *contra Pacem* of the King, or Kings, in whose Reign, or Reigns, the Offence was committed.

2 *Hawk. P. C.* 242.

(c) That every Indictment ought regularly to conclude

*Domini Regis.* 2 *Hal. Hist. P. C.* 188. — And tho' it conclude *contra Pacem*, yet if it be without *Domini Regis*, it is insufficient. 2 *Hal. Hist. P. C.* 188. — That tho' the Offence be for using a Trade, not having served an Apprenticeship, yet it ought to conclude *contra Pacem*; for every Offence against a Statute is *contra Pacem*, and ought to be so laid. 2 *Hal. Hist. P. C.* 188. — Yet *per Hawkins* there are some Precedents without this Conclusion, but not warranted by any Resolution. 2 *Hawk. P. C.* 242, 243. — Except only where the Indictment is for a bare Non feassance, as the not performing the Order of Justices of Peace; which hath been resolved to be good, without this Conclusion, in 1 *Vent.* 108, 111.

*contra Pacem*

Therefore if *A.* be indicted for an Offence supposed to be committed in the Time of a former King, and concludes *contra Pacem Domini Regis nunc*, it is insufficient; for it must be supposed to be done *contra Pacem* of that King in whose Time it was committed.

2 *Hal. Hist. P. C.* 188-9.

If an Offence be supposed to be begun in the Time of one King, and continued in the Time of his Successor, (as a Nufance) it must conclude *contra Pacem* of both Kings, or else it is insufficient.

2 *Hal. Hist. P. C.* 189.

As if one be indicted for having erected a Wear in the Reign of Queen *Elizabeth*, and continuing it in the Reign of King *James*, and the Indictment conclude, that so it was erected and continued *contra Pacem Regis*, &c. without adding *contra Pacem nuper Regine*, it is insufficient, because the Commencement of the Wrong, which is as much indicted as the Continuance, was in the Reign of the Queen; but it is said, that if the Erection had been laid only by way of Inducement, and the Jet of the

*Yelv.* 66. Sir John Winter's Case. 2 *Hawk. P. C.* 243.

Indictment had only been the Continuance of it, such Conclusion, *contra Pacem* of the King only, might be good.

*Cro. Jac.* 377. If an Offence be alledged in the Time of Queen *Elizabeth*, and the  
*2 Hal. Hist.* Indictment taken in the Time of King *James*, and concludes *contra*  
*P. C.* 189. *Q.* *Pacem nuper Regine & Domini Regis nunc*, it seems good; and *Domini*  
*Regis nunc* but Surplusage, as well as in a Count in Trespass.

*2 Hawk. P. C.* It seems clear, that neither Informations *qui tam*, nor Informations for  
 243. an Intrusion, or other Wrong of a Civil Nature done to the King's  
 Lands, Goods or Revenues, need this Conclusion.

#### 8. Whether it be necessary to lay it *contra Coronam & Dignitatem Regis*.

*2 Hawk. P. C.* It is said in *Hawkins*, that the Words *contra Coronam & Dignitatem*  
 243. and *per* *Regis* are used in all the Precedents in *Coke's Entries*, which lay the Of-  
*Hale*, an In- fence *contra Pacem*, yet that they are omitted in *Rastal's Precedents*; and  
 dictment it hath been (a) resolved, that an Indictment for a Riot is good without  
 need not conclude & them, nor can he find the contrary to have been adjudged any where.  
*contra Coro-*  
*nam & Dignitatem ejus*, tho' it be usual in many Indictments. *2 Hal. Hist. P. C.* 188. (a) *2 Rol. Abr. S.*

#### 9. Whether it be necessary to lay it in *Contemptum Regis*.

*2 Hawk. P. C.* The Words in *Contemptum Regis* are sometimes used in Indictments of  
 243. superior Courts, and in Informations of Intrusion, and in Actions upon  
 Statutes, and sometimes omitted; but there is no Authority relating  
 hereto, except in the Year-Book of 4 H. 6. pl. 7. wherein it seems to be  
 admitted, that it is necessary in an Action on a Statute.

#### 10. Whether it be necessary to lay it *illicite*.

*2 Hawk. P. C.* The Word *illicite* has been adjudged not to be necessary in an Indict-  
 244. ment for a Riot, because the Fact indicted appears to be unlawful, and  
 the same may be said as to all other Indictments at Common Law; but  
 if a Statute in describing a Thing prohibited uses the Word *illicite*, an  
 Indictment thereon is not good without it.

#### 11. Whether a Defect in any of these Particulars be amendable.

*2 Hawk. P. C.* It is clearly agreed, that none of the Statutes of Amendment extend  
 244. & vide to Criminal Prosecutions, and therefore no Indictment can be amended  
*Tit. Amend-* in any Case wherein an Amendment is not allowable by the Common  
*ment, Letter* (C). Law.

*2 Hawk. P. C.* But it is said, that the Body of an Indictment from *London* may be  
 244. amended, because by the City Charters the Tenor of the Record only  
 shall be removed from thence.

*2 Hawk. P. C.* Also a Coroner may by Rule amend his Inquest by the Notes in  
 244. Matter of Form before it is filed; and the Caption of an Indictment  
 may, on Motion, be amended by the Clerk of the Assises, or of the  
 Peace, so as to make it agree with the Original Record, at any Time  
 during the Term in which it came in, but not in a subsequent Term.



But it is said, that the Caption of an Inquisition shall never be amended after it is filed; for being Part of, and drawn at the same Time with the Inquisition, greater Exactness is required in it than in the Caption of an Indictment, which is left, as of Course, to be drawn up as Occasion shall require.

Also it seems to be settled, that a Discontinuance in a Criminal Prosecution is not amendable without Consent; but it seems, that a meer Misprision in the joining of an Issue, as where the Word *Similiter*, &c. is omitted, is amendable at any Time; also the Direction of a *Venire vicecomitibus* of *B.* which is returned by *J. S. vicecomiti*, may be amended on the Oath of *J. S.* that there is but one Sheriff of *B.* which is himself; also it is common Practice to amend Criminal Informations, and the Pleadings thereon, while all is in Paper.

And anciently, where an Indictment appeared to be insufficient, the Practice was not to put the Defendant to answer it; but if it were found in the County, in which the Court sat, to award Process against the Grand Jury, to come into Court and amend it; and it is common Practice at this Day, while the Grand Jury, which found a Bill, is before the Court, to amend it, by their Consent, in Matter of Form, as the Name or Addition of the Party.

## (H) What ought to be the Form of an Indictment upon a Statute: And herein,

### 1. Whether it be necessary that such Indictment recite the Statute whereon it is grounded.

IT seems to be agreed, that there is no Necessity for any Indictment or Information on a (a) publick Statute to recite such Statute, whether the Offence be *Malum prohibitum*, or *Malum in se*, or whether it be prohibited by more than one Statute, or by one only; for the Judges must, *ex officio*, take Notice of all publick Statutes; or if there be more than one, by which an Indictment may be maintained, they will go upon that which is most for the King's Advantage.

that induce a Forfeiture to the King, or make a Felony or Treason, are general Statutes, because it concerns the King.

(a) 2 Hawk. P.C. 245. and several Authorities there cited. 2 Hal. Hist. P.C. 172. S.P. accord. And that all Penal Statutes

### 2. What Mircitals of such Statutes are fatal.

Altho' it be not necessary to recite a publick Statute; yet if a Prosecutor take upon himself to recite a Statute, and materially vary from it, and conclude *contra formam Statuti* (b) *prædicti*, he vitiates the Indictment, because it judicially appears that there is no such Foundation as that whereon it is expressly grounded.

246. (b) But if it conclude generally *contra formam Statuti in hujusmodi casu edit' & provis'*, it is good, for the Court takes Notice of the true Statute, and will reject the Mircital as Surplusage. 2 Hal. Hist. P. C. 172 3. 1 Keb. 662. S. P.

Flowd. 79, 83, 84. Cro. Eliz. 236. 245. Palm. 565. 4 Co. 48. 2 Hawk. P.C.

As where in an Indictment, with such Conclusion on the Statutes which prohibit Entries with strong Hand, the Word *Vi* is put for *Manu*; or where *Nuncia* is put for *Mendacia* in an Indictment on the Statute of *Scandalum*

2 Hawk. P.C. 246.

*Scandalum Magnatum*, or where the Verb put to expresse the principal Act, wherein the Offence consists, is neither Classical nor Legal *Latin*, &c.

<sup>2 Hawk. P.C.</sup>  
<sup>246.</sup> Yet the Omission of a synonymous Word, having no farther Meaning than those which are expressly recited, or the joining of Words much of the same Sense, as *Malitiose & Contemptuose* with a Copulative, where the Statute uses a Disjunctive; or the using the Singular Number for the Plural, or the Plural for the Singular, where the Sense is the same, vitiates not an Indictment; as where in reciting a Statute, speaking of Suits in any Courts, or of Disturbers of Persons in open Preaching, the Words *in aliqua curia*, or *in apertis Predicationibus*, are used.

<sup>2 Hawk. P.</sup>  
<sup>C. 246.</sup> Also no Advantage can be taken of a Variance from any Part of a private Statute, without shewing it to the Court in (a) a proper Manner; because otherwise such Statute shall be taken to be as it is recited.

(a) If a Statute be particular, it must be recited in the Indictment, and proved by an examined Copy upon the Trial.  
<sup>2 Hal. Hist. P. C. 172.</sup>

<sup>2 Hawk. P.C.</sup>  
<sup>246 7.</sup> A Misrecital of the Place or Day on which the Parliament was holden, by which a publick Statute was made, on which the Indictment is grounded, vitiates the Indictment; for the Court takes judicial Notice of all such Statutes, and will not make good a Proceeding, which of the Party's own shewing appears to be commenced on a supposed Statute of this Kind, where there is no such Statute; as if a Parliament be summoned to meet on the Twenty-third Day of *January*, and before the Meeting be prorogued to the Twenty-fifth, &c. and a Statute made by it be recited as made in a Parliament holden on the Twenty-third, &c. or if a Parliament first holden in one Year be prorogued to another, and a Statute made the second Year be recited, as having been made at a Parliament holden or begun in such second Year, which is all one, instead of saying, that it was made at a Sessions of Parliament then holden, and the Indictment conclude *contra formam Statuti Prædicti*. &c. yet Faults of this Nature may be helped by the constant Course of Precedents on a Statute, or by concluding *contra formam Statuti*, without adding *Prædicti*; or, as some say, by the Defendant's Admittance that there is such a Statute as is supposed.

<sup>2 Hawk. P.C.</sup>  
<sup>247.</sup> Also a Repugnancy in setting forth the Time when a Parliament was holden is fatal; as if a Statute be recited to have been made in the first and second Years of such a King; also it hath been holden necessary to shew in what County the Parliament was holden, but that the Omission of the Day is no Fault.

<sup>2 Hawk. P.C.</sup>  
<sup>247.</sup> It seems not to be clearly settled, whether the Misrecital of the Title of an Act be material; but it seems more clear, that a Variance in reciting it, as commencing after the Making, where it is to commence after the End of the Sessions, is fatal.

<sup>2 Hawk. P.C.</sup>  
<sup>247.</sup> A Variance no way altering the Sense does no Hurt; as where in reciting an Oath prescribed by Statute, the Words *Sea of Rome* are put for *See of Rome*, and *I do declare in Conscience*, instead of *I do declare in my Conscience*; neither is it a material Variance to omit or misrecite a Branch of a Statute no way relating to the present Purpose, but put only by way of Flourish and *ex abundanti*.

<sup>2 Hawk. P.C.</sup>  
<sup>247 8.</sup> Neither is the Misrecital of the Preamble of a Statute material, where the Substance of the Purview is well recited; as where, in an Action on the Statute of Hue and Cry, the Declaration recites the Preamble, as speaking of burning of Houses, where the Statute speaks of Arsons generally, without mentioning Houses; or where, in an Action of *Scandalum Magnatum*, the Declaration, reciting the Preamble of the Statute, mentions only what relates to Earls, &c. but if an Indictment on 8 H. 6. in reciting the Clause, which shews in what Actions the Party shall recover, after mentioning Recoveries by Verdict, omit the Words, or any other Manner, or recite the Statute as giving the Fine on a Recovery by

by Action *dicto Domino Regi*; where there is nothing to make good the Word *dicto*, or recite the Clause concerning the bringing an Action, as saying, *if the Party after such Entry make a Feoffment, &c.* where the Words are, *if after such Entry any Feoffment be made*, or recite it thus; *if any Person be put out and disseised*, where the Words are, *if any Person be put out or disseised*, the Variances have been adjudged fatal; yet the last has been holden to be immaterial, because tho' the Words above-mentioned are in the Disjunctive, they have been always expounded in the Copulative; and it seems questionable how far the other Variances will be holden fatal at this Day, Niceties of this Kind not having been of late so much regarded as formerly.

The total Omission of the Clause, which gives the Forfeiture, does <sup>2 Hawk. P. C.</sup> not hurt; and it may be probably argued, that a Misrecital of such <sup>248 9.</sup> Clause, in putting the Words *admitteret & forisfaceret*, for *amitteret & forisfaceret*, is immaterial; for the Variance is in a Word wholly Nugatory, and the Sense is compleat without it; but if the Variance carries with it a material Repugnancy, as where the Words *whoever shall do the same shall incur the Pain, &c.* are thus recited, *whoever shall do the contrary shall incur the Pain, &c.* it will be difficult to make it good.

### 3. How far it is necessary to bring the Offence indicted within the very Words of the Statute.

It is a general Rule, that unless the Statute be recited, neither the Words *contra formam Statuti*, nor any Periphrasis, Intendment, or Conclusion, will make good an Indictment which does not bring the Offence within all the material Words of the Statute; as if an Indictment of Rape omit the Word *Rapuit*; or an Indictment of Perjury on *5 Eliz. cap. 9.* omit the Words *Voluntarie & corrupte*; or an Indictment for Striking in a Church on *5 & 6 E. 4. cap. 4.* omit the Words *to the Intent to Strike*; or an Indictment for Forstalling on *5 & 6 E. 6. cap. 14.* do not expressly alledge that the *Goods were then coming to the Market to be sold*; or an Indictment on the same Statute for Ingrossing, do not alledge that the Defendant *ingrossed, &c. by buying, &c.* or an Indictment of Treason in compassing the King's Death, on *25 E. 3.* have neither the Words *compass* nor *imagine, &c.* <sup>2 Hawk. P. C. 249.</sup>

Neither is it always sufficient to pursue the Words of the Statute, <sup>2 Hawk. P. C. 249.</sup> unless in so doing you fully, directly and expressly alledge the Matter wherein the Offence consists, without the least Uncertainty or Ambiguity; and therefore if an Indictment of Perjury on *5 Eliz. cap. 9.* setting forth that the Party, *tanto per se Sacro Evangelio falso deposuit*, do not directly shew that he was sworn; or if an Information on *18 H. 6. cap. 17.* for not abating so much of the Price of Wine sold as the Vessels wanted of the Statute-Measure, do not expressly shew how much they wanted; or if an Indictment on the Statute of Usury, setting forth that the Defendant took more than five in the Hundred, do not shew how much, it is insufficient.

If the Statute relate only to such and such Persons particularly described by it, the Indictment must bring the Defendant within all such Descriptions, unless they carry with them the bare Denial of a Matter, the Affirmation whereof will be a proper natural Plea for the Defendant; as where it is enacted, that all Persons, having no reasonable Excuse, shall go to their Parish Church, &c. in which Case there is no Need to alledge in the Indictment, that the Defendant had no reasonable Excuse; for this will more properly come into Question from the Plea; neither is there any Need, in order to bring a Defendant within the Description of a Statute, to shew where the Thing happened which brought him within

it; neither is it necessary where you alledge, that the Defendant *existens* so and so, as the Statute mentions, did the Fact, to shew any further, that he was so at the Time of the Fact.

2 Hawk. P.C.  
250.

There is no Need to alledge in an Indictment on a Statute, that the Defendant is not within any of its Provisoes, notwithstanding the Purview expressly takes Notice of them, as by saying, that none shall do the Thing prohibited otherwise than in such special Cases, &c. as are expressed in the Act; but it is said, that a Conviction on a Penal Statute ought expressly to shew that the Defendant is not within any of its Provisoes; for since the Defendant has no Remedy against such a Conviction, but from a Defect appearing on the Face of it, it ought to have the highest Certainty, and to satisfy the Court that the Defendant had no such Matter in his Favour, as the Statute it self allows him to plead.

2 Hawk. P.C.  
250.

If the Statute, whereon an Indictment is founded, be particularly recited, and the Substance of the Fact, and the Time and Place, and Things and Persons concerned, be alledged with sufficient Certainty, and a Circumstance only omitted, the general Conclusion, *contra formam Statuti*, seems to help such Omission.

#### 4. Whether an Indictment grounded on a Statute that will not maintain it, may be good as an Indictment at Common Law.

2 Hawk. P.C.  
251.

It was formerly holden, that no Indictment grounded on a Statute, and concluding *contra formam Statuti*, could be maintained as an Indictment at Common Law, if it were not maintainable as an Indictment on some Statute, because it appears that the Prosecution is grounded on a Foundation which will not support it; but the Law is now taken to be otherwise; and accordingly it hath been adjudged, that on a special Indictment on the Statute of Stabbing, the Defendant may be found Guilty of general Manslaughter at Common Law, and the Words *contra formam Statuti* rejected as senseless.

#### 5. How far it is necessary to conclude *contra formam Statuti*.

2 Hawk. P.C.  
251.

It seems to be agreed, that a Judgment on a Statute shall never be given on an Indictment which doth not conclude *contra formam Statuti*; and therefore if the Fact indicted be an Offence prohibited only by Statute, and the Indictment conclude not *contra formam Statuti*, no Judgment can be given upon it; for tho' an Indictment, which is redundant, may be helped by rejecting what is senseless, an Indictment that is defective in a material Part can be no way supplied; but it seems, that a Judgment on 8 H. 6. cap. 9. may be given on a Writ of Assise of *Novel Disseisin*, brought in the Common Law Form; but this depends upon a reasonable Construction of the Statute, which being express that the Party may recover by such Writ, but giving no new one, may be well intended to give the Party a Remedy by a Writ brought in the old Form.

2 Hawk. P.C.  
252.

If there be more than one Statute concerning the same Offence, the latter of which only continues the former, without making any Addition to it, or only qualifies the Method of Proceeding upon it, without altering the Substance of its Purview, it is safe to conclude an Indictment on it *contra formam Statuti*; but where the same Offence is prohibited by several independent Statutes, or a new Penalty is added by a subsequent Statute to an Offence prohibited by a former, it is said to be safer to conclude *contra formam Statutorum*, than *contra formam Statuti*.

# (I) What ought to be the Form of a Caption of an Indictment.

THE Caption of the Indictment is no Part of the Indictment it self, <sup>2 Hal. Hist. P. C. 165.</sup> but it is the Style or Preamble, or Return, that is made from an Inferior Court to a Superior, from whence a *Certiorari* issues to remove it, or when the whole Record is made up in Form; for whereas the Record of the Indictment, as it stands upon the File in the Court wherein it is taken, is only thus: *Juratores pro Domino Rege super Sacramentum suum presentant*; when this comes to be returned upon a *Certiorari*, it is more (a) full and explicite.

(a) And in this Form,

*Posit. Ad generalem sessionem Pa is tent. apud S. in Com. Prædict. 5 die Octobris Anno Regni, &c. coram A. B. C. D. & Sociis suis Justiciariis Domini Regis ad Pacem dicti Domini Regis in Com. Prædict. conservand. nec non ad diversas felonias transgress. & alia Malefacta in eodem comitat. audiend. & terminand. assignatis, per Sacrament. E. F. G. H. &c. Proborum & legalium hominum comit. Prædict. Jurat. & onerat. ad inquirend. pro dicto Domino Rege & pro Corpore comit. Prædict. existit Presentatum. 2 Hal. Hist. P. C. 165.*

Every Caption of an Indictment must shew that it was taken before a <sup>2 Hawk. P. C. 255</sup> Court which has a proper Jurisdiction; and therefore if it shew only that it was taken before *J. S. Steward*, without shewing to whom, or in what Court; or if the Caption of an Inquisition, *super visum Corporis*, shew only that it was taken before *J. S. Mayor of London*, without adding that he was Coroner; or if it barely call him Coroner, without shewing that he was such for the District in which the Inquisition was taken, it is insufficient; but if it shew that he was a Coroner in the County, it sufficiently shews that he was a Coroner for the County; and if the Caption of an Indictment shew that it was taken at the Sessions of the Peace of such a County, it sufficiently shews that such Sessions was holden for the County; but if it only shew that it was holden in the County, it is said to be insufficient; so it is also if it omit the Clause *necnon ad diversas felonias, &c.* or if it barely shew that the Indictment was taken at a Sessions of the Peace, without shewing before whom, or without naming of the Justices, or shewing for what Place they were Justices; or if in describing them as Justices *ad Pacem, &c. conservand.* it omit the Word *assignat.* but if it sufficiently shews that some of them were of the *Quorum*, by shewing that the Indictment was taken at a General Sessions, and if it call them Justices of Peace, it needs not any farther to shew that they were Justices of the King's Peace.

The Caption of an Indictment *ad magnam curiam cum leta tent.* is in- <sup>2 Hawk. P. C. 254</sup> sufficient; but if it be *ad magnam curiam & ad letam*, or *ad vis. franci Pleg. cum cur. baron. tent.* perhaps it is sufficient; for since the Court Baron has no Jurisdiction over Criminal Matters, and the Caption in these last Cases is not exprefs, that the Indictment was taken at it, as it is in the first Case, the Court will intend that it was taken at the Leet, which alone had Power to take it.

The not shewing in the Caption of an Indictment at a Leet, whether <sup>2 Hawk. P. C. 254</sup> the Court were holden by Charter or Prescription, is helped by the Multitude of Precedents.

Every Caption of an Indictment ought to shew that the Indictors were <sup>2 Hawk. P. C. 254</sup> of the Precinct for which the Court was holden, and that they were twelve in Number, and that they found the Indictment on their Oaths; also Indictments have been quashed for an Omission of the Names of the Jurors; and others, for want of the Words *Proborum & legalium hominum*; and others, for want of the Words *ad tunc & itidem* before *Jurat. & onerat.*; and others, for want of the Words *ad inquirend. pro Domino Rege & pro Corpore Comitatus*; yet of late Years Exceptions of this Kind have

not

not been much favoured, especially if the Indictment were in a superior Court, and that which is omitted be, in common Understanding, implied in what is expressed.

Every Caption must shew a certain Day and Year when the Indictment was found, and must record it in the present Tense; but if it describe the Court as holden *die Martis & die Mercurii*, or on such a Day in such a Year of the King, without shewing what King; or if it shew the Day and Year in Figures, which are not *Roman*, it is insufficient; yet it needs not add the Year of the Lord; and the Multitude of Precedents have made good the Use of *Exstitit Presentat* instead of *Existit*, &c.

2 Hawk. P.C.  
255.

Every such Caption must also shew where the Indictment was found, that it may appear to have been at a Place within the Jurisdiction of the Court; and therefore if it set forth, that the Indictment was taken at a Sessions of the Peace, holden for such a County at *B.* without shewing in what County *B.* lies, otherwise than by putting the County in the Margent, it is insufficient; but if an Inquest of Death be set forth as taken at *B.* before the Coroner of the Liberty of *B.* it needs not express that *B.* is within the Liberty of *B.* for it cannot but be intended.

### (L) Where an Indictment may be quashed.

2 Hawk. P.C.  
258.

BY the Common Law, the Judges may, in Discretion, quash any Indictment for any such Insufficiency in the Body or Caption of it, as will make a Judgment given on it against the Defendant erroneous; but they are in no Case bound so to do *ex debito justitiæ*, but may oblige the Defendant to Plead or Demur; and this they generally do where the Offence is of an enormous or publick Nature, or where the Indictment has been removed by *Certiorari*, and a Recognizance for procuring the Trial of it has been forfeited.

By the 7 *W. & M. cap. 3.* ‘No Indictment for High Treason or Misprision thereof, (except Indictments for counterfeiting the King’s Coin, Seal, Sign or Signet,) nor any Process, or Return thereupon, shall be quashed for Misreciting, Mispelling, false or improper Latin, unless Exception concerning the same be taken and made in the respective Court where the Trial shall be, by the Prisoner, or his Counsel assigned, (a) before any Evidence given in open Court on such Indictment; nor shall any such Misreciting, Mispelling, false or improper *Latin*, after Conviction on such Indictment, be any Cause to Stay or Arrest Judgment; but nevertheless any Judgment on such Indictment shall be liable to be reversed on Writ of Error, as formerly.

(a) In the Construction hereof it hath been settled, that no such Exception can be taken after Plea pleaded. 2 Hawk. P. C. 259.

# Infancy and Age.

- (A) Who are Infants; and therein of the several Ages and Periods between which the Law distinguishes as to several Purposes.
- (B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.
- (C) How far the Law Regards and takes Notice of Infants in *Ventre sa mere*.
- (D) How Infancy is to be tried.
- (E) Of what Things an Infant is capable in Relation to the Publick, and in which he shall answer for his Neglect.
- (F) Of what Things capable, being for his own Advantage.
- (G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches; and herein where he must take Notice of and perform Conditions, &c.
- (H) Where punishable for Crimes and Injuries committed by him.
- (I) Of the Acts of Infants, as they are good, void, or voidable: And herein,
  - 1. Of his Contracts for Necessaries.
  - 2. Of judicial Acts, or Acts done by him in a Court of Record.
  - 3. Of his Acts in *Pais*, where void or only voidable.
  - 4. Where void, or voidable, as to the Infant, shall yet bind others.
  - 5. At what Time voidable Acts are to be avoided.
  - 6. By whom to be avoided.
  - 7. In what Manner they are to be avoided.
  - 8. Of the Confirmation of voidable Acts.
- (K) Of the Privilege of Infants in Suits and Actions by and against them: And herein,
  - 1. How far the Courts take Care of the Interest of Infants.
  - 2. How they are to appear when they sue or are sued.

## (L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

1. In what Actions shall the Parol demur.
2. Where the Parol shall demur without any Plea Plead.
3. Upon what Plea Plead shall the Parol demur.
4. For the Nonage of what Person shall the Parol demur.
5. In Respect to what Estate and Interest shall the Parol demur.
6. Where for the Nonage of the Vouchee.
7. Where for the Nonage of the *Prayee in Aid*.
8. In what Cases if the Parol demur against one it shall against another.
9. In what Cases the Demurrer of the Parol for Part shall be for all.
10. Of the Prayer of Age and Counterplea.

## (A) Who are Infants; and therein of the several Ages and Periods between which the Law distinguishes as to several Purposes.

FROM the Observations made on the daily Actions of Infants, as to their arriving to Discretion, the Laws and Customs of (a) every Country have fixed upon particular Periods on which they are presumed capable of acting with Reason and Discretion; hence in our Law the (b) full Age of Man or Woman is (c) Twenty-one Years.

(a) For tho' the Civil Law obtains much, being a wife and well calculated Law, yet it is not of any Force here, or in any other Countries, farther than by Custom or Acts of Parliament it has been admitted. 1 *Hal. Hist. P. C.* 16. (b) Is the full Age of Male or Female, according to common Speech. *Lit. Sect.* 104, 259. (c) At which Age he is capable of contracting, and may alien his Lands, Goods and Chattels; and this Period we have fixed upon from the Feudal Law, for by that Law the Tenant at this Age was presumed capable to attend his Lord in the Wars, and therefore at this Age was out of Ward of Guardian in Chivalry. *Co. Lit.* 78. b. — But according to the Civil Law, the compleat full Age, as to Matters of Contract, is Twenty-five Years. *Dig. l. b. 4. tit. 4.* 1 *Hal. Hist. P. C.* 17.

Dyer 143. Therefore if one under the Age of (d) Twenty-one Years makes his (e) Will, and thereby devises his Lands, and after attains the Age of Twenty-one Years, and dies, without making any new Publication thereof, this Devise is void.

Raym. 84. 1 *Sid.* 162. (d) If a Child be born the

16th Day of February, this Child will be of full Age any Part of the 15th Day of February Twenty-one Years after, for the Law makes no Fractions of a Day, and upon the last Instant of that Day he would have compleated Twenty one Years. 1 *Keb.* 589. 1 *Sid.* 162. Raym. 84. S. C. *Herbert and Tarbol.* 2 *Mod.* 281. S. P. *arguendo.* 1 *Salk.* 44. S. P. said by *Holt* to have been adjudged. (e) So if an Infant make a Deed, and deliver it within Age, and afterwards, upon his coming of full Age, deliver it again, yet the Deed is void; for the Deed must take Effect from the first Delivery, or not at all. 3 *Co.* 35. b.

Vaugh. 178. But tho' a Person under the Age of Twenty-one cannot dispose of his Lands, yet it is said, that one under that Age may, pursuant to the Statute of 12 *Car. 2. cap.* 24. dispose of the Custody of his Infant Child, and that such Disposition draws after it the Land, &c. as incident to the Custody.



Also, it seems, it was agreed, that an Infant Male at fourteen, and Female at twelve, may dispose of their personal Estate at those Ages: For herein the Common Law has appointed no Time, being a Matter cognizable in the Spiritual Court, which herein proceeds according to the Civil Law, by which Law Infants at those Ages are presumed to have sufficient Discretion to make such Disposition; and therefore their Testaments in these Cases are not to be set aside, or controuled in Chancery or the Temporal Courts.

Law has not precisely determined at what Age a Person may make a Disposition of his personal Estate; but that it is generally allowed it may be made at the Age of eighteen. — And my Lord Coke mentions seventeen or eighteen; at which Years, he says, an Infant may make his Testament, and constitute his Executors for his Goods and Chattels. *Co. Lit. 89. b.*

The Age of Consent to a Marriage in an Infant Male is (a) fourteen, and in a Female twelve; (b) but they may marry before, and if they agree thereto when they attain these Ages, the Marriage is good; but they cannot (c) disagree before then; and if one of them be above the Age of Consent, and the other under such Age, the Party so above the Age may as well disagree as the other; for both must be bound, or neither.

herein our Law and the Civil agrees, for that before these Ages they are said to be *impuberes*. *1 Hal. Hist. P. C. 17.* — And tho' by our Law they may agree before, yet if the Wife hath a Child before the Husband attains the Age of fourteen, it is a Bastard. *4 Co. 29. Goldsb. Fevert. Canon 484.* (b) And they are Baron and Feme de Facto; so that the Baron before he attains the Age of fourteen, or the Wife twelve, may have Trespass de Muliere abducta cum Bonis Viri. *1 Rol. Abr. 340. Moor 741. 2 And. 208. 6 Co. 22.* (c) If they disagree by Parol, and afterwards agree and live together as Man and Wife, the Disagreement is not binding, but that they may well live together without any new Marriage. *1 Rol. Abr. 341. Lee and Ipton.* — But if the Disagreement had been before the Ordinary, they could never agree again to make it a good Marriage. *1 Rol. Abr. 341. per Warborton.* — If a Man within the Age of fourteen takes a Wife of full Age, and after brings a Writ de Muliere abducta cum Bonis Viri, and after comes to the Age of fourteen, if he after makes any Continuation of the Action, this shall be an Agreement to the Marriage, so that it cannot after be defeated. *1 Rol. Abr. 341.*

But tho' the Party above Age may as well disagree as the other, yet it is said that the Party cannot do it before the other arrives at the proper Age: Also it is said to have been (d) adjudged, that if a Man marries a Woman that is within the Age of twelve Years, and after the Woman at eleven Years of Age disagrees to the Marriage, and after the Husband takes another Wife, and hath Issue by her, that this is a Bastard; for the first Marriage continues notwithstanding the Disagreement of the Woman; for she cannot disagree within the Age of twelve Years, and so her Disagreement is void.

If a Man marries a Woman that is within the Age of twelve Years, and after the Feme Covert within the Age of Consent disagrees to the Marriage, and after the Age of twelve Years marries another, now the first Marriage is absolutely dissolved, so that he may take another Wife; for tho' the Disagreement within the Age of Consent was not sufficient, yet her taking another Husband after the Age of Consent affirms the Disagreement, and so the Marriage avoided *ab initio*. *1 R. Abr. 341. Babbington and Warner, adjudged in B. R. upon a Writ of Error out of the C. B. and the first Judgment affirmed. Moor 575. S. C. adjudged, because she cohabited with her second Husband all Times after the Age of Consent. But note; It does not appear by the Book whether the second Marriage was at or before the Age of Consent. N. Dyer 13. a. Margin, S. C. cited.*

But for the better Explication hereof it may not be improper to insert a Case determined before the Delegates, which was thus:

Mrs. K. Fitzgerrard was married to my Lord Decius, she being of the Age of twelve Years and a Half, and he of the Age of eight; afterwards, she being thirteen Years old disagreed from this Marriage, and married Mr. Fillers; and upon Suit in the Spiritual Court the second Marriage was affirmed: The Lord Decius appealed to the Delegates, and it was argued by Civilians and common Lawyers before the Bishops of London and Rochester, North C. J. Littleton Baron, Jones and Atkins Justices, and

2 Mod 315.  
2 Jones 210.  
Cmb. 50.  
1 Vern. 255.  
2 Vern. 469.  
Preced. Chan.  
316. — In  
the Office of  
Execut. 305.  
it is said that  
the Common

Co. Lit. 33.  
78, 79.  
2 Inst 434.  
2 Inst. 88, 89.  
6 Co. 22.  
7 Co. 43.  
1 R. Abr.  
340, 341.  
(a) That

1 Hal.  
Hist. P. C. 17.  
4 Co. 29.  
Goldsb. Fevert. Canon 484.  
1 Rol. Abr. 340.  
Moor 741.  
2 And.  
208.  
6 Co. 22.  
1 Rol. Abr. 341.  
Lee and Ipton.  
1 Rol. Abr. 341.  
per Warborton.  
1 Rol. Abr. 341.

Co. Lit. 79.  
(d) 1 Rol. Abr.  
341.

1 R. Abr.  
341.  
Babbington and Warner, adjudged in B. R. upon a Writ of Error out of the C. B. and the first Judgment affirmed.

21 June,  
29 Car. 2.  
before the  
Delegates  
at Sessions-  
house, Fleet-  
street.

and several Doctors of the Civil Law: The Civilians said, that Minors could not contract Matrimony, but only *Sponsalia de futuro*, and therefore tho' they bind themselves *per verba de presenti tempore*, yet the Law, by reason of the Incapacity of the Parties, would make such a Construction that it shall only be a Contract *de futuro*. In this Case indeed one of the Parties is of Age of Consent, but that makes no Diversity; for a Contract of Matrimony is *utrinque obligatorius*, and reciprocal in its Nature. On the other Side it was said, that such a Contract as this betwixt Persons of unequal Ages might as well claudicate as other Contracts, which are also *utrinque obligatorii*; they said, that a Contract of Marriage carries a Relation in itself, and is reciprocal, but that in some Cases this may fail, by reason of an Accident or Circumstance in the Persons, notwithstanding which the Nature of the Thing will remain to be *ultra citroque* obligatory, as we see in other Contracts; but Arguments from the Definition of Civil Affairs are not cogent; for no Law can be framed to meet with all Emergencies and Circumstances, but ought to be differently applied according as the particular Circumstances require. The Law does not make Contracts *per verba de presenti tempore* to be Contracts *de futuro*, but in Cases of Minors, and they cannot shew any Texts that Contracts *per verba de presenti* by *Minors* shall be by Construction made Contracts *de futuro*. The Laws of God and Nature require Performance of Promises and Agreements; and the Woman, in the present Case, cannot dissent before the Husband come to the Age of Consent, because till then he cannot dissent no more than he can assent. Serjeant *Maynard*. In our Law, Marriage betwixt Minors has the Effect of a Marriage till it be annulled: If the Woman be nine Years old she shall be endowed, be the Husband of what Age soever, and Dower can never be, but where there was a precedent Marriage, *posito effectu ponitur causa*; such a Wife shall have an Appeal of the Death of her Husband, and the Husband in such a Case shall have a Writ *de Uxore abducta cum Bonis Viri*. If Tenant by Knight's Service die, his Heir within Age of Consent, and married, the Lord cannot tender him to Marriage, a Disagreement, he within Age. *Lee and Ashton*, 5 Jac. 1. where two within Age had contracted Matrimony, and the Parent of one was bound to give so much at their Age of Consent, if they would agree to this Marriage: An Action was brought for this Money, and it was found that within Age they disagreed, but at their full Age agreed; and Judgment was for the Plaintiff, because the Disagreement was not material. 1 Inst. 79. *Banisters versus Offley*. Our Law calls it *Matrimonium*, altho' the Term of *Sponsalia* is not unknown to us; we find it in *Glanvil*, Lib. 6. and *Littleton* calls it an Affiance; to shew what Regard our Law has to such a Marriage, he cited 1 Inst. 33. 1 Rol. Abr. 340. *Dyer* 369. To prove that before Age of Consent no Agreement or Disagreement can be, *Moor* 575. 1 Rol. Abr. 341. 1 Inst. 79. and the Pleadings in 7 Co. *Kenn's Case*, and 6 Co. *Ambrosia Gorges' Case*. *Thursby cont.* Our Law gives such Credit to this inchoate Marriage, that if the Parties die before it be avoided, the Law will not say that it was null and void; and upon this Ground are the Cases of Dower and Appeal which have been cited. The Case in *Dyer* 369. is for the Decree; for there, by the Opinion of many Doctors, *quamvis alia sunt Sponsalia de futuro, tamen in causa Dotis extenduntur ad verum Matrimonium ratione Privilegii*; he cited 7 H. 6. 11. 6 Co. 22. and the Sentence given in the Spiritual Court was affirmed.

Co. Lit. 78. b.  
Hob. 225.

And as the Age of fourteen is the Age of Consent to a Marriage in an Infant Male; so by Law hath he several other Ages assigned him to several Purposes, viz. at the Age of twelve to take the Oath of Allegiance in the Tourn or Leet, at fourteen to be out of Ward of Guardian in Socage, to chuse a Guardian; and this also is accounted his Age of Discretion; fifteen to have had *Aid pur faire Fitz Chevalier*.

The Authority of a Guardian in Chivalry did not determine till the Heir, if a Male, came to the Age of twenty-one Years; because it was presumed that till that Age he was not capable of doing Knight's Service, and attending the Lord in his Wars. The Guardianship of an Heir Female determined at (a) fourteen at Common Law, but by *Westminster* the 1<sup>st</sup>, the Lord had the Wardship till she attained the Age of sixteen, to tender her convenable Marriage; but the Authority of a Guardian in (b) Socage, as has been said, ceases at the Age of fourteen, at which Age the Infant may call his Guardian to an Account, and may (c) chuse a new Guardian.

by the Statute of *Merton*, cap. 6. *Lit. fed.* 108. *Co. Lit.* 50. (b) But the Guardianship of the Father, which is a Guardianship by Nature, continues till the Son and Heir Apparent attain to the Age of twenty-one Years; but that is with respect to the Custody of the Body only. *Cartb.* 386. per *Holt* C. J. (c) In the Spiritual Court, if the Infant be above the Age of seven, he chuses his own Curator or Tutor; but if under that Age, they chuse one for him.

One within the Age of twenty-one Years may do Homage, but cannot do Fealty; because in doing of Fealty he ought to be sworn, which an Infant (d) cannot be.

teen may be sworn as a Witness, at which Age he is presumed to have sufficient Discretion. 2 *Hal.* *Hist.* P. C. 278. *Vide* Tit. Evidence, Letter (A).

An Infant at the Age of seventeen may be a Procurator or (e) Executor; and in this both the Civil and Common Law agree.

P. C. 17. (e) And if one under the Age of seventeen be made Executor, and Administration *durante minore etate* is granted to another, such Administration ceases when the Infant arrives to the Age of seventeen. *Hob.* 250. *Yels.* 128. 5 *Co.* 29. *Godolph.* 102.— But if Administration be granted to one during the Minority of a Person who is intitled to it, as next of Kin to the Intestate, such Administration does not determine till the Infant's Age of twenty one; because before that Age he cannot give Bond to the Ordinary to administer faithfully. *Cartb.* 446 7.

Infancy is good Cause of Refusal of a Clerk; also by the Statutes 13 *Eliz.* cap. 12. and 13 & 14 *Car.* 2. none is to be admitted a Deacon unless he be twenty-three Years at least, nor a Priest unless he be twenty-four.

By the Custom of *Gavelkind* an Infant at the Age of fifteen is reckoned at full Age to sell his Lands; and this seems to have been taken from the Civil Law, which reckons fourteen the *Ætas Pubertatis*; for they reckoned that tho' the Infant had ended his Years of Guardianship at fourteen, yet he might not have completed his Account with his Guardian till the Age of fifteen, and that was esteemed to be the Age when he was completely out of Guardianship; and therefore at this Age he was allowed to sell the Lands descended to him: But in this the Customs of *England* differed from the Civil Law; for the Civil Law does not allow of his Dispositions till the Age of twenty-five; therefore this must have been allowed by the old *Saxon* Law, because they thought that a great deal of Time was lost, if the Infant could only use his own without being able to dispose of it in a way of Traffick, or in Marriage, till twenty-five; and therefore they allowed the Infant to sell, but under great Limitations and Restrictions, that he might not be defrauded; and by this Means they thought there was sufficient Provision made for the Necessity of Commerce, which in the small divided Shares was absolutely necessary.

Also by Custom, in some Places, an Infant seised of Lands in Socage may at the Age of fifteen Years make a Lease for Years, which shall bind him after he comes of Age; for the Custom makes fifteen his full Age to that Purpose.

Also by the Custom of *London*, an Infant unmarried, and above the Age of fourteen, tho' under twenty-one, may bind himself Apprentice

*Palm.* 361. to (a) a Freeman of *London* by Indenture, with proper Covenants; which  
 1 *Mod.* 271. Covenants, by the Custom of *London*, shall be as (b) binding as if he  
 (a) But this Custom does were of full Age.  
 not extend  
 to one bound 'Prentice to a Waterman under twenty one; for the Company of Watermen are but a  
 voluntary Society, and being free of that does not make one free of the City of *London*. 6 *Mod.* 69.  
 (b) And for Breach an Action may be brought in any other Court, as well as in the Courts in the  
 City. *Moor* 136.

*F. N. B.* 202. As to Capital Offences, in which the Law is the same with Regard to  
*Co. Lit.* 247. b. the Male and Female Sex, the Age of fourteen is the common Standard,  
*Dalt. cap* 95. at which both Males and Females are, by (c) our Law, obnoxious to  
 and 104. capital Punishments; for this being the *Ætas Pubertatis*, or Age of Dis-  
 1 *Hal. Hist.* cretion, the Law presumes them at those Years to be *Doli Capaces*, and  
*P. C.* 25. capable of discerning between Good and Evil; and therefore subjects  
 1 *Hawk. P.* them to Capital Punishments as much as if they were of full Age.  
*C. 2.*  
 (c) But the Civil Law, as  
 to Capital Punishments, distinguished the Ages into four Ranks: 1. *Ætas Pubertatis plena*, which is  
 eighteen Years. 2. *Ætas Pubertatis*, or *Pubertas* generally, which is fourteen Years, at which Time  
 they were likewise presumed to be *Doli Capaces*. 3. *Ætas Pubertatis proxima*; but in this the Roman  
 Lawyers were divided, some assigning it to ten Years and a Half, others to eleven, before which the  
 Party was not presumed to be *Doli Capax*. 4. *Infantia*, which lasts till seven Years, within which Age  
 there can be no Guilt of a Capital Offence. 1 *Hal. Hist. P. C.* 17, 18, 19.

1 *Hal. Hist.* But tho' the Age of fourteen be the *Ætas Pubertatis*, before which  
*P. C.* 26. our Law does not presume the Party to be *Doli Capax*, and therefore that  
 a Party indicted for a Capital Offence committed before these Years  
 is to be found Not guilty, yet hath this general Rule the following  
 Temperaments.

1 *Hal. Hist.* 1. That if the Party be above twelve, tho' under fourteen, and appears  
*P. C.* 26. to be *Doli Capax*, and could discern between Good and Evil at the Time  
 of the Offence committed, he may be convicted, and undergo Judgment  
 and Execution of Death, tho' he hath not attained the Age of fourteen:  
 But herein, according to the Nature of the Offence and Circumstances  
 of the Case, the Judge may or may not in Discretion reprieve him,  
 before or after Judgment, in order to the obtaining the King's Pardon.

1 *Hal. Hist.* 2. If an Infant be above seven, and under twelve Years, and commit  
*P. C.* 27. a Capital Offence, *prima Facie* he is to be judged Not guilty, and to be  
 found so; because he is supposed not of Discretion to judge between  
 Good and Evil: But yet if it appear, by strong and pregnant Evidence  
 and Circumstances, that he had Discretion to judge between Good and  
 Evil, Judgment of Death may be given against him; for *Malitia supplet*  
*Ætatem*; but herein the Circumstances must be inquired of by the Jury,  
 and the Infant is not to be convict upon his Confession: Also herein, my  
 Lord *Hale* says, that it is Prudence after Conviction to respite Judgment,  
 or at least Execution; but he says, that if he be convicted, the Judge  
 cannot discharge him, but only reprieve him from Judgment, and leave  
 him in Custody till the King's Pleasure be known.

1 *Hal. Hist.* 3. If an Infant within Age be *infra Ætatem Infantie*, viz. seven Years  
*P. C.* 27, 28. old, he cannot be guilty of Felony, whatever Circumstances proving  
*Plew.* 19. a. Discretion may appear; for *ex Præsumptione Juris* he cannot have Discre-  
 tion, and no Averment shall be received against that Presumption.

(B) To whom the Privilege of Infancy extends, or who are to be considered as Minors.

THE Privilege of Infancy does not extend to the King; for the Political Rules of Government have thought it necessary, that he who is to govern and manage the whole Kingdom, should never be considered as a Minor, incapable of governing himself and his own Affairs.

Therefore if the King within Age make any Lease or Grant, he is bound presently, and cannot avoid them, either during his Minority, or when he comes of full Age.

So if the King consent to an Act of Parliament during his Minority, yet he cannot after avoid this Act; because the King, as King, cannot be a Minor; for as King he is a Body Politick.

Also the Acts of a Mayor and Commonalty shall not be avoided, by reason of the Nonage of the Mayor.

Altho' a Duke, Earl, or the like, be but a Minor, or not above ten Years of Age, in the Custody and in the Family of another Nobleman, who may and doth retain Chaplains, yet he may qualify Chaplains to be dispensed withal to hold two Benefices with Cure, in like sort as if he was of full Age.

An Infant in Gavelkind shall have his Age, and all other Privileges of the Infant at Common Law; because tho' he hath the Privilege of Alienation at fifteen, yet that doth not take from him any Privilege he had before at Common Law.

A Bastard being impleaded shall have his Age; for the dilatory Plea must be determined before the Pleas in chief can come on; so that the Plea of Infancy will stay the Suit, before it can be inquired whether he is or is not a Bastard.

(C) how far the Law regards and takes Notice of Infants in *Ventre sa Mere*.

A Child in *Ventre sa Mere* may be appointed Executor, or may take a Legacy; also if there are two or more at a Birth, they shall be joint Executors or joint Legatees of the Thing bequeathed; for the (a) Civil Law, for the Benefit of the Infant, repotes a Child in his Mother's Womb in the same Condition as if it were born.

*tre sa Mere* may be vouched, is capable of taking; the Mother may detain Charters on Behalf of such Child; a Bill may be brought on Behalf of such Child; and a Court of Equity will grant an Injunction in his Favour to stay Waste.

If there be *Bastard eigne* and *Mulier puisne*, and the Bastard enters, and dies seised, his Issue shall inherit the Lands, and exclude the *Mulier* for ever; but in this Case if the Bastard had died leaving Issue in *Ventre sa Mere*, and the *Mulier* had entered, and then a Son is born, yet cannot he enter upon the *Mulier*: And herein our Law differs from the Civil Law; for our Law requires an immediate Descent, which cannot be before the Person is in *Esse*; also by our Law the Freehold cannot be in Abeyance.

11 H. 6. 13. It appears to have been a Matter of much Controversy, whether a Devise of Lands to an Infant in *Ventre sa Mere* be good, because not in Being to take at the Time of the Death of the Devisor; and since, as some say, by the Devise the Person is to take immediately after the Death of the Devisor, the Freehold cannot be put in Abeyance by the Act of the Parties; but others hold, that such Devise is good, tho' the Infant be not in *Effè* at the Death of the Devisor, and that the Freehold shall not be in Abeyance, but shall descend to the Heir at Law in the mean time.

1 Sid. 153.  
1 Lev. 135.  
Raym. 163.  
1 Keb. 85.  
1 Salk. 231.  
2 Mod. 9.  
1 Sid. 153.  
1 Lev. 135.  
Raym. 163.  
S. C. Snow and Cutler.  
Moor 637.  
Chur h and Wiat.  
3 Lev. 408.  
4 Mod. 359.  
1 Salk. 227.  
Carth. 309.  
Reeve and Long; & vide 10 & 11 W. 3. cap. 16. and Head of Remainders.

But however all the Books agree in this, that a Devise to an Infant when he shall be born, or when God shall give him Birth, is good as an Executory Devise, and that the Freehold shall descend to the Heir at Law in the mean time.

So it is clear, that if Land be devised for Life, the Remainder to a posthumous Child, that this is a good contingent Remainder; because there is a Person in Being to take the particular Estate; and if the contingent Remainder vests during the Continuance of the particular Estate, or *eo instanti* that it determines, it is sufficient.

Reeve and Long; & vide 10 & 11 W. 3. cap. 16. and Head of Remainders.

1 Rel. Rep. 109. 138.  
2 Bull. 273.  
Co. Copyh. 9.  
& vide Moor 637.

Also it seems agreed, that a Man may surrender Copyhold Lands immediately to the Use of an Infant in *Ventre sa Mere*; for a Surrender is a Thing executory, and nothing vests before Admittance; and therefore if there be a Person to take at the Time of the Admittance, it is sufficient, and not like a Grant at Common Law, which putting the Estate out of the Grantor must be void, if there be no Body to take.

Mob. 240.

If an Usurpation be had on one in *Ventre sa Mere*, at the next Turn after his Birth, he shall be relieved on the Statute *Westm. 2. cap. 5.*

### (D) How Infancy is to be tried.

1 Lev. 142.  
1 Sid. 321.  
1 Keb. 796.  
Cro. Jac. 59.  
581.

INFANCY is to be tried by Inspection of the Court, or by Jury: And herein it is laid down as a Rule in some Books, that wheresoever it is alledged upon the Pleading, that the Party was and yet is under Age, there it shall be tried by Inspection; but where the Infant is of full Age at the Time of the Plea, there it shall be tried *per Pais*.

Co. Lit. 380.  
Moor 76.  
2 Rel. Abr. 15.  
2 Inst. 485.  
2 Bull. 320.  
12 Co. 122.

But here we must observe, that as to judicial Acts, or Acts done by an Infant in a Court of Record, and which he is allowed to avoid, the Trial thereof must be by Inspection; and therefore if an Infant levies a Fine, he must reverse it by Writ of Error; and this must be brought during his Minority, that the Court may by Inspection determine the Age of the Infant; but the Judges, as by *Adjuncta*, may in such Cases inform themselves by Witnesses, (a) Church-Books, &c.

(b) To prove the Nonage of a Devisor, an Almanack, in which the Father had wrote the Nativity of his Son, was allowed to be strong Evidence. Raym. 84.

Co. Lit. 380.  
Moor 884.  
Keckwick's Case.

If an Infant brings a Writ of Error to reverse a Fine for his Nonage, and, after Inspection and Proof of Infancy by Witnesses, dies before the Fine is reversed, his Heir may reverse it; because the Court having recorded the Nonage of the Conusor, ought to vacate his Contract when he appeared to be under a manifest Disability at the Time he entered into it.

Moor 189.  
& vide Cro. Jac. 230-1.

An Infant acknowledged a Fine, and the Conuzees omitting to have the Fine ingrossed till he came of Age, in order to prevent the Infant from

from bringing a Writ of Error; yet the Court upon View of the Conu-  
zance produced by the Infant, and upon his Prayer to be inspected, and  
his Age examined, recorded his Nonage, to give him the Benefit of his  
Writ of Error, which he must otherwise lose, his Nonage determining  
before the next Term.

So if an Infant suffer a common Recovery by appearing in (a) Person, (a) That if  
this must be reversed during his Minority by Inspection of the Judges. he suffers a  
common Re-  
covery by Guardian, and having a Privy Seal for that Purpose, such Recovery cannot be at any  
Time set aside: But for this *vide Tit. Fines and Recoveries, and infra Letter (1).*

But it is said, that if an Infant suffers a Recovery, in which he ap- 1 *Sid.* 321.  
pears by Attorney, he may reverse it after his full Age, as it may be 1 *Lev.* 142.  
discovered whether he was within Age when the Recovery was suffered;  
because it may be tried *per Pais* whether the Warrant of Attorney was  
made by him when he was an Infant.

It is said, that in all Cases where the Party pleads that he was within *Skin.* 10, 11.  
Age at B. and alledges a Place, that there the Trial may be well enough  
where it is alledged; where no Place is alledged, there in personal  
Actions where the Writ is brought, and in (b) real Actions where the (b) *Cro. Eliz.*  
Right of the Land depends upon Infancy, there the Trial is to be where *St. S. P.*  
the Land lies, and if not, where the Action is brought.

An Infant entered into a Recognizance of 100*l.* as Bail to J. S. *Carth.* 278.  
which became forfeited, and he taken in Execution; whereupon he *Trin.* 5 *W.* 3.  
brought an *Audita Querela*, suggesting his Infancy, and the Writ being *Loyd versus*  
brought into Court, he appeared *in propria Persona*; and it was moved *Eagle.*  
that he might be inspected, and his Witnesses examined; and thereupon  
his Mother peremptorily deposed, that at that very Time he was twenty  
Years old, and no more, and a Maid-Servant gave circumstantial Evi-  
dence to the same Purpose; and it was moved that he might be bailed:  
But *per Curiam*, it is a Matter of Discretion either to admit him to Bail,  
or to refuse it, he being in Execution; but if he had brought his *Audita*  
*Querela* before he had been taken in Execution, he must have a *Super-*  
*fedeas* of Course; and the Court would not bail him, tho' the long Vaca-  
tion was near, but required the Evidence to be strengthened by a Copy  
of the Register where he was born, which being in *Yorkshire*, he appeared  
again in *Mich. Term* in Custody, and a Copy of the Register was pro-  
duced, and sworn to be a true Copy, and the Mother and the Maid  
being again sworn, and all agreeing in the same Thing, he was discharged  
by the Court.

## (E) Of What Things an Infant is capable in Relation to the Publick, and in Which he shall answer for his Neglect.

AN Infant seems capable of such Offices as do not concern the Admi- *Plow.* 379.  
nistration of Justice, but only require Skill and Diligence; and 381.  
these, it seems, he may either exercise himself, when of the Age of Dis- 2 *Co.* 48, 97.  
cretion, or they may be exercised by Deputy; such as the Offices of *Vide Tit.*  
Park-keeper, Forester, (c) Gaoler, &c. *Offices.*

(c) The Sta-  
ture of *West-*  
*minster* 2. *cap.* 11. extends to an Infant-Gaoler, so as to charge him in an Action of Debt for an  
Escape of one in Execution. 2 *Inst.* 382. 3 *Mod.* 222. *S. P.* cited.

*Co. Lit.* 3. *b.* But it is said, that an Infant is not capable of the Stewardship of a Manor, or of the Stewardship of the Courts of a Bishop; because by *1 Rol. Abr.* Intendment of Law he hath not sufficient Knowledge, Experience, and *731. 2 Rol.* Judgment to use the Office, and also because he cannot make a De- *Abr.* 153. puty. *March* 41. 43. *Cro. Eliz.* 636. *Cro. Car.* 556.

*F. N. B.* 118. An Infant cannot be an (a) Attorney, (b) Bailiff, Factor, or Re- *1 Rol. Abr.* ceiver. *117. Co. Lit.*

*172. Cro. Eliz.* 637. (a) Cannot be an Attorney, because he cannot be sworn. *March* 92. (b) Because not to be charged in any Account. *Co. Lit.* 172. — Not in an *Indebitatus* upon an *Infimus compromisset*; for in this Action no Evidence shall be given of the Value or Necessity of the Thing, but of the Account only, in which the Infant may be mistaken. *Latch* 169. adjudged. *Nov* 87. S. C. adjudged, between *Wood* and *Whittherick*, &c. *vide Palm.* 528. *2 Rol. Rep.* 271. — Nor can an Infant be charged as Bailiff, &c. in Equity farther than in Law; and therefore it is said, that if such a one is made Factor, his Friends should give Security for his Accounting. *Abr. Eq.* 6.

*1 Rol. Abr.* If an Infant, being Master of a Ship at *St. Christopher's* beyond Sea, by *530. Furnes* Contract with another, undertakes to carry certain Goods from *St. Chri-* *and Smith,* stopher's to *England*, and there to deliver them; but does not afterwards *and a Prohi-* deliver them according to the Agreement, but wastes and consumes them, *bition denied* he may be sued for the Goods in the Court of Admiralty, tho' he be an *to the Court* Infant; for this Suit is but in Nature of a Detinue, or Trover and Con- *of Admiralty.* version at the Common Law.

*1 Rol. Abr.* 2. If an Infant keeps a common Inn, an Action on the Case upon the *Carth.* 161. Custom of Inns will not lie against him. *cited.*

*Carth.* 160. So if an Infant draws a Bill of Exchange, yet he shall not be liable on *Williams ver.* the (c) Custom of Merchants, but he may plead Infancy in the same *Harrison, ad-* Manner that he may to any other Contract of his. *judged on*

*Demurrer.* (c) Not a Trader within the Statutes of Bankrupts. *Vide Tit. Bankrupt.*

*Hob.* 325. An Infant cannot be a (d) Juror; and it is said by *Hobart*, that by the *(d)* But may Wisdom of the Common Law a Person under forty-two could not be on *be a Wit-* a Trial *de Ætate probanda*, because he then tried a Matter which might *ness, if he* have happened before he was twenty-one. *appears to* have Discre- *tion. Vide Tit. Evidence.*

*2 Inst.* 47. An Infant, or one under the Age of twenty-one Years, cannot be *(e)* This is elected a Member of the (e) House of Commons; nor can any Lord of *expressly en-* Parliament sit there until he be of the full Age of twenty Years. *acted by the* *7 & 8 W. & M. cap.* 25.

*Vide Head of* An Infant may be appointed Executor, but he cannot administer till *Executors and* he is of the Age of seventeen; and before that Age, Administration is to *Administrators,* be granted to some Friend of his; but an Infant cannot be an Administra- *Letter* tor before the full Age of twenty-one Years, because before that Age he *(A).* cannot give Bond, as required by the Statute, to administer faithfully.

## (F) Of what Things capable, being for his own Advantage.

*Co. Lit.* 2. S. AN Infant is capable of inheriting, for the Law presumes him capable *2 Inst.* 203. of Property; also an Infant may purchase, because it is intended for his Benefit, and the Freehold is in him till he disagree thereto, because an Agreement is presumed, it being for his Benefit, and because



the Freehold cannot be in the Grantor contrary to his own Act, nor can be in Abeyance, for then a Stranger would not know against whom to demand his Right; and if at his full Age the Infant agrees to the Purchase, he cannot afterwards avoid it; but if he dies during his Minority, his Heirs may avoid it; for they shall not be bound by the Contracts of a Person who wanted Capacity to contract.

If an Infant take a Lease for Years rendering Rent, if he enter upon the Land he shall be charged with an Action of Debt during his Minority, because the Purchase is intended for his (a) Benefit; but he may waive the Term, and not enter, and if more Rent be reserved upon the Lease than the Land is worth, he may avoid it.

2 Bull. 69.  
(a) That the Court of Chancery will Decree

building Leases for 60 Years of Infants Estates, when it appears to be for their Good. 2 Vern. 224.

If an Infant be Lord of a Copyhold Manor, he may grant Copyholds notwithstanding his Nonage; for these Estates do not take their Perfection from the Interest or Ability of the Lord to grant, but from the Custom of the Manor, by which they have been demised, and are demisable, Time out of Mind.

4 Co. 23. b.  
Co. Copyholder 79, 107.  
Noy 41.  
8 Co. 63.

An Infant may present to a Church; and here it is said, that this must be done by himself, of whatsoever Age he be, and (b) cannot be done by his Guardian, for the Guardian can make no Advantage thereof, and consequently has nothing therein whereof he can give an Account, and therefore the Infant himself shall present.

Co. Lit. 17. b.  
89. a. 29 E.  
3. 5.  
3 Inst. 156.  
(b) But it is said, that if the Heir be

within the Age of Discretion, the Guardian may present in his Name. Cro. Jac. 99. & vide Parson's Law, cap. 20. fol. 76. — Also a Presentment made by the Guardian, in the Name of the Heir, is a good Title to the Heir in a *Quare Impedit*. 42 E. 3. 130.

## (G) How far the Law takes Care of his Interest, so as not to let him suffer by his Laches; and herein, Where he must take Notice of and perform Conditions, &c.

THE Rights of Infants are much favoured in Law, and regularly their Laches shall not be prejudicial to them, upon a Presumption that they understand not their Right, and that they are not capable of taking Notice of the Rules of Law, so as to be able to apply them to their Advantage; hence by the Common Law Infants were not bound for want of (c) Claim and Entry within a Year and a Day, nor are they bound by a Fine and five Years Non-claim, nor by the Statutes of Limitation, provided they prosecute their Right within the Time allowed by the Statute after the Impediment removed.

Plow. 338. a.  
360. a.  
4 Co. 125. a.  
vide Tit. Fines and Recoveries, and Tit. Limitations.  
(c) Not bound by a Cessavit per Biennium, because the

Law intends that he doth not know what Arrearages to tender.

3 Mod. 223.

If Lands are devised to Trustees till Debts paid, and then to an Infant and his Heirs, and *j. s.* a Stranger enters on the Lands, and levies a Fine and five Years and Non-claim pass, and the Infant, when of Age, brings an Ejectment, but is barred, because the Trustees ought to have entred; yet Equity will relieve, and not suffer an Infant to be barred by the Laches of his Trustees, nor to be barred of a Trust-Estate during his Infancy; and the Infant in this Case shall recover the mean Profits.

2 Vern. 386.  
Allen ver. Sayer.

*Preced. Chan.*  
518. *Lockey*  
and *Lockey*.

It has been ruled in Chancery, that where one receives the Profits of an Infant's Estate, and six Years after his coming of Age he brings a Bill for an Account, that the Statute of Limitations is a Bar to such Suit, as it would be to an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Estate is not such a Trust, as being a Creature of a Court of Equity, the Statute shall be no Bar to, for he might have had his Action of Account against him at Law, and therefore no Necessity to come into this Court for the Account; but the Reason why such Bills are brought here, is from the Nature of the Demand, that they might have the Discovery of Books, Papers, and the Party's Oath, for the more easy Taking of the Account, which they cannot so well do at Law; but if the Infant lies by for six Years after he comes of Age, as he is barred of his Action of Account at Law, (a) so shall he be of his Remedy in this Court; and there is no Sort of Difference in Reason between the two Cases.

(a) If a  
Stranger enters and receives the

Profits of an Infant's Estate, he shall, in Consideration of Equity, be looked upon as a Trustee for the Infant. 2 *Vern.* 342. 1 *Vern.* 295. S. C. — So if a Man, during a Person's Infancy, receives the Profits of an Infant's Estate, and continues to do so for several Years after the Infant comes of Age before any Entry is made on him, yet he shall account for the Profit thro'out, and not during the Infancy only. *Abr. Eq.* 280. *Tallop* and *Holworthy*.

*Lit. sect.* 402,  
403.

The Entry of an Infant is not taken away by a Descent cast, by Reason of his Weakness and Incapacity to claim, which is not to be imputed to him.

*Co. Lit.* 245. b.

But if a Man seised of Lands in Fee die, his Wife *privement ensient* with a Son, and a Stranger abates, and dies seised, and after the Son is born he shall be bound by the Descent; because at the Time of the Descent he had no Right to enter, not being in *esse*, and by Consequence had no Wrong then done him, and the Lord had none but the Heir to avow upon at the Time of the Descent.

*Co. Lit.* 246. a.

*B.* Tenant in Tail enfeoffs *A.* in Fee, who hath Issue within Age, and dies, *B.* abates and dies seised, the Issue of *A.* being still within Age; this Descent shall bind the Infant, because the Issue in Tail is remitted to his former and elder Right, which is to be preferred before the defeazible Title of the Discontinuee's Heir.

*Co. Lit.* 244.  
3 *Co.* 101.  
*Sir Richard*  
*Pembell's*  
*Case.*  
*Blow.* 372.

It is a Rule in Law, that the Possession and dying seised of a *Bastard eigne* bars the *Mulier*; so if the *Mulier* be an Infant during the Possession of the *Bastard eigne*, yet he is barred by the Descent; for tho' no Laches can be imputed to an Infant, because not being of the Age of Consent, his Permission cannot be taken for a Consent; yet in such Cases, where Time is limited by the Law for Pleas and Actions, Infants are included, unless specially excepted, for here their Permission is taken for a Consent; because they are supposed to consent to the established Law, to which they are obliged for Protection during Minority; and the Law hath not thought fit in this Case, because it might happen to be a publick Mischief in a very tender Point, for it might be any Man's Case to suffer by the Bastardy of an Ancestor; and the Law hath given the Infants Guardians to plead by, but it cannot revive the Evidence of Legitimation, which so easily perishes with the Life of the Party.

2 *Inst.* 303.

If an Infant be Tenant by the Curtesy, or Lessee for Life or Years, he shall answer not only for Waste committed by himself, but also for permissive Waste, or Wastes, committed by a Stranger; for the Privilege of Infancy cannot prevail in a Matter that would be a Wrong and Disherison to him who hath the Inheritance; nor is it in the last Case any Hardship to the Infant, because he hath his Remedy over against the Wrong-doer.

2 *Inst.* 703.

If by Tenure, or Prescription, certain Lands are obliged to the Repair of Bridges, Highways, &c. and such Lands come to an Infant either by Descent or Purchase, he shall be obliged to repair, &c. in the same Manner as if he were of full Age

If an Infant present not to a Church within six Months, it shall lapse; *Co. Lit. 140* if the five Years for making a Claim after a Fine begin in the Ancestor's Life, he must claim within them; if he do not claim a Villain, fled into ancient Demefne, within a Year and a Day, he cannot afterwards claim him; and he shall be barred in an Appeal of the Death of his Ancestor, if he do not bring it within a Year and a Day: If the King die seised, the Infant is driven to his Petition; for in these Cases the Law prefers the Good of the Church, the publick Repose of the Realm, Liberty, Life, and the King's Prerogative, before the Privilege of Infancy.

An Infant is bound by (a) all Conditions, Charges and Penalties, in an original Conveyance, whether he comes to the Estate by Grant or Descent.

*1 Inst. 233.*  
*8 Co. 44.*  
*Latch 199.*  
*2 Rol. Rep. 72.*  
*1 Leon. 100. Hard. 11.* (a) Bound by Conditions annexed to the Estate at Common Law, because *transit cum onere*; and therefore if the Infant will have the Estate, he must observe the Condition upon which it was granted. *Carth. 45.*

Therefore if a Person devise to his Granddaughter, who is not Heir at Law, Lands, upon Condition that she marry with the Consent of certain Trustees, she is obliged to take Notice, at her Peril, of the Condition, and likewise to perform it; but had she been Heir at Law, she must have had Notice given her of the Condition, to make the Marriage, without Consent, a Forfeiture.

An Infant shall be bound by Conditions in Fact, and such Conditions as he can perform, in Equity as well as in Law, as was adjudged in the precedent Case of *Fry and Porter*.

So where *A.* gave Lottery-Tickets amongst her Servants, on Condition, that if any of them came up a Prize of 20*l.* or more, they should give one Half to her Daughter; the Ticket given the Foot-Boy, who was an Infant, came up 1000*l.* Prize; and it was held in Chancery, that the Daughter was well intitled to a Moiety, for a Gift to an Infant, on Condition, binds him as well as another Person.

If an Office of Parkship be given or descends to an Infant, if the Condition in Law annexed to such an Office (which is Skill) be not observed, the Office is forfeited.

If a Man make a Feoffment in Fee to another, reserving Rent, and if he pay not the Rent within a Month, that he shall double the Rent, and the Feoffee dieth, his Heir within Age, the Infant, payeth not the Rent, he shall not by his Laches herein forfeit any Thing; but otherwise it is of a Feme Covert; and the Reason of the Diversity is, because the Infant is provided for by the (b) Statute, *non current usura contra aliquem infra etatem existens*, &c. but that Statute doth not extend to a Feme Covert, neither doth it extend to a Condition of a Re-entry, which an Infant ought to perform, for the Forfeiture thereof cannot be called *usura*.

It has been held by some (c) Opinions, where the Custom of a Copyhold Manor was, that every Surrender which is made *secundum consuetudinem* out of Court, shall be presented by the Homage at the next Court to be held for the said Manor; and that upon such a Presentment Proclamation had been usually made, and so for three Courts next following; and if upon the third Proclamation no Person came to be admitted, &c. that then the Lord of the Manor should seize the Lands as forfeited, that this Custom bound an Infant.

But this is now settled by the 9 *Geor. 1. cap. 29.* by which it is enacted, 'That no Infant, or Feme Covert, shall forfeit any Copyhold, Messuages, &c. for their Neglect or Refusal to come to any Court or Courts, to be kept for any Manor whereof such Messuages, &c. are Parcel, and to be admitted thereto; nor for the Omission or Denial

2 Salk. 415.  
per Cowper  
Lord Chan-  
cellor.

‘ to pay any Fine or Fines imposed or set upon their, or any of their  
‘ Admittances to any such Copyhold, Messuages, &c.

If a Legacy be devised generally, and no Time ascertained for the Payment, and the Legatee be an Infant, he shall be paid Interest from the Expiration of the first Year after the Testator's Death; but it seems a Year shall be allowed, for so long the Statute of Distribution allows before the Distribution be compellable, and so long the Executor shall have, that it may appear whether there be any Debts; but if the Legatee be of full Age, he shall only have Interest from the Time of his Demand after the Year; for no Time of Payment being set, it is not payable but upon Demand, and he shall not have Interest but from the Time of his Demand; otherwise it is in the Case of an Infant, because no Laches is imputed to him.

### (H) Where punishable for Crimes and Injuries committed by him.

1 Hal. Hist.  
P. C. 16, &c.  
supra Letter  
(A).

IT has been already observed, that one above the Age of fourteen, or of the Years of Discretion, may be guilty of a Capital Offence in the same Manner as one of full Age; also that one under these Years, if above the Age of seven, may according to the Circumstances of the Case, as if in Murder he hides the Body slain by him, makes Excuses, or otherwise shews such Signs of Cunning as demonstrate him capable of discerning between Good and Evil, be guilty and convicted of a Capital Offence; but that in these latter Cases, the Judges may respite Judgment, or Execution, in order to the obtaining the King's Pardon.

1 Hal. Hist.  
P. C. 28-9.

Also if an Infant, under the Age of fourteen, be indicted by the Grand Inquest, and thereupon arraigned, the Petit Jury may either find him generally Not guilty, or they may find the Matter specially that he committed the Fact, but that he was under the Age of fourteen, *scilicet etatis 13 annorum*, and had not Discretion to discern between Good and Evil, & *non per feloniam*; but if a Man be arraigned in such a Case upon an Indictment of Murder, or Manslaughter, by the Coroner's Inquest, there if the Party committed the Fact, regularly the Matter ought to be specially found; because if the Jury find the Party Not guilty, they must inquire how he came by his Death; but if he be first arraigned, and acquitted upon the Indictment by the Grand Inquest, and found Not guilty, he may plead that Acquittal upon his Arraignment upon the Coroner's Inquest, and that will discharge him; and the Petit Jury shall inquire farther how the Party came by his Death.

1 Hal. Hist.  
P. C. 20.

As to Misdemeanors and Offences that are not Capital, in some Cases an Infant is privileged by his Nonage; and herein the Privilege is all one, whether he be above the Age of fourteen, or under, if he be under one and twenty Years, but with these Differences:

Bro. Saver  
Default 50.  
Plow. 364. a.  
Co. Lit. 246 b.  
2 Inst. 703.  
Cro. Jac. 467.  
1 Hal. Hist.  
P. C. 20.

If an Infant under the Age of Twenty-one Years be indicted of any Misdemeanor, as a Riot or Battery, he shall not be privileged barely by reason that he is under Twenty-one Years; but if he be convicted thereof by due Trial, he shall be fined and imprisoned; and the Reason is, because upon his Trial the Court *ex officio* ought to consider and examine the Circumstances of the Fact, whether he was *doli Capax*, and had Discretion to do the Act wherewith he is charged; and the same Law is of a Feme Covert; but if the Offence charged by the Indictment be a meer Nonfeasance, (unless it be of such a Thing as he is bound to by reason of Tenure, or the like, as to repair a Bridge, &c.) there in some

Cases

Cases he shall be privileged by his Nonage, if under Twenty-one, tho' above fourteen Years, because Laches in such a Case shall not be imputed to him.

If an Infant in an Assise vouch a Record, and fail at the Day, he shall not be imprisoned, nor, it seems, a Feme Covert; and yet the Statute of *Westm. 2. cap. 25.* that gives Imprisonment in such a Case, is general. 1 Hal. Hist. P. C. 20.

If *A.* kills *B.* and *C.* and *D.* are present, and do not attach the Offender, they shall be fined or imprisoned; yet if *C.* were within the Age of Twenty-one Years, he shall not be fined nor imprisoned. 1 Hal. Hist. P. C. 21.

Where the Corporal Punishment is but collateral, and not the direct Intention of the Proceeding against the Infant for his Misdemeanor, there in many Cases the Infant, under the Age of Twenty-one, shall be spared, tho' possibly the Punishment be enacted by Parliament. 1 Hal. Hist. P. C. 21.

It is said by *Hale*, that if an Infant, of the Age of eighteen Years, be convict of a Disseisin with Force, yet he shall not be imprisoned, and yet a Feme Covert shall be imprisoned in such Case. 1 Hal. Hist. P. C. 21.

But herein the Law seems to be, that an Infant at the Age of eighteen, nay fourteen, or a Feme Covert, by their own Acts may be guilty of a forcible Entry, and they may be fined for the same; but it seems, by the better Opinion, that the Infant cannot be imprisoned, because his Infancy is an Excuse by reason of his Indiscretion, being not (a) particularly mentioned in the Statute against forcible Entries, to be committed for such Fine. Bridg. 173.  
Crompt. Just. 61.  
Dalt. 302.  
Co. Lit. 357.  
(a) That the Infant ought not to be im-

prisoned, because he shall not be subject to Corporal Punishment by force of the general Words of any Statute wherein he is not expressly named. 1 Hawk. P. C. 147.

But neither an Infant, or Feme Covert, can be guilty of a forcible Entry, or a Disseisin, by barely commanding one, or by assenting to one to their Use, because every such Command or Assent by Persons under these Incapacities are void; but an actual Entry by an Infant, into another's Freehold, gains the Possession, and makes him a Disseisor as well as it does a Feme Covert. Crom. 69.  
Co. Lit. 357.  
1 Hawk. P. C. 147.

Two Infants Jointenants, one releases to the other, by which the other holds the whole, this seems a Disseisin, because the Release being in no Manner for the Advantage of the Infant, is utterly void; then the Entry of the other being without Title is tortious, and a Disseisin; but if there had been Livery made upon it, tho' between Jointenants, this is void; yet it seems no Disseisin, for the Regard the Law has to the Solemnity of Livery, which shall continue till defeated by Act of equal Notoriety. Bro. Disseisin 19.

If a Man carries an Infant into the Lands of *J. S.* and there claims the Lands to the Use of himself and the Infant, yet the Infant seems no Disseisor, because he made no claim of it himself, and then shall not be charged with the Tort of another Person. 1 Rol. Abr. 661.

If an Infant be convict in an Action of Trespass *Vi & Armis*, the Entry must be *Nil de fine, sed pardonatur quia Infans*, for if a *Capiatur* be entered against him, it is Error, for it appears judicially to the Court that he was within Age when he appears by Guardian; the like Law is, that he shall not be in *Misericordia pro falso clamore*. Cro. Jac. 274.  
1 Hal. Hist. P. C. 21.

General Statutes, that give Corporal Punishment, are not to extend to Infants; and therefore if an Infant be convict in Ravishment of Ward, he shall not be imprisoned, tho' the Statute of *Merton, cap. 6.* be general in that Case; but this must be understood where it is, as before said, a Punishment as it were collateral to the Offence, as in the Cases before mentioned. Plow. 364.  
1 Hal. Hist. P. C. 21.

But where a Fact is made Felony or Treason, it extends as well to Infants, if above fourteen Years, as to others; and this appears by several Co. Lit. 247.  
1 Hal. Hist. P. C. 21, 22.

(a) So by the Statute of 21 H. 8. cap. 7. concerning Felony by Servants that imbezel their Masters Goods delivered to them, there is a special Proviso, that it shall not extend to Servants under the Age of eighteen Years, who certainly had been within the Penalty if above the Age of Discretion, viz. fourteen Years, tho' under eighteen Years, unless a special Provision had been to exclude them. 1 Hal. Hist. P. C. 22. — So by the 12 Ann. cap. 7. where Apprentices, under the Age of fifteen Years, who shall rob their Masters, are excepted out of the Act.

1 Sid. 258.

1 Lev. 169.

1 Keb. 905,

913. S. C.

Johnson and

Pie.

(b) That an

Action for

Words lies

against an

Infant of the

Age of seven-

teen, for *Malitia supplet Aetatem*. Noy 129.

Infants are liable for Torts and Injuries of a private Nature; but if an Infant, affirming himself to be of Age, borrows 100 l. and gives his Bond for it, and being sued upon the Bond, avoids it by reason of his Nonage, yet no Action lies against him for the Deceit; for tho' Infants shall be bound by actual Torts, (a) as Trespais, &c. which are *Vi & Armis*, yet they shall not for those that sound in Deceit; for if they should, all the Infants in *England* might be ruined; adjudged, and Judgment arrested after a Verdict for the Plaintiff in an Action upon the Case for the Deceit.

1 Keb. 778.

Grove and

Nevil.

1 Sid. 258.

1 Lev. 169.

S. C. cited.

So where an Action of Deceit was brought for affirming upon the Sale of a Horse, that it was the Defendant's Horse, whereas it was the Horse of another Man, &c. the Defendant pleaded Infancy; and on Demurrer the Court, on the first Argument, inclined for the Defendant, for this Action depends upon the Contract; and tho' the Contract (it being an actual Delivery) be not void, but voidable, and this Action be brought upon the Wrong, and not upon the Contract, yet here, by this Plea, he shews that he elects to avoid the Contract, and then this Action falls; and afterwards it was adjudged for the Defendant; and the Court said, that it was like an Action brought against an Infant for affirming himself to be of full Age.

1 Sid. 258.

per cur.

But if an Infant judicially perjure himself in Point of Age, or otherwise, he shall be punished for the Perjury; so he may be indicted for cheating with false Dice, &c.

## (I) Of the Acts of Infants as they are good, void, or voidable: And therein,

### 1. Of their Contracts for Necessaries.

10 H. 6. 14.

18 E. 4. 2.

1 Rol. Abr.

729.

HERE we must observe, that strictly speaking, all Contracts made by Infants are either void or voidable, because a Contract is the Act of the Understanding, which during their State of Infancy they are presumed to want; yet Civil Societies have so far supplied that Defect, and taken Care of them, as to allow them to contract for their Benefit and Advantage, with Power, in most Cases, to recede from and vacate it when it may prove prejudicial to them; but in this Contract for Necessaries they are absolutely bound, and this likewise is in Benignity to Infants, for if they were not allowed to bind themselves for Necessaries, no Body would Trust them, in which Case they would be in worse Circumstances than Persons of full Age.

Therefore it is clearly agreed by all the Books that speak of this Matter, that an Infant may bind himself to pay for his necessary Meat, Drink, Apparel, necessary Physick, and such (a) other Necessaries, and likewise for his good Teaching and Instruction, whereby he may profit himself afterwards.

up Provision for his Wife and Children. *Carter* 215. *laid.*

But it must appear that the Things were actually necessary, and of reasonable Prices, and suitable to the Infant's (b) Degree and Estate, which regularly must be left to the Jury; but if the Jury find that the Things were Necessaries, and of reasonable Price, it shall be presumed they had Evidence for what they thus find; and they need not find particularly what the Necessaries were, nor of what Price each Thing was; also if the Plaintiff declares for other Things as well as Necessaries, or alleges too high a Price for those Things that are necessary, the Jury may consider of those Things that were really Necessaries, and of their intrinsic Value, and proportion their Damages accordingly.

Necessaries; as between a Nobleman and Gentleman's Son; also in Point of Time and Education, the Law distinguisheth; as at School, *Oxford*, and Inns of Court; and that he is not to be looked upon in the same Condition when a School Boy, as when of riper Years. *Carter* 215. — Velvet and Satin Suits laced with Gold held not to be necessary. *Cro. Eliz.* 385.

If an Infant promises another, that if he will find him Meat, Drink and Washing, and pay for his Schooling, that he will pay 7 *l.* yearly; an Action upon the Case lies upon this Promise; for Learning is as necessary as other Things, and tho' it is not mentioned what Learning this was, yet it shall be intended what was fit for him, till it be shewn to the contrary on the other Part; and tho' he to whom the Promise was made does not instruct him, but pays another for it, the Promise of Repayment thereof is good; and it appears that the Learning, Meat, Drink and Washing, could not be afforded for a less Sum than 7 *l.*

*Assumpsit* for Labour and Medicines in curing the Defendant of a Distemper, &c. who pleaded *infra statum viginti & unius annorum*; the Plaintiff replied, it was Necessaries generally; and upon a Demurrer to this Replication it was objected, that the Plaintiff had not assigned in certain how or in what Manner the Medicines were necessary; but it was adjudged that the Replication in this general Form was good.

If an Infant be a Mercer, and hath a Shop in a Town, and there buys and sells, and he contracts to pay a certain Sum to *J. S.* for certain Wares sold to him by *J. S.* to re-sell, yet he is not chargeable upon this Contract, for this Trading is not immediately necessary *ad victum & vestitum*; and if this were allowed, Infants might be infinitely prejudiced, and buy and sell and live by the Loss.

And as the Contract of an Infant for Wares, for the necessary carrying on his Trade, whereby he subsists, shall not bind him; so neither shall he be liable for Money which he borrows to lay out for Necessaries; and therefore the Lender must, at his Peril, lay it out for him, or see that it is laid out in Necessaries.

As in Debt upon a single Bill, the Defendant pleaded that he was within Age; the Plaintiff replied, that it was for Necessaries, *viz.* 10 *l.* for Cloaths, and 15 *l.* Money lent *pro & erga* his necessary Support at the University; the Defendant rejoined, that the Money was lent him to spend at Pleasure; *absque hoc*, that it was lent him for Necessaries; and Issue hereupon was found for the Plaintiff, who had Judgment in *C. B.* but was reversed in *B. R.* on a Writ of Error; for the Issue only being, whether this Money was lent the Infant for Necessaries, not whether it was laid out in Necessaries, it cannot bind the Infant whichever way it is

*Co. Lit.* 172. a. *et c.*  
(a) If an Infant at the Age of fifteen marries, he may take

*Cro. Jac.* 562.  
*2 Rol. Rep.* 144.  
*Po. h.* 151.  
*Palm.* 301.  
*Gulf.* 168.  
*Geob.* 219.  
*1 Leon.* 114.  
(b) That the Law distinguishes between Persons as to

*1 Rol. Abr.* 729.  
*Palm.* 528.  
*1 Jon.* 182.  
*S. C. Pucker- ing ver. Gun- ning*, adjudged on a Motion in Arrest of Judgment.

*Carth.* 110.  
*Hugens and Wiseman.*

*1 Rol. Abr.* 729.  
*Cro. Jac.* 494.  
*2 Rol. Rep.* 45.  
*S. C.* adjudged between *Hill and Whittingham.*

*5 Mod.* 368.  
*1 Salk.* 386-7.

*1 Salk.* 386.  
*Farle ver. Peale.*



found; for it might have been borrowed for Necessaries, and laid out in a Tavern; and the Law will not intrust the Infant with Application and laying of it out.

1 Salk. 279. So if one lends Money to an Infant, who actually lays it out in Necessaries, yet this shall not bind the Infant, nor subject him to an Action; for it is upon the Lending that the Contract must arise, and after that Time there could be no Contract raised to bind the Infant, because after that he might waste the Money, and the Infant's applying it afterwards for Necessaries will not by Matter *ex post facto* intitle the Plaintiff to an Action.

Cro. Eliz. 920. Also altho' an Infant shall be liable for his Necessaries, yet if he enters into an Obligation with a Penalty for Payment thereof, this shall not bind him; for the entering into a Penalty can be of no Advantage to the Infant.

Co. Lit. 172. It is also said, that an Infant cannot either by a Parol Contract or a Deed bind himself, even for Necessaries, in a Sum certain, and that should an Infant promise to give an unreasonable Price for Necessaries, that would not bind him; and that therefore it may be said, that the Contract of an Infant for Necessaries, *quatenus* a Contract, does not bind him any more than his Bond would; but only since an Infant must live, as well as a Man, the Law gives a reasonable Price to those who furnish him with Necessaries.

(a) 1 Lev. 86. Yet it hath been (a) adjudged, and is admitted in several (b) other Books, that if an Infant contracts for Necessaries, and enters into a single Bill for Payment, that this shall bind him, and that an Action of Debt will lie on such Obligation.

(b) Co. Lit. 172. S. P. and Diversity taken between a single Obligation and an Obligation with Penalty. Cro. Eliz. 910. S. P. and same Diversity *per Curiam*. 1 Rol. Abr. 729. S. P. tho' thereby the Defendant is outted of his Wager of Law.

1 Rol. Abr. 729. So an Infant may bind himself in an *Assumpsit* for Payment of Necessaries, and an Action upon the Case lies against him upon the Promise for this, but in Nature of an Action of Debt; and therefore where Debt lies, an Action on the Case lies against him.

Noy 85. Also it seems clear, that if an Infant becomes indebted for Necessaries, and the Party takes a Bond from the Infant, that this shall not drown the simple Contract, because the Bond has no Force.

Co. Lit. 172. But it is agreed, that an *Infimus computasset* will not lie against an Infant, tho' it be for Necessaries; for he not having Discretion, is not to be liable to false Accounts.

Latch 157, & v. 3 Balf. 188. If an Infant comes to a Stranger who instructs him in Learning, and boards him, there is an implied Contract in Law that the Party should be paid as much as his Board and Schooling are worth; but if the Infant at the Time of his going thither was under the Age of Discretion, or if he were placed there upon a special Agreement with some of the Child's Friends, the Party that boards him has no Remedy against the Infant, but must resort to them with whom he agreed for the Infant's Board, &c.

1 Rol. Abr. 729.

Noy 85.

Latch 157, &

v. 3 Balf. 188.

1 Rol. Rep.

382.

Cro. Eliz. 920.

Co. Lit. 172.

Latch 169.

Noy 87.

Allen 94.

Truncomb and

Tickridge.

## 2. Of judicial Acts, or Acts done by him in a Court of Record.

Co. Lit. 380. As to judicial Acts and Acts done by an Infant in a Court of Record, they regularly bind the Infant and his Representatives, with the following Savings and Exceptions; as if an Infant levies a Fine, tho' the Judges ought not to admit the Acknowledgment of one under that Disability; yet having once recorded his Agreement as the Judgment of the Court, it shall



shall for ever bind him and his Representatives, unless he reverses it by Writ of Error, which must be brought by him during his Minority, that the Court by Inspection may determine his Age. *T. 155. 3 Mod. 229.*

So if an Infant levies a Fine, he is enabled by Law to declare the Uses thereof, and if he reverseth not the Fine during his Nonage, the Declaration of Uses will stand good for ever; for tho' that be a Matter in *Pais*, and all such Acts an Infant may avoid at any Time after his full Age, if he do not consent; yet being made in Pursuance of the Fine levied, which Fine must stand good for ever, (unless reversed in the Manner as has been mentioned,) so will the Declaration of Uses too. *2 Co. 58. a. 10 Co. 42. Moor 22. Dalf. 47. 2 Leon. 159. Goulsf. 13. 1 Jones 390. Winch 103, 104. 1 Leon. 115, 317. 2 Sid. 55. 2 Jones 182.*

If there be Tenant for Life, the Remainder to an Infant in Fee, and they two join in a Fine, the Infant may bring a Writ of Error, and reverse the Fine as to himself; but it shall stand good as to the Tenant for Life; for the Disability of the Infant shall not render the Contract of the Tenant for Life, who was of full Age, ineffectual.

If an Infant brings a Writ of Error to reverse a Fine for his Nonage, and his Nonage, after Inspection, is recorded by the Court, but before the Fine reversed he levies another Fine to another, this second Fine shall hinder him from reversing the first; because the second having intirely barred him of any Right to the Land, must also deprive him of all Remedies which would restore him to the Land. *1 Rol. Abr. 788.*

If an Infant levies a Fine, and the Conuzee renders to him either for Life or in Tail, it is said that he shall have no Writ of Error to avoid this Fine; because the Reversal of the Fine being only to restore him to the Land he parted with by the Fine, it would be fruitless to give him a Writ of Error, since he could not thereby be restored to the Land which the Fine itself, which he would endeavour to reverse, had before given him. *Moor 74. but quare.*

As to Recoveries suffered by Infants, when these were improved into a common Way of Conveyance, it was thought reasonable that those, whom the Law had judged incapable to act for their own Interest, should not be bound by the Judgment given in Recoveries, tho' it was the solemn Act of the Court; for where the Defendant gives Way to the Judgment, it is as much his voluntary Act and Conveyance, as if he had transferred the Land by Livery, or any other Act in *Pais*; and therefore if an Infant suffers a Recovery, he may reverse it as he may a Fine, by Writ of Error, during his Minority: And this was formerly taken to be Law, as well where the Infant appeared by Guardian, as by his Attorney or in Person: But now the Distinction turns upon this Point, that if an Infant suffers a Recovery in Person, it is erroneous, and he may reverse it by Writ of Error; but even in this Case the Writ of Error must be brought during his Minority, that his Infancy may be tried by the Inspection of the Court; for at his full Age it becomes obligatory and unavoidable; but in Cases of Necessity the Court has admitted the Infant to appear by Guardian, and to suffer a Recovery, or come in as Vouchee; but this too is seldom allowed by the Court, unless it be upon Emergencies, when it tends to the Improvement of the Infant's Affairs, or when Lands of equal Value have been settled on him, and when he has had the King's Privy Seal for that Purpose; and these Recoveries have been allowed and supported by the Judges, and the Infant could not set them aside or shake them; besides, if such Recoveries be to the Prejudice of the Infant, he has his Remedy for it against his Guardian, and may reimburse himself out of his Pocket to whom the Law had committed the Care of him. *1 Rol. Abr. 731, 742. Co Lit. 381. l. 2 Rol. Abr. 395. 10 Co. 43. a. Cro. Eliz. 471. Hob. 196. 7. Cro. Car. 307. 2 Bullf. 235. 1 Sid. 321. 2. 1 Lev. 142. 2 Sand. 94. 1 Vern. 461. 2 Salk. 567.*

Partition by Writ *de Partitione facienda* binds Infants, because by Judgment in a Court of Justice, to which no Partiality can be imputed. *Co. Lit. 171. b.*

If an Infant acknowledge a Recognizance or Statute, it is only voidable; and the Infant at his Peril must avoid them by *Audita Querela*, as he *Moor, pl. 206. 2 Inst. 483. he 673.*

*Co. Lit.* 380. he must a Fine or Recovery by Writ of Error, during his Minority; *Kelw.* 10. for such Conveyances or other Acts of Record become obligatory and *Reg.* 149. unavoidable, if they be not set aside before the Infant comes of Age; 10 *Co.* 43. *a.* the Reason is, because these Contracts being entered into under the Inspection of the Judge, who is supposed to do Right, the Infant cannot against them aver his Disability, but must reverse them by a Judgment of a superior Court, who by Inspection has the same Means to determine whether the inferior Jurisdiction has done Right, that first received the Contract.

2 *Ist.* 673. If an Infant bargain and sell his Land by Deed indented and inrolled, yet he may plead Nonage; for notwithstanding the Statute 27 *H.* 8. *cap.* 16. makes the Inrollment in a Court of Record necessary to complete the Conveyance; yet the Bargainee claims by the Deed as at Common Law, which was, and therefore is still, defeasible by Nonage.

### 3. Of his Acts in Pais, where void, or only voidable.

39 *E.* 3. 20. *b.* Infants are regularly allowed to rescind and break thro' all Contracts  
1 *Roll. Abr.* in Pais made during Minority, except only for Schooling and Necessaries,  
729. be they never so much to their Advantage; and the Reason hereof is, the  
*Co. Lit.* 172, Indulgence the Law has thought fit to give Infants, who are supposed to  
381. want Judgment and Discretion in their Contracts and Transactions with others, and the Care it takes of them in preventing their being imposed upon or over-reached by Persons of more Years and Experience.

*Cro. Car.* 502. And for the better Security and Protection of Infants herein, the Law  
1 *Jones* 405. has made some of their Contracts absolutely void; *i. e.* all such in which  
3 *Mud.* 310. there is no apparent Benefit or Semblance of Benefit to the Infant; but as to those from which the Infant may receive Benefit, and which were entered into with more Solemnity, they are only voidable; that is, the Law allows them when they come of Age, and are capable of considering over again what they have done, either to ratify and affirm such Contracts, or to break thro' and avoid them.

*Co. Lit.* 2, 8. Hence it hath been agreed, that an Infant may purchase, because it  
2 *Vent.* 203. is intended for his Benefit, and that at his full Age he may either agree or disagree to the same.

*Co. Lit.* 380. Also the Feoffment of an Infant is not void, but only voidable, not  
*Dyer* 104. only because he is allowed to contract for his Benefit, but because that  
2 *Roll. Abr.* there ought to be some Act of Notoriety to restore the Possession to him,  
572. equal to that which transferred it from him.

4 *Co.* 125. *a.* Therefore if an Infant make a Feoffment and Livery in Person, he  
8 *Co.* 42. shall have no Assise, &c. but must avoid it by (a) Entry; for it is to be  
*Bro. Tit. Dis-* presumed in Favour of such Solemnity, that the Assembly of the Pais  
*seisin,* 63. then present would have prevented it, if they had perceived his Nonage,  
(a) May a- and therefore the Feoffment shall continue till defeated (b) by Entry,  
void his Feoffment which is an Act of equal Notoriety.  
by Entry  
during his

Minority, but must have the Writ *dum fuit infra Aetatem* till his full Age. *F. N. B.* 172. *Co. Lit.* 380.  
*Sk w. Parl. Cases* 153. *Co. Lit.* 247. *a.* (b) But if an Infant exchanges with another, if the other enters, the Infant may have an Assise. 18 *E.* 4. 2. 1 *Roll. Abr.* 730.

2 *Roll. Abr.* 2. But if the Infant had made a Letter of Attorney to deliver Seisin, he  
*Noy* 130. might have an Assise, &c. because the Letter of Attorney, like all other  
*Palm.* 237. Acts or Agreements made by an Infant to his (c) Prejudice, must be  
(c) But a void; and therefore whoever claims under it, or by Virtue of its Autho-  
Feoffment rity, must be (d) a Wrong-doer.  
to an Infant,  
with a Let-  
ter of Attorney by him to accept Livery, is said to be only voidable. because for the Infant's Bene-  
fit. 1 *Roll. Abr.* 730. (d) That the Attorney who executes it is a Disseisor, 1 *Roll. Rep.* 242.

So if an Infant enfeoffs his Guardian, this is void, for the apparent Prejudice it must be to the Infant. 35 Aff. 3  
1 Roll. Abr. 725

If an Infant make a Lease for Years, reserving Rent, it seems agreed that such a Lease is only voidable by the Infant. Vide Head of  
Leases.

But if he make a Lease for Years, without Reservation of any Rent, it seems by the Opinion of the greater Number of the Books, that from the apparent Prejudice and Hurt it must be to the Infant, that such Lease is absolutely void : But this Point does not appear to have been ever judicially determined ; and indeed the Reasons against it seem very cogent, and that it would be a greater Indulgence to the Infant, and more for his Service, to allow him when he comes of Age, and is capable of considering over again what he has done, either to ratify and affirm all his Contracts, or to break thro' and avoid them ; and that this Power should be extended to all Leases and Contracts made by Infants during their Minority, as well to those which are for their Benefit and Advantage, as to those which apparently tend to their Hurt and Prejudice ; for if it were to be confined only to the last, it would exclude them from being Judges of either, since no Man can be supposed to know what is to his Disadvantage, but as he is allowed to compare it with such Things as are for his Advantage and Good ; and therefore the Power of judging in general must be left to him ; and as a Consequence thereof, it should seem that he may, when he comes of Age, either affirm or avoid all Leases or Contracts made by him during his Minority, according as he judges them to be beneficial or hurtful to him, without any intervening Judgment of Law to condemn some only, and leave others to the Infant's Discretion, when he comes of Age ; and the giving of Infants such Power in general over all their Contracts, will sufficiently secure them against the Danger of being imposed on, or over-reached by others ; for when the Power is general, and all Persons who deal with Infants know they are to be at their Mercy, when they come of Age, whether they will think fit to stand to their Bargain, or not, this will take off from the Temptation of imposing upon them ; or if any should be so hardy as to do it, yet since the Infant is at Liberty, when he comes of Age, to rescue himself by avoiding such injurious Contract, there seems no possible Mischief in the mean time to suffer such Contract to hang *in Equilibrio*, and defer pronouncing any Sentence upon it, since that, as has been said, would curtail the Infant's Power, and take off from his Freedom of judging at all ; besides that, the very Reason of giving to Infants such Power, was to secure them against the Imposition of others, which a Lease for Years, reserving the full Rent, cannot be supposed to be ; and therefore if they were only to use it in such Cases, it would be useless ; and if they were denied it in the other, where no Rent at all is reserved, (as they must be, if the Law prejudices for them,) it would be no Power at all in them, or at most but an empty and idle one ; therefore it seems by the stronger Reasons, if an Infant make a Lease for Years, without Reservation of any Rent, tho' this is apparently to his Hurt and Prejudice whilst he continues a Minor, yet since when he comes of Age he may either by Assise or Trespas recover the Possession and mesne Profits, and so make himself whole *ab initio*, the Lease is good in the mean time, and the rather, because most of the Books agree, that if a Rent were reserved on such Lease, it would then be only voidable ; whereas such Rent may be so small in Proportion to the Value of the Land, that there may be more Reason to adjudge it absolutely void, than if none at all were reserved ; because in the one Case the Imposition is apparent, but in the other it may be so misrepresented and coloured over as to deceive the Infant, even when he comes of Age, into some unwary Act of Ratification of it ; besides that, the Infant when he comes of Age may, if he think fit, make such Lease for Years without reserving any Rent : And why then may he not consent to, and

ratify such Lease, tho' made before, which (if the Law permitted him) he might do by accepting of Fealty, which is incident to every such Lease.

*Abbot* 105.

2 *Leon.* 216,  
218.

As to the Books before cited, that a Lease for Years by an Infant without any Reservation of Rent should be absolutely void, they are only *obiter* Opinions; and there is but one Case where it is expressly so held, and there only by two Judges; for *Gawdy* was of another Opinion, and the Judgment there given was upon the Right and Merits of the Case, not upon the Point of the Lease; tho' the two Judges, to enforce the Judgment for the Defendant, would have the Infant's Lease to the Plaintiff, upon which the Ejectment was brought, to be absolutely void, and so no Title at all against the Defendant, who was in Possession; besides the Lease there was by Parol, not by Deed, which may make a considerable Difference.

*Cro. Car.* 302.

1 *Jones* 405.

1 *Roll. Abr.*

728. *Loyd*  
and *Gregory*.

Another Case produced to enforce the Reason of such Leases being absolutely void, is, that a Surrender by an Infant to him in Reversion hath been adjudged to be absolutely void, whether it were a Surrender in Law by taking of a new Lease, or an express Surrender, and that no Agreement by him at full Age should make it good, so as to establish the second Lease; and the Reason there given was, because there being no Increase of his Term, or Decrease of the Rent, the Surrender was absolutely void at first; but there seems a much better Reason for the Judgment given in that Case; for the first Lease was made 1 *E. 6.* by a Dean and Chapter for fifty Years, and this Lease being afterwards assigned to Infants, they 29 *Eliz.* took a new Lease of the same Lands from the then Dean and Chapter for the same Term, and under the same Rent and Covenants as were in the first; but this second Lease not being warranted by 13 *Eliz.* the succeeding Dean and Chapter would have avoided it, and so stripped the Infants of any Interest at all in the Lands; to prevent which Mischief, and help the Infants, the Court gave Judgment against the Surrender, that it was absolutely void *ab initio*, and so the second Lease never good; and this was but a just Construction as this Case was; for if the Court had adjudged the Surrender to have been only voidable, then the Infants Agreement to the second Lease when they came of Age, would have made the Surrender of the first absolute, and then their Title standing only upon the second Lease, and that not warranted by 13 *Eliz.* they would have been defeated of both, which would have been a very severe Construction in a Case of this Nature, where the Operation of the Law in working the Surrender of the first Lease might be easily supposed not to be thought of or understood by them.

*Show. Parl.*

*Cases* 153.

3 *Mod.* 310.

2 *Salk.* 427,

576.

*Carth.* 435.

*Comb.* 439.

*S. C. Thomp-*

*son versus*

*Leah.*

Another Case produced is of a Surrender by a Person *non compos*, &c. who being Tenant for Life, with Remainder to his first and other Sons, did before the Birth of any Son surrender to him in the Remainder, with Intent to destroy the contingent Remainders to his Sons; but it was adjudged, that the Surrender was absolutely void *ab initio*, and by Consequence the contingent Remainders not hurt thereby; and there it was said, that the Grants of Infants and of Persons *non compos* were parallel both in Law and Reason, and the preceding Case was cited as an Authority in Point, that a Surrender by an Infant was *ipso facto* void, and so of a Person *non compos*, &c. but the Case of the Infant has already received an Answer; and this of the *Non compos* may be easily answered too; for if the Surrender should have been allowed, it would have been not only prejudicial to himself, but likewise to all his Sons after born, who were Strangers or third Persons; and there could no Use be made of the Surrender but to do them Mischief, which the Acts of a Madman ought not to be allowed to do, when by a reasonable Construction it is in the Power of the Court to help them, as in that Case they did, by adjudging the Surrender to be absolutely void, rather than voidable: So that notwithstanding the Cases above cited, it does not seem clear that

that the Lease of an Infant, without Reservation of any Rent, is absolutely void, but rather voidable, since their Power of avoiding it when they come of Age, sufficiently guards them against the Unreasonableness or Practice of others, which was the only Mischief the introducing this Law in Favour of Infants designed at first to obviate and prevent.

Also it hath been held, that if an Infant grant a Rent-charge out of his Land, this is not absolutely void, but only voidable by him when he comes of Age; for if the Grantee should then distrain for the Rent, tho' the other may bring an Action of Trespas, yet he cannot plead *Non concessit*; for the Deed is only voidable (a) by shewing of his Infancy, and not void because it was delivered with his own Hands.

*Trin. 6 Anna.*  
in *B. R.*  
*Hudson versus*  
*Jones.* But  
in *3 Mod.*  
310. it is  
said *per Cur.*  
that if an In-

fant grants a Rent-charge out of his Lands, it is not voidable, but *ipso facto* void; and that if the Grantee distrain for the Rent, the Infant may have an Action of Trespas against him. (a) That to a Lease for Years made by an Infant, he can in no Case plead *Non est factum*, but must avoid it by pleading the special Matter of his Infancy. 5 Co. 115. 2 Inst. 483. Cro. Eliz. 127. Moor pl. 132. Popb. 178.

Copyhold was granted to one for Life, Remainder to an Infant in Fee; they both join in a Surrender to one, who was admitted; then the Tenant for Life dies, and after the Infant dies, and his Heir enters; and it was adjudged that he might well enter, without being put to his Writ of *Dum fuit infra Etatem*; for such Surrender was but a Conveyance by Matter in *Pais*, which cannot bind an Infant, but that he or his Heirs may enter, or bring Trespas before Admittance.

*Cro. Eliz. 90.*  
*Knight versus*  
*Fortipon*; *per*  
*vide Cro. Car.*  
103.

If there be two Coparceners, and one of them an Infant, and they make an unequal Partition, this shall not bind the Minor; for tho' Partition, if equal, will bind an Infant, because compellable to make Partition; and whatever one is compellable to, may be done by the same Person voluntarily, yet when the Partition is unequal, and the lesser Part allotted to the Minor, this shall not bind her; for then the Security the Law has provided for Infants, to prevent their being over-reached, would be useless.

*Lit. sect. 268.*  
*Co. Lit. 171.*

But yet such unequal Partition is not absolutely void, but the Infant has Election either to affirm it at full Age, by taking the Profits of the unequal Part allotted to her, or to avoid it, either during her Minority, or at full Age, by Entry into the other Part with her Sister.

*Co. Lit. 171.*

If an Infant submit to Arbitration, he may execute or avoid it at his Election, as he may all other his Contracts.

13 H. 4. 12.  
10 H. 6. 14.  
March 111,  
141. 1 Rol. Abr. 730 1 Jones 164.

Also as to the Acts of Infants being void or voidable, there is a Diversity between an actual Delivery of the Thing contracted for, and a bare Agreement to deliver it only, that the first is voidable, but the last absolutely void; as if an Infant deliver a Horse or a Sum of Money with his own Hands, this is only voidable, and to be recovered back in an Action of Account.

*Rerk sect. 12.*  
19 1 Rol.  
*Abr. 730.*  
2 Rol. Rep.  
408  
*Lat. b 10.*

But if an Infant agrees to give a Horse, and does not deliver the Horse with his Hand, and the Donee take the Horse by Force of the Gift, the Infant shall have an Action of Trespas; for the Grant was merely void.

*Park sect. 12.*  
19  
1 Mod 137.

In Trespas *quare Vi & Armis Insultum fecit, & totum Crinem Capitis ipsius Annæ abscindit*, the Defendant as to all the Trespas *præter tonsuram Crinis* pleads Not guilty, and as to that, pleads that the Plaintiff was of the Age of sixteen Years, and for a certain Sum of Money *licentia*vit the Defendant *duas uncias Crinis dictæ Annæ detondere & abscindere*; and upon the Demurrer to this Plea the Court held, that the Contract was absolutely void, and consequently the Tonsure unlawful, and gave Judgment accordingly for the Plaintiff.

*Mish 25 Car.*  
2 Anna Se-  
*burgham per*  
*Guardianum*  
*versus Stu-*  
*artson.*  
3 Keb 369  
S. C.

1 *Sid* 129.  
1 *Lev* 169.  
1 *Kob* 925,  
913.

And as an Infant is not bound by his Contract to deliver a Thing; so if one deliver Goods to an Infant upon a Contract, &c. knowing him to be an Infant, he shall not be chargeable in Trover and Conversion, or any other Action for them; for the Infant is not capable of any Contract, but for Necessaries; therefore such Delivery is a Gift to the Infant: But if an Infant without any Contract wilfully takes away the Goods of another, Trover lies against him; also it is said, that if he take the Goods under Pretence that he is of full Age, Trover lies; because it is a wilful and fraudulent Trespass.

*Side 1 Vern.*  
132.  
2 *Vern.* 224-5

Also it seems that if an Infant, being above the Age of Discretion, be guilty of any Fraud in affirming himself to be of full Age, or if by Combination with his Guardian, &c. he make any Contract or Agreement with an Intent afterwards to elude it, by reason of his Privilege of Infancy, that a Court of Equity will decree it good against him according to the Circumstances of the Fraud; but in what Cases in particular a Court of Equity will thus exert itself, is not easy to determine.

For the  
Manner in  
which In-  
fant Trustees  
are to convey  
the Estates  
devolved on  
them pursu-  
ant to this  
Act, *vide*  
*Preced Chan*  
454

Also notwithstanding the Disability of an Infant to contract, by the 7 *Ann.* cap. 19. it is Enacted, 'That it shall and may be lawful for any Person under the Age of twenty-one Years, by the Direction of the High Court of Chancery, or the Court of Exchequer, signified by an Order made upon hearing all Parties concerned, on the Petition of the Person or Persons for whom such Infant or Infants shall be seised or possessed in Trust, or of the Mortgagor or Mortgagors, or Guardian or Guardians of such Infant or Infants, or Person or Persons intitled to the Monies secured by or upon any Lands, Tenements, or Hereditaments, whereof any Infant or Infants are or shall be seised or possessed by way of Mortgage, or of the Person or Persons intitled to the Redemption thereof, to convey and assure any such Lands, Tenements, or Hereditaments in such Manner as the said Court of Chancery, or the Court of Exchequer, shall by such Order so to be obtained direct, to any other Person or Persons; and such Conveyance or Assurance so to be had and made, as aforesaid, shall be as good and effectual in Law to all Intents and Purposes whatsoever, as if the said Infants or Infant were, at the Time of making such Conveyance or Assurance, of the full Age of twenty-one Years; any Law, &c.'

And it is further Enacted by the said Statute, 'That all and every such Infant and Infants being only Trustee or Trustees, Mortgagee or Mortgagees, as aforesaid, shall and may be compellable, by such Order so as aforesaid to be obtained, to make such Conveyance or Conveyances, Assurance or Assurances as aforesaid, in like Manner as Trustees or Mortgagees of full Age are compellable to convey or assign their Trust Estates or Mortgages.'

#### 4. Where voidable as to the Infant, shall yet bind others.

1 *Stow* 1. 1.  
1 *Mort* 248

It is laid down as a general Rule, that Infancy is a Personal Privilege, of which no one can take Advantage but the Infant himself, and that therefore, tho' the Contract of the Infant be voidable, that yet it shall bind the Person of full Age; for being an Indulgence which the Law allows Infants, to protect and secure them from the Fraud and Imposition of others, it can only be intended for their Benefit, and is not to be extended to Persons of the Years of Discretion, who are presumed to act with sufficient Caution and Security; and were it otherwise, this Privilege, instead of being an Advantage to the Infant, might in many Cases turn greatly to his Detriment.

Therefore it hath been adjudged, that if an Infant lett a Houſe to <sup>1 Sid. 446.</sup> <sup>1 Mod. 25.</sup> *J. S.* reſerving Rent, and the Rent is in Arrear, that the Infant may diſtrain for the Rent, or bring an Action of Debt; tho' it was objected, that in the Inſtitution the Contract was not reciprocal.

So where an Infant brought an Action on the Caſe by her Guardian, and ſet forth, that ſhe did give the Defendant 10 *l.* and put herſelf to be her Servant for ſeven Years, and that in Conſideration thereof, the Defendant did promiſe to find her with all Neceſſaries, ſave only Apparel, and did likewise promiſe to teach her to ſing and to dance; and that the Defendant within the Time turned her out of her Houſe, and did not teach her to ſing and dance; whereupon there was Judgment by Default, and a Writ of Inquiry of Damages; and it was moved to ſtay the filing of the Writ of Inquiry, becauſe here was no Conſideration, the Agreement not being reciprocal: But the Court held, that tho' the Contract might be void as to the Infant, that yet it bound her Miſtreſs, who was of full Age, and therefore ordered the Writ of Inquiry to be filed. <sup>1 Sid. 446.</sup> <sup>2 Keb. 623.</sup> <sup>S. C. *Furnha*</sup> <sup>v. *r. Watkins*.</sup>

So where an Infant brought an *Aſſumpſit* by his Guardian, and declared, that whereas the Defendant entered into his Cloſe, and cut his Graſs, that in Conſideration he would permit him to make it Hay, and carry it away, he promiſed to give him ſix Pounds for it: Upon this Declaration the Defendant demurred, ſuppoſing it to be no Conſideration; for the Infant was not bound by his Permiſſion, but might ſue him notwithstanding; but the Court gave Judgment for the Plaintiff. <sup>1 Vent. 51.</sup> <sup>1 Mod. 25.</sup> <sup>3 Keb. 581.</sup> <sup>S. C. *Smith*</sup> <sup>verſus *Bowen*.</sup>

So a Promiſe to pay the Plaintiff, an Infant, the Value of ſuch Land, in Conſideration the Plaintiff would ſuffer the Defendant to enjoy the ſaid Land after the Death of *A.* to the Time of his full Age, the Plaintiff had Judgment, tho' he was not bound by the Contract. <sup>2 Sid. 109.</sup> <sup>*Davies* and *Mannington*.</sup>

So on a Promiſe to an Infant to do ſuch an Act, in Conſideration that the Infant promiſed to pay ſuch a Sum, in *Aſſumpſit* by the Infant he had Judgment, tho' the Money was not paid; for the Court held, that the Infant's Promiſe was only voidable at his own Election, and not at the Election of him to whom it was made. <sup>1 Sid. 41.</sup> <sup>1 Keb. 1.</sup> <sup>S. C. *Forreſter's Caſe*.</sup>

So if a Man of full Age and a Female of fifteen promiſe to intermarry, and after Requeſt by her, he marries another Woman, an Action on the Caſe lies againſt him for the Violation of the Contract; for tho' objected that this was *Nudum Pactum*, and not reciprocal, as the Man could not compel her, being an Infant, to perform her Promiſe, yet being voidable as to herſelf only, as ſhe finds it for her Benefit, it ſhall bind him being of full Age. <sup>*Trin. 5 Geo. 2.*</sup> <sup>*Holt* and *Ward*, adjudged.</sup>

If an Infant loſe Money at Play, which the Winner takes, ſuch Taking is a Conversion, and Trover and Conversion lies for the Infant for the Sum ſo received; but if the Infant had won, he might have retained the Money, and no Action would have lain againſt him for it. <sup>Cited in the *Caſe of Holt* and *Ward*, to have been held by *Hlt C. J.*</sup>

*Hill. 3 Anna.* in *B. R.* in the Caſe of *Barker* and *Medlicot*; but the Action there brought was an *Indebitatus Aſſumpſit*, and for that Cauſe the Plaintiff was nonſuited, becauſe the foundation of the Action was a Tort, and the Action brought founded in Contract.

## 5. At what Time voidable Acts are to be avoided.

Here we muſt obſerve a Diverſity between Matters of Record done or ſuffered by an Infant, and Matters in Fait; that he may avoid Matters in Fait, either within Age, or at full Age; but Matters of Record, as Statutes Merchant and of the Staple, Recognizances acknowledged by him, or a Fine levied by him, Recovery againſt him by Default in a real Action, (ſaving in Dower,) muſt be avoided, *viz.* the Statute, &c. by *Audita Querela*, and the Fine and Recovery during his Minority; <sup>*Co Lit.* 380.</sup> <sup>2 *Leſt.* 483.</sup> <sup>*Godb.* 149.</sup> <sup>*Wimb* 114.</sup> <sup>*Relv.* 155.</sup> <sup>12 *Co.* 121.</sup> <sup>3 *Mod* 229.</sup>



for being judicial Acts, taken by a Court or Judge, the Nonage of the Party to avoid the same shall be tried by Inspection, and not by the Country.

- 1 And 25, 228. And as an Infant cannot avoid a Recognizance, &c. but during his  
N. Bendt. 80. Minority; so if an Infant enters into a Recognizance, &c. and brings an  
pl. 125. *Audita Querela* to reverse it, and the Judges upon Inspection find him  
Dyer 232. within Age, and therefore adjudge the Recognizance void, and discharge  
pl. 9. the Infant; but the Conuzee after reverses the Judgment in the *Audita*  
Moore 75, 460. *Querela* for Error; the Infant after his full Age shall have no new *Audita*  
2 And. 158. *Querela* to vacate the Recognizance, tho' it once appeared to the Judges  
10 Co. 43. a. that he was within Age when he entered into the Contract; and the  
Noy 16. Reason hereof is, because the Infant in no Case after his full Age can  
Yelv. 88. set aside the Recognizance or Statute: For, 1<sup>st</sup>, The Writ in the Register  
Reg. 149, runs *quod Conusor adtunc & adhuc infra Etatem existit*, and therefore can-  
150. not have it at full Age without altering the Form of the Writ. 2<sup>dly</sup>,  
2 Bull. 320. When the Judgment of the *Audita Querela* is reversed by a Writ of  
5. N. B. 105. Error, it is intirely set aside, and in all Respects uselefs as if it had  
never been given, and consequently can obtain no Credit, should the  
Conusor produce the Record. 3<sup>dly</sup>, When the Conusor is of full Age,  
there will be no Averment admitted against the Recognizance, &c. which  
is an Act of Record; and it is presumed by the Record that the Conusor  
was of full Age, since the Judge or other Officer that took the Recogni-  
zance, &c. suffered them to enter into them.
- 2 Inst. 673. But if an Infant bargain and sell Lands by Deed indented and in-  
rolled, he may avoid it at any time.
- 1 Sid. 321. Also it is said, that if an Infant appears by Attorney, and suffers a  
1 Lev. 142. Recovery, it may for this Error be reversed after the Infant comes of  
5 Mod. 209. Age, because it shall be tried by the Country whether the Warrant of  
Attorney was made when under Age or not.

## 6. By whom to be avoided.

- 8 Co. 42. b. It seems agreed as a general Rule, that none but the Infant himself,  
2 Inst. 483. or his Representatives Privies in Blood, can avoid (a) a Conveyance  
1 Rol. Rep. made by the Infant during his Nonage.  
401.  
(a) This must be understood such a Conveyance as is in its own Nature voidable by the Infant, &c.  
such as a Feoffment, &c. and not absolutely void, as a Surrender, Grant, Release, which being void  
*ab initio*, are so to all Men, and of which all Persons may take Advantage. Carth. 436. 3 Mod. 301, &c.
- 8 Co. 42. b. As if an Infant seised in Fee make a Feoffment, and dies, his Heir  
shall enter.
- 8 Co. 43. a. So if seised in Tail Male, and he makes a Feoffment, and (b) dies,  
(b) So tho' his Son being Heir general and special may enter.  
attainted of  
Felony, 8 Co. 43. a. — But by Co. Lit. 337. a. it is otherwise in such Case, because his Entry is not  
lawful in respect of his Estate only, but of his Blood also, which is corrupted.
- 3 Co. 43. And if he hath no Sons, but only Daughters, his Brother, being his  
special Heir *per Formam Doni* made to his Father, may avoid the Feoff-  
ment, because he is Privy in Blood, and has the Land only by De-  
scend.
- 3 Co. 43. a. But Privies in Estate cannot avoid (c) a Conveyance made by an  
(c) But if Infant.  
Tenant in  
Tail within Age comes in as Vouchee by Attorney in a Common Recovery, he in Remainder may  
assign this for Error; for he is Party in Interest to the Recovery; and where a Man's Interest is  
bound by another's Act, it is but reasonable he should be allowed to free himself from the Mischief  
of it, by taking Advantage of any Error in it: But for this *vide* 1 Rol. Abr. 755. Bridg. 75. 1 Rol.  
Rep. 301. Cro. Eliz. 739. Palm. 123. Allen 75.



As if Tenant in Tail, being within Age, makes a Feoffment, and dies without Issue, the Donor shall not enter, because he was Privy only in Estate, and no Right accrued to him by the Death of the Donee.

8 Co. 43.  
But in *Paton*,  
254. this  
Case is cited,  
and denied.

by *Houghton* Justice to be Law, who said, the Feoffment by an Infant could not put him to his *Formedon* by a Discontinuance, and then if he could not enter, he would be without Remedy.

So if there be two Joint-tenants within Age, and one of them makes a Feoffment in Fee of his Moiety, and dies, the Survivor cannot enter; for by the Feoffment the Jointure was severed, so long as the Feoffment continued in Force, and therefore the Heir of the Feoffor may have a *Dam suit infra Ætatem*, or enter into the Moiety.

8 Co. 43. a.  
Co. Lit. 327.  
S. P.

But if both had joined in the Feoffment, and one had died, the Right had survived to the other, and he should have had the Land from the first Feoffor.

8 Co. 43. a.

If a Man within Age, seised in Right of his Wife, makes a Feoffment, and dies, his Heir cannot enter, because no Right descends to him; but inasmuch as the Baron, if he had lived, might have entered in the Right of his Wife only, and not in respect of any Right which he himself had, the Wife (even before the 32 H. 8.) might in such Case have entered in her own Right.

8 Co. 43. b.  
Lit. sect. 632.

But if the Feme, being only Tenant in Tail, and the Baron within Age, had made a Gift in Tail to another, by which the Baron gained a new Reversion in Fee, and died, the Wife might enter, or the Heir of the Baron who had a new Reversion descended to him; but if the Heir had entered, and defeated the Tail given by the Infant, his Estate vanished, and by Operation of Law the Feme was immediately seised of her old Estate.

8 Co. 43. b.  
Co. Lit. 337. a.

Privies in Law, as the Lord by Escheat, shall not avoid a Conveyance made by an Infant.

8 Co. 44. a.

As if an Infant makes a Feoffment, and dies without Heir, the Lord shall not avoid it; but because that in this Case it appeared the Feoffment was executed by Letter of Attorney made by the Infant, it was resolved to be void, and that the Land should escheat to the Queen.

8 Co. 42, 45.  
*Whittingham's Case*.  
*Dyer* 10. b.  
2 *Rel. Abr.* 2.  
3 *Mod.* 306.

## 7. In what Manner they are to be avoided.

As to Fines and Recoveries, they being, as has been already observed, Matters of Record, are regularly to be avoided by Writ of Error, which must be brought during the Infant's Minority, that the Court may inspect the Infant, and so vacate the Contract with the same Solemnity that it was entered into.

Co. Lit. 336.  
2 *Inst.* 483.

Therefore if an Infant suffer a Common Recovery, in which he comes in as Vouchee in his proper Person, and not by Guardian, tho' this shall not bind him, but that he may in a Writ of Error avoid it, because it is Error in Law; yet at his full Age he cannot enter into the Land, and avoid it by his Entry, before he has reversed it by a Writ of Error; for Judgments are not to be subverted by Matter in *Pais* without Matter of Record.

1 *Rel. Abr.*  
742.  
*Styl.* 246.

If a Feme Covert, being under Age, levies a Fine, which she is afterwards willing to reverse, she may be brought into Court by *Habeas Corpus*, that she may be inspected; and, it seems, the Fine may be set aside on Motion; for the Husband may not be willing, nor permit her to bring or proceed in a Writ of Error.

2 *Vent.* 30.  
1 *Mod.* 246.  
3 *Lev.* 36.  
*Et vide Tit.*  
*Fines and Recoveries*.

Also it has been held, that if a Feme Covert, being an Infant, is about to levy a Fine, her Relations may enter a *Caveat*, and that then the Court will set aside all Proceedings after such Entry; but that if they

*Pash* 30 *Car.*  
2. *Raculinsford*  
*ver. Owens*.

(a) Where  
the Court  
ordered In-  
formations

to be filed against Commissioners who took a Fine from an Infant. 3 Lev. 36. But for this *vide* 12 Co. 124. 1 Rol. Rep. 113. Cro. Eliz. 551.

Dyer 232.

Reg. 149.

Moor 75.

L. N. B. 105.

2 Inst. 673.

10 Co. 43.

Noy 16.

Cro. Jac. 5.

2 Rol Abr 57.

2 Bulf. 320.

3 Mod. 229.

(b) That an Infant may bring an *Audita Querela* to avoid a Statute for his Nonage, altho' it be not certified or returned in any Court. 1 And. 228. — And there said, that the common Practice was so, else the Conusor might be of Age before the Conussee would procure it to be certified; & *vide* 3 Bulf. 307.

Ray 155.

Cro. Jac. 646.

S. P. & *vide*

Co. Ent. 87,

88. — Where

an Infant was

Bail, and taken in Execution, and he brought an *Audita Querela*, and moved to be inspected; and the Court, as a Matter discretionary, refused to admit him to Bail till he corroborated his Allegation by the Oaths of Witnesses; which he having done, and a Copy of the Register where he was born being produced, he was discharged; but if he had brought his *Audita Querela* before he was taken in Execution, he must have a *Superfedeas* of Course. Carth. 278. & *vide supra* Letter (D).

Cro. Jac. 694.

But for this

*vide* Tit. At-

tornes.

Co. Lit. 247. b.

248. a.

(c) But tho'

the Infant

may avoid

his Feoffment

by Entry

during his

Nonage,

yet he cannot

have a *Dum fuit*

*infra Ætatem*

till he

comes to his

full Age; for

he is allowed

to enter, that

he may save

to himself the

Profits in the

mean time; but

such Entry

being the Act

of an Infant

seems to be

as voidable

at full Age

as his

Feoffment; but

if he was to

recover in a

Writ of *Dum fuit*

*infra Ætatem*,

it would for

ever bind him,

and therefore

it can only

be brought

when he

comes to full

Age. F. N. B. 192.

But if *A.* being within Age enters into a Bond to *B.* who procures *C.* without any Warrant to appear for *A.* and confesses a Judgment thereupon, yet *A.* shall not have an *Audita Querela*, but he must take his Remedy by Action of Deceit against the Attorney.

If an Infant make a Feoffment, he may enter (c) either within Age, or at full Age; and if he dies, his Heir may enter, or have a *Dum fuit infra Ætatem*.

his Feoffment by Entry during his Nonage, yet he cannot have a *Dum fuit infra Ætatem* till he comes to his full Age; for he is allowed to enter, that he may save to himself the Profits in the mean time; but such Entry being the Act of an Infant seems to be as voidable at full Age as his Feoffment; but if he was to recover in a Writ of *Dum fuit infra Ætatem*, it would for ever bind him, and therefore it can only be brought when he comes to full Age. F. N. B. 192.

If Husband and Wife are both within Age, and they by Indenture join in a Feoffment, and the Husband dies, the Wife may enter, or have a *Dum fuit infra Ætatem*.

But (d) if she was of full Age, she shall not have a *Dum fuit infra Ætatem* for the Nonage of her Husband, tho' they be but one Person in Law.

the Baron of full Age. F. N. B. 192.

If two Joint-tenants, being within Age, make a Feoffment, tho' they may join in a Writ of Right, yet they cannot in a *Dum fuit infra Ætatem*; for the Nonage of one, is not the Nonage of the other.

If an Infant surrenders a Copyhold Estate, and dies, his Heir may enter without being put to his Writ of *Dum fuit infra Ætatem*; for such Surrender

Surrender was but (a) a Conveyance by Matter in *Pais*, which cannot (a) That  
bind an Infant, but that he or his Heirs may enter, or bring Trespass. Surrenders,  
Grants, Re-  
leases, &c. which are said to be void *ab initio*, they may be avoided by Entry, Assise, &c. at any  
Time. *Cro. Car.* 103. 2 *Roll. Abr.* 728. 1 *Shew. P. Cases* 153. *Carth.* 436. — But a Feoffment by an  
Infant with Livery cannot be avoided by Assise without Entry. *Bro. Disseisin* 63. — *Seus* if the Livery  
was by Letter of Attorney. *Bro. Disseisin* 63.

If an Infant make a Lease for Years, tho' he reserve no Rent thereon, *Bro. Tit*  
he cannot plead *Non est factum*, but must avoid it by pleading the special *Leases* 80.  
Matter of his Infancy. *Cro. Eliz.*  
857.

10 *Co.* 43. 5 *Co.* 119. 2 *Inst.* 483. *Moor.* pl. 132. *Poph.* 178.

So if an Infant enter into an Obligation, which takes Effect by Seal- 1 *Salk.* 279.  
ing and Delivery, and consequently (b) a deliberate Act, he can only *per Treby C. 1.*  
avoid it by pleading the special Matter of his Infancy. (b) The Deeds  
of Infants  
have the

Form, tho' not the Operation of Deeds; so that *Non est factum* cannot be pleaded thereto, without  
shewing some special Matter to make them of no Efficacy. 3 *Mod.* 310. *per Cur.*

But in *Assumpsit* against an Infant, he may give Infancy in Evidence, 2 *Lev.* 144.  
and need not plead it; for the Promise of an Infant is absolutely void. 1 *Salk.* 279.

If the Heir within Age assign to the Wife more Land in Dower than *T. N. B.* 148.  
she ought to have, he himself shall have a Writ of Admeasurement of *Co. Lit.* 59. a.  
Dower at (c) full Age by the Common Law: So if too much be assigned 2 *Inst.* 567.  
in Dower by the Heir within Age, or his Guardian in Chivalry, and (c) *Quare*, if  
the Heir dies, his Heir shall have such Writ to rectify the Assignment; not within  
but the Heir, in whose Time the Assignment of too much was by the Age.  
Guardian, cannot have such Writ till his full Age, because till then the  
Interest of the Guardian continues, and if any Wrong be done, it is to  
the Guardian himself, and not to the Heir.

If the Heir within Age, before the Guardian enters, assigns too much 2 *Inst.* 367.  
in Dower, the Guardian shall have a Writ of Admeasurement of Dower  
by the Statute of *W. 2. cap. 7.* before which Statute the Guardian had  
no Remedy; because the Writ of Admeasurement being a real Action  
lay not for the Guardian, who had but a Chattel: Also by the same  
Statute it is provided, that if the Guardian pursue such Writ faintly,  
or by Collusion with the Wife, the Heir at full Age shall have a Writ  
of Admeasurement, and may alledge the faint Pleading or Collusion  
generally.

### 3. Of the Confirmation of voidable Acts.

The Privilege the Law allows Infants being intirely calculated for *Co. Lit.* 3. a.  
their Benefit; hence at their full Age they are allowed to ratify and 2 *Vent.* 203.  
confirm their Contracts, or to rescind and break thro' them, as it shall  
seem most for their Advantage; and therefore the Purchase of an Infant  
is only voidable, and vests the Freehold in him till he disagrees thereto;  
and his Continuing in Possession after he comes of Age is a tacit Consent  
and Confirmation thereof, since it is to turn to his Advantage.

If an Infant take a Lease for Years of Land, rendering Rent, which *Cro. Jac.* 320.  
is in Arrear for several Years, then the Infant comes of Age, and still *Godb.* 120.  
continues the Occupation of the Land; this makes the Lease good and 2 *Bulf.* 67.  
unavoidable, and by Consequence makes him chargeable with all the 1 *Roll. Abr.*  
Arrears incurred during his Minority; for tho' at full Age he might have 751. S. C.  
departed from his Bargain, and thereby have avoided Payment of the adjudged,  
Arrears which the Lessor suffered to incur during his Minority; yet between  
his Continuance in Possession after his full Age, ratifies and affirms the *Kettley* and  
*Ellist.*

Contract *ab initio*, and so gives Remedy for the Arrears of Rent incurred from the Time of the Contract made.

*Falf. 64.*  
*per Curiam.*

But it is said, that if an Infant possessed of a Term for Years sells it for Money, and after he comes of full Age receives Part of the Money for it, he shall avoid the Grant notwithstanding; for the Contract being void in the Commencement, it cannot be made good by any subsequent Act.

*1 Vern. 132.*

Yet it hath been ruled in Chancery, that if an Infant makes an Agreement, and receives Interest under it after he comes of full Age, such Agreement shall be decreed against him.

*2 Vern. 225.*  
*per Curiam.*

So if an Infant make an Exchange of Lands, and continues in Possession after he comes of Age, he shall be bound by it.

*2 Vern. 224.*

Also where an Infant desired that Lands subject to a Trust for Payment of younger Childrens Portions might not be sold, and offered by his Answer to settle other Lands for raising the Portions, it was held, that he should be bound by the Offer made by him in his Answer, if the other Side were thereby delayed, and if the Infant did not immediately after his coming of Age apply to the Court, in order to retract his Offer, and amend his Answer.

*4 Leon. 4.*

An Infant made a Lease for Years, and at full Age said to the Lessee, *God give you Joy of it*; this was held by *Mead* a good Affirmation of the Lease; for this is a usual Compliment to express one's Assent and Approbation of what is done.

*3 Leon. 164.*

*4 Leon. 5.*

*Godb. 158.*

*1 Leon. 114.*

*N Dyer 272.*

*Cro. Eliz. 127.*

*But Cro. Eliz.*

*700. S. P. cont. by Fenner cont. Clinch, and 1 Rol. Abr. 18. S. P. cont. & vide Fesb. 178. Lat. b 21.*

*Owen 94.*

If an Infant enters into an Obligation for Payment of Money, and the Obligee when he comes of Age threatens to sue him, and the Infant being of full Age promises, in Consideration of Forbearance, that he would pay him, this Promise is good, and shall bind him, tho' he might have avoided the Obligation by Plea.

*Comb. 381.*

*per Holt at*

*the Sittings*

*in Guild-hall.*

Also it is said to have been ruled, where the Defendant under Age borrowed Money of the Plaintiff, and afterward at full Age promised to pay it him, that this is a good Consideration for the Promise, and the Defendant shall be charged.

*Abr. Eq.*

*282 3.*

Also it is said to have been decreed in Chancery, that if an Infant borrows a Sum of Money, for which he gives a Bond, and devises his Personal Estate (being of sufficient Capacity) for the Payment of his Debts, particularly those he had set his Hand to, this Bond-Debt shall be paid.

## (K) Of the Privileges of Infants in Suits and Actions by and against them: And herein,

### 1. How far the Courts take Care of the Interests of Infants.

*Cro. Jac. 464.*  
*per Houghton*  
*Justice, in*  
*the Case of*

**I**NFANTS have divers judicial Privileges, which Persons of full Age have not; as if Judgment be given against an Infant by (a) Default, after the Default he shall have a Writ of Error, and reverse the Judgment. *Holford and Platt*, which *vide*, and *Hob. 266. 2 Rol Rep. 14, 22. S. C.* (a) That this must be understood of an Hereditary Right, in which the Infant shall not lose by Default; but there is a Difference betwixt those Things which concern the Hereditary Right, for which the Parol shall demur, and those Actions which are brought and grounded *de son Tort demesne*, as in Waste, Disseisin, or the like; for in these the Infant shall not be privileged, *quia Malitia supplet Aetatem. Cro Jac. 467 per Croke Justice.*

ment for his Nonage; but if an Infant after Appearance make Default, Judgment shall be given against him.

In an Assise against two, of which one is an Infant, if they make Default by which the Assise is awarded, and after the Assise remains for Default of Jurors, yet the Infant shall be received to plead afterwards.

In an Assise by an Infant, if the Tenant pleads an Ill Bar, and the Infant replies, by which he makes the Bar good, if the Plaintiff had been of full Age, yet this shall not make the Bar good against the Infant; but if the Judgment be for the Tenant thereupon, this is Error; for the Court ought to (a) plead for the Infant, for the Tenderneſs of his Age.

Judges ought to be his Counsellors. Cro. Jac. 466.

In Debt against an Infant for Rent Arrear, the Defendant demurred to the Declaration, and afterwards pleaded to Issue, and the Court held that the Infant may wave his Demurrer in the same Term, but not in a subsequent one.

If in a *Fermedon* in Remainder the Tenant pleads Infancy, and that the Remainder descended to him, and prays his Age, and the Demandant pleads that the Remainder did not descend to him, and thereupon Issue is joined, and found for the Demandant, a final Judgment shall be given, notwithstanding the Infancy of the Tenant; for in all Cases where the Issue is upon a Dilatory Plea, and tried *per Pais*, the Judgment is peremptory.

An Infant shall be privileged from Fine and Imprisonment in those Cases in which Persons of full Age shall be thus punished; as if an Infant in an Assise vouch a Record, and fail at the Day, he shall not be imprisoned, altho' the Statute of *Westm. 2. cap. 25.* that gives Imprisonment in such a Case, is general; so if guilty of a forcible Entry, tho' he may be fined for the same, yet he cannot be imprisoned; so if an Infant be convict in an Action of Trespass *Vi & Armis*, the Entry must be *Nilil de fine, sed pardonatur quia Infans.*

An Infant being Plaintiff or Demandant shall not be amerced; and this is the Reason (b) he shall not find Pledges.

*Palm. 518* 1 *Roll. Abr. 214, 288.* (b) That he shall not find Pledges, *Cro. Car. 161.*

But an Infant Defendant shall be amerced if he pleads with the Demandant, and the Matter is found against him; (c) but he shall be pardoned of Courſe.

Entry in such Case is *Ideo in misericordia, sed pardonatur quia Infans.* 8 *Co. 61. Palm. 518* *Nilil in misericordia quia Infans* *Cro. Car. 410.*

But if an Infant bring an Action by his *Prochein Amy*, and pending the Action comes of full Age, and makes an Attorney, and after is Non-suit, he shall be amerced.

If an Infant brings an Action of Trespass by Guardian against two, and the Defendants plead Not guilty, and at the *Nisi prius* the Plaintiff appears in Person, and a Verdict is found for the Plaintiff for Part, and Not guilty for the rest, and one of the Defendants is found Not guilty, and Judgment is given for the Plaintiff, for that for which the Verdict is given for him, & *quod nil capiat per Billam* for the rest, *sed nihil de misericordia pro falso clamore, &c. quia querens tempore transgressionis praedicti facti infra Etatem existet at,* yet this is good, and no Error.

If a *Precipe* be brought against an Infant, and pending the Plea he comes of full Age, he shall be amerced for the Delay after he comes of full Age.

If an Infant by his Guardian or *Prochein Amy* brings an Ejectment which is found against him, and the Guardian, &c. becomes insolvent, the Infant himself must answer the Costs; because the Rule was entered

into

into for the Infant's Benefit; and Infants must not disturb the Possession of others by unlawful Entries, without being punished with Costs.

2 Vern. 342.  
per Holt C. J.  
in his Argu-  
ment of the  
Case of Lord  
Talland and  
Bertie.

(a) That this

Court will decree building Leases for sixty Years of Infants Estates, when it appears to be for their Advantage. 2 Vern. 224. — That Court will not suffer an Infant to be prejudiced by the Laches of his Trustees. 2 Vern. 368. — Nor of his Guardian. *Pieced Chan.* 151. — That a Court of Equity may, by the Approbation of an Infant's Relations, allow the Infant Maintenance out of a Trust Estate, tho' there be no Provision in the Trust for that Purpose; and this is founded on natural Justice. 2 Vern. 236.

1 Vern. 295.

2 Vent. 331

2 Vern. 232.

If there are several Parties to a Suit in Chancery, and it appears that any one of the Defendants is an Infant, and any thing is prayed against him, by the Decree he must have a Day given him to shew Cause; the Words of which Decree are thus; *viz. And this Decree is to be binding to the said J. S. the Infant, unless he shall within six Months after he shall attain his Age of twenty-one Years, (being served with (b) Process for that Purpose,) shew unto this Court good Cause to the contrary.*

(b) This Pro-  
cess is by  
way of Sub-

*pœna*, to be served on the Defendant at his coming of Age, and it is a judicial Writ, and must be returned in Term-time.

*Abr. Eq.*  
280-1.

If he shews no Cause the Decree is made absolute upon him; but when he comes of Age, and shews Cause within the six Months, he may put in a new Answer, and make a new Defence; for it would be highly unreasonable to conclude him by what his Guardian had done, who perhaps made an improper Defence, or mistook the Nature of his Case; and if the Infant notwithstanding were to be bound thereby, it would be to no Purpose to give him a Day to shew Cause.

*Carth.* 79.

3 Mod. 259.

1 Show. 89.

S. C. *Eccleston*  
and *Petty*.

(c) If an In-  
fant put in  
an Answer

by Guardian, and there is a Decree against him without any Day given him to shew Cause, such Answer shall not be read or admitted as Evidence against him when he comes of Age; but if a superannuated Defendant puts in an Answer by his Guardian, it shall be read against him at any Time after, for he is supposed to grow worse, and is not to have a Day to shew Cause. *Abr. Eq.* 281. *Leving and Caverley*.

2 Vern. 429.

*Cooke and*  
*Parsons de-*  
*creed.*

*Pieced Chan.*  
185. S. C.  
and S. P.

But it seems that if Lands are devised to be sold for Payment of Debts, the Lands may be decreed to be sold without giving the Heir who is an Infant a Day to shew Cause when he comes of Age; for nothing descends to him; but if he is decreed to join in the Sale, he must have a Day after he comes of Age.

## 2. How they are to appear when they sue or are sued.

*Falch.* 225,

250

1 *Roll. Abr.*

287-S.

Regularly an Infant Plaintiff must appear by *Prochein Amy* or Guardian, but must defend by Guardian; but in neither Case can he appear by Attorney, for an Attorney's appearing for him is without Warrant, for an Infant cannot give him Authority *ad perdend' & lucrand'*, as the Warrant of Attorney purports; and therefore is to appear by Guardian

assigned

assigned either by the Court, or by Writ out of Chancery, and such Guardian hath his Warrant from the Court, not from the Infant, and ought to be one of an Estate; for if he misbehaves himself, an Action of Deceit lies against him.

If a Judgment be against an Infant, and the Infant brings a Writ of Error to reverse the Judgment, he ought to assign the Error by Guardian, and not by Attorney. *Co. Ent. 289. Cro. Jac. 25.*

In Replevin the Defendant being an Infant appeared for two Terms by Attorney, and the third Term by Guardian, and for this Cause the Judgment was reversed: But an Infant may appear by Guardian, and when he comes of full Age he may make an Attorney in the same Suit, and this shall not be Error. *Moor 665. Palm. 229.*

If in a Writ of Right the Demandant sues by *Prochein Amy*, and Issue is joined upon the Plea of Non-tenure, and before Trial the Demandant comes of full Age, tho' he was well admitted to sue by *Prochein Amy*, yet now he ought to appear by Attorney: But the Tenant not having taken Exceptions to the Trial, but admitted him to be of full Age, whether this could afterwards be assigned for Error *dubitatur*. *Cro. Jac. 585. Stone and March. 1 Bull. 24. S. C. and S. P. seems to be admitted; but adjudged per totam Curiam* that it could not be assigned for Error, and therefore the first Judgment was affirmed. — And now by the 21 Jac. 1. cap. 13. it is Enacted, That after Verdict given in any Court of Record, Judgment shall not be stayed or reversed by reason the Plaintiff in Ejectment, or other Personal Action, being under Age did appear by Attorney, and the Verdict pass for him.

In an Ejectment against an Infant the Defendant cannot appear by *Prochein Amy*; for a Guardian and *Prochein Amy* are distinct, and the Suit by *Prochein Amy* was not before the Statute of *Westm. 1. cap. 47.* and *Westm. 2. cap. 15.* and is given in Case of Necessity, (a) where an Infant is to sue his Guardian, or is esloigned, or that the Guardian will not sue for him; adjudged by three Judges against one, upon a Writ of Error upon a Judgment given in *Durham*, and the first Judgment reversed accordingly. *Cro. Jac. 640. Palm. 295. 1 Rol. Rep. 257. Simpson and Jackson. S. C. adjudged. Hutton 92. S. C. cited. F. N. B. 27.*

S. P. *Styl. 369.* S. P. (a) But for the Profits received after fourteen the Infant was admitted by Guardian to sue an Account against his Guardian in Socage; for he must charge him as Bailiff. *Cro. Jac. 219.*

But in all Cases where an Infant is Plaintiff, unless in these special Cases, the Suit shall be by Guardian, and not by *Prochein Amy*. *Palm. 296. per Dod. — But 2 Inst. 390.* it is said, whether the Infant be esloigned or no, he may sue by *Prochein Amy*; but perhaps in all Cases where he is Plaintiff, except these, he may sue by Guardian or *Prochein Amy*; and for this *vide F. N. B. 27. 2 Inst. 261, 390. Co. Lit. 135. b. Cro. Car. 86. Hutt. 92. 1 Jones 177. Hest. 52. Lit. Rep. 60. Cro. Jac. 161, 641. Bridg. 74.*

The respective Courts in which the Suit is commenced must (b) assign a proper Guardian to the Infant; and therefore if an Infant is sued, the Plaintiff must move to have a proper Guardian assigned him. *Styl. 369. Bridg. 74. 1 Rol. Rep. 303.*

(b) That the Course hath been to allow some of the Officers of the Court, who, by reason of their Skill, make the best Guardians, and *Prochein Amys*, for the Advantage of the Infants. *2 Inst. 261.* — That the Court of Chancery may assign one of the Six Clerks to be Guardian to an Infant. *2 Chan. Ca. 163.* — But if there be a Guardian appointed by the Father, or *ex provisione Legis*, as Guardian in Socage, who acts accordingly, he only shall be admitted to sue for the Infant, unless he hath misdemeaned himself. *1 Sid. 424.* — That the Court may discharge one Guardian, and appoint another. *Styl. 456.* — Where in the Common Pleas a Record of Admittance is made, but in the King's Bench it is only recited in the Court, *J. S. per A. B. Guardianum suum ad hoc per Cur. specialiter admissum queritur, &c.* *3 Co. 53. b. and vide 1 Sid. 173, 342. Cro. Eliz. 158. 2 Inst. 261. 3 Mod. 236. 1 Lev. 224.* — The Appearance must be entered in the Name of the Infant, *scilicet, predict' Katherine per J. S. Guardian' venit, & dicit, quod ipsa, &c. not ipse, &c.* *3 Mod. 230.* — If the Guardian for the Defendant is admitted *ad Prosequend'*, this is erroneous. *Cro. Jac. 641. Palm. 296.* — But an Admission *quod Sequatur* is good in a Common Recovery. *1 Sid. 446. 1 Mod. 48. 2 Sand. 95.* — The Infant cannot revoke the Authority of the Guardian. *Palm. 252, & vide 1 Salk. 176.* — A Guardian ordered to acknowledge Satisfaction for so much as he received upon a Judgment. *Moor 852.*

1 *Rel. Abr.*  
288.

An Appeal of Death by an Infant must be prosecuted by Guardian; yet if the Infant comes into Court, and says that he will relinquish it, and yet the Guardian will prosecute it, the Court may in Discretion discharge such Guardian, and assign another; for it is not reasonable that an Infant be bound to continue a Suit against his Will, which demands nothing but Revenge, and will be chargeable to him.

26 *Aff.* 40.

1 *Rel. Abr.*  
288. S. C.

In an Action against Baron and Feme, the Feme being within Age, the Feme ought to appear by Guardian.

1 *Rel. Abr.* 288.

*Bridg.* 74, 228.

*Palm.* 224,

244, 250, *et c.*

*Cro. Eliz.* 379.

S. C. *Holland*

and *Lee.*

(a) That the

Husband

cannot disa-

vow a Guar-

dian made

by the Court

for his Wife.

1 *Vent.* 185.

1 *Vent.* 185.

*Freeman* and

*Boddington,*

adjudged.

2 *Lev.* 28.

S. C. 2 *Keb.* 578. S. C.

because the Appearance was *per Attornatum* of the Husband only, and there

said, tho' in a real Action, the Wife must appear by Guardian; yet perhaps it may be otherwise in a

personal Action, for the Damages will survive (b) But if they bring an Action, they may sue by

Attorney, and the Baron shall name an Attorney for both. 2 *Sand.* 213. *per Cur. am. arguendo.*

1 *Rel. Abr.*

287-8.

*Poph.* 130.

*Cro. Jac.* 420.

1 *Rel. Rep.*

380. S. C.

If an Action of Debt be brought against an Infant Executor, he cannot appear by Attorney, but ought to appear by Guardian, else it is Error, because otherwise he might be at great Prejudice; for Assets may be found in his Hands, and so Judgment shall be given to recover the Debt, Damages, and Costs against him *de Bonis Testatoris, si, &c. si non*, the Damages and Costs *de Bonis propriis*, (as it was done in this Case,) and perhaps the Infant had a Release or Acquittance to plead, and so he shall be charged *de Bonis propriis* by his ill Pleading, without any Remedy against the Attorney; but if a Guardian mispleads, and loses thereby, an (c) Action lies against him, and therefore his being Executor cannot make him as a Man of full Age.

(c) That an

Action in

such Case

lies against a

Guardian. *Palm.* 229. 2 *Leon.* 59. *Cro. Jac.* 641. 1 *Mod.* 49.— But no Action lies against a *Prochein*

*Amy*; for if he loses in such Action, he is not concluded thereby, but may resort to his Action of a

higher Nature. *Palm.* 296. *per Dod'.*

*Poph.* 130.

*Cro. Jac.* 441.

S. C. and

there said,

But if an Infant (d) Executor brings an Action as Executor by Attorney, and hath Judgment to recover, this is not erroneous, because for his Benefit.

there is a Difference where an Infant Executor is Plaintiff, and where Defendant, and being Plaintiff,

where he recovers or not; for if Judgment is given against him where he is Plaintiff, it seems all

one as if he were Defendant (d) That if an Infant Administrator appears by Attorney it is

Error, tho' Judgment be given for him 3 *Bulf.* 180. but 1 *Rel. Abr.* 288. cont. & vide 1 *Vent.* 103.

*Cro. Eliz.* 541. 2 *Sand.* 213. 1 *Mod.* 47, 298.

1 *Rel. Abr.* 288.

If an Infant and Man of full Age are made Executors, they may

Countels of (e) bring an Action as Executors, and the Infant may sue by Attorney

Case, adjudged, in which the Executors recovered in the Action. *Cro. Eliz.* 278. S. C. 2 *Sand.* 212, 213.

S. P. adjudged *per Cur.* cont. *Twisslen*; for he that is of full Age may make an Attorney for him that is

within Age. 1 *Mod.* 47, 72, 296. adjudged by three Judges against *Twisslen*. 1 *Vent.* 102. adjudged.

1 *Sid.* 449. adjudged. (e) But if an Action is brought against them, he that is under Age must appear

by Guardian. *Styl.* 318. adjudged; & vide 3 *Mod.* 236. said to be agreed.



without making any *Prochein Amy*, (a) because he sues in the Right of the Testator, and not in his own Right.

(a) This is founded upon another Reason, viz.

upon Necessity; for it is absolutely necessary that all who are appointed Executors by the Will should be made Parties to the Action, and where there are several Executors, the Act of one shall conclude his Companions, and therefore the general Appearance *per Attornatum* is good for all of them. *Cartb. 124. per Holt C. J.*

In Replevin in *C. B.* against *A. B.* and *C.* they all *per J. S. Attornat* made Conusance as Bailiffs to *J. N.* and at the Trial the Plaintiff was nonsuit, and the Defendants had Judgment upon a Writ of Error in *B. R.* It was assigned for Error, that *A.* one of the Defendants, was an Infant, and yet had appeared and pleaded by Attorney; but notwithstanding the Judgment was unanimously affirmed, tho' for different Reasons; three of the Judges held, that it ought to be affirmed because the Defendants are *in Auter Droit*, and they all make but as one Bailiff, and that the Disability of the Servant shall not prejudice his Master, and they agreed that the Case of Executors is the same in Reason with the present Case; they agreed likewise, that there is a Difference where the Infant is Plaintiff, and where he is Defendant, and that an Avowant is in Nature of a Plaintiff, and so are the Bailiffs who make Conusance: But *Holt C. J.* differed; he held, that this Appearance of the Infant was irregular, for he ought to plead *per Guardianum*, and the joining the other Defendants with him signified nothing, so as to charge the Infant, for if the Judgment pass against him it shall be for the Damages *de Bonis propriis*, and he shall be amerced; therefore where he is joined, or where he is single, there is no manner of Difference in Reason, for in both Cases the Loss is the same, if Judgment is against him; but he agreed that in this Case the Judgment should be affirmed, (b) because the Plaintiff did not take Advantage of the Infancy in Time, according to the general Rule which he laid down, viz. that a Man shall never assign that for Error which he might have pleaded in Abatement; for it shall be accounted his Folly to neglect the Time of taking that Exception.

*Cartb. 122*  
*Coan versus Bowles*, adjudged.  
*1 Shew. 13, 165. S. C.*  
*1 Salk. 205. S. C.* adjudged, because the Plaintiff might have pleaded this in Abatement.  
*4 Mod. 7. S. C.* but not the *S. P.*

(b) But one of the Judges was of Opinion, that this Matter might be assigned for

Error, tho' it was pleadable in Abatement of the Conusance. *Cartb. 123.*

The Testator had obtained a Judgment, and made a Person of full Age and two Infants Executors; he of full Age proved the Will, and he alone brought a *Scire Facias*, setting forth the Truth of the Case, and had Judgment, whereon Error was brought, and assigned that all ought to have (c) joined in the *Scire Facias*; but by all the Justices, on Advice with the Civilians, it was ruled not to be Error; for the others cannot prove the Will during their Nonage; and the Judgment was affirmed; for the Execution of the Judgment shall not be delayed till the Infants come of full Age.

*1 Lev. 181. Hutton and Mascat*, adjudged in the Exchequer Chamber on a Writ of Error out of *B. R.* *Et vide Raym. 198. S. C.*

(c) *Et vide Yelv. 130.* where it is held, that an Infant cannot be summoned and severd.

The Plaintiff being an Infant had sued by his Guardian, but the Entry on the Roll was no more but *per T. S. Guardianum suum*, omitting the Clause *ad hoc per Curiam specialiter admittit*, as the common Course is, and as it was alledged it ought to be; but *per Curiam* the Entry is sufficient; for, in Fact, if the Guardian was not admitted by the Court, a Writ of Error lies.

*Cartb. 256.*

An Infant cannot bring a Bill in Chancery but by his *Prochein Amy*, and such *Prochein Amy* must take Care of it; for if the Bill is dismissed, he must (d) pay the Costs thereof.

(d) And therefore

any Person may bring a Bill as *Prochein Amy* to an Infant without his Consent, because it is at his Peril that he brings it, to be answerable for the Event. *Abr. Ep. 72. Andrews and Craddock.*

And

*Abr. Eq.* 260.

*Lloyd* and  
*Carew.*

(a) That the  
Court can-

not appoint a Guardian unless the Heir be in Person before them, 2 *Leon.* 189. — A Guardian is always admitted before a Judge, and that Admission carried to the Clerk of the Rules, who enters the Rule; but the Court usually examines a *Prochein Amy*, per *Sir Sam. Asty*, *Comb.* 331. — Tho' the Court seldom admits a Guardian unless the Infant be there in Person, yet they may do it. *Comb.* 330. per *Holt C. J.* — That the Court will admit one to sue by Guardian upon a Motion, tho' not present, nor any Affidavit made. *Comb.* 256.

Where a Bill is brought against an Infant (if in Town) he must appear in Court, and have a Guardian assigned him, by whom he may defend the Suit; if in the Country, he sues out a Commission to assign a Guardian, and put in his Answer; and whether he pleads, answers, or demurs, still it must be done by his Guardian; for if it is the Plea, Answer, or Demurrer of the Infant, without doing it by the Guardian, it will be irregular.

But when the Infant neglects to appear, or to have a Guardian assigned, it is a Motion of Course (he being in Contempt to an Attachment) to pray for a Messenger to bring him into Court, and when he is there, the Court always assigns him a Guardian: But it is doubted whether this can be done against a Peer of the Realm who is an Infant, and whose Person is sacred.

## (L) Of the Privilege of Infancy as to the Parol's demurring: And herein,

### 1. In what Actions shall the Parol demur.

3 *Bulf.* 143.  
1 *Roll. Rep.*  
325.

THE Parol's Demurring until the full Age of the Infant is a dilatory Plea, or temporary Bar, and peculiar only to the Feudal Law; for in the Civil Law, the Guardian was Party to the Suit instead of the Infant; and if there was *Mala Fides* in his Defence, he was to answer it to the Infant; but the Wardship in the Feudal Law was of another Nature, for the Guardian has the whole Profits in the Estate, and also the Marriage of the Infant, which was to breed him up to Arms, and to marry him to such Person as they thought might continue the Martial Strain, that so the Ward might subserve the original Design of the Tenure.

6 *Co.* 3. b.  
*Markal's*  
*Case.*

Hence it was that the Guardian was not trusted with the Action, nor could the Infant, by reason of his Imbecility and Want of Understanding, be admitted to prosecute or defend; but this Establishment was confined to such Cases where the Right of the Inheritance was in Demand, and was not allowed to Actions touching the Possession; and the Reason was from a Necessity; for if the Infant was not allowed to defend his Possession, an Infant would be stript of all he had, during Minority; and so of Injuries done by an Infant the Parol shall not demur, because then a general License would be given for Infants to commit Injuries; and therefore the Prosecution of these Actions are committed to the next Friend, and the Defence of the Actions against an Infant to a special Guardian assigned by the Court.

6 *Co.* 3. b.  
*Lyer* 133.

And therefore in all Cases where a naked Right in Fee descends from any Ancestor to an Infant, there in every Action Ancestral brought by the Heir within Age, the Parol shall demur; for the Law in this Case

judgets

judges it less prejudicial that the Infant should be delayed of his Right, than that he should run the Hazard of losing it for ever, which he might be in Danger of by his Want of Knowledge in setting forth his Title as he ought to do.

Hence if an Infant brings a Writ of Right as Heir to his Ancestor, and lays the Esplees in his Ancestor, the Tenant may pray that the Parol demur. 1 Rol. Abr. 137.  
6 Co. 3. b.

So in a *Formedon* in Reverter the Parol shall demur, because he claims as Heir in Fee-simple to the Reversion, and must lay the Esplees in the Donor. 6 Co. 3. b.

So in all Cases on the Fee, as if an (a) Action of Debt on the Obligation of the Ancestor be brought against the Heir, there the Parol shall demur, because that lays a Burden on the Fee, which by Law is to be preserved intire until the Infant come of Age. 2 Inst. 89.  
Moor 74.  
Dyer 239.  
H. 39.  
1 And. 10.

of Debt against an Heir he shall have his Age, because at his full Age he may discharge himself by saying he hath *Riens per Descent*. 1 Rol. Abr. 140. — If an Ancestor dies indebted by Bond, in which the Heir is expressly bound, and leaves no Personal Assets, and the Lands descend on an Infant Heir, whether Equity will during the Minority of the Heir decree Satisfaction, is made a *Quære*, 1 Vern. 173. and there said, that Infants may be sued in Equity, and that there is no Precedent that the Parol should demur; and in 1 Vern. 428. it is said by the Master of the Rolls, that he thought such a Decree reasonable; but the Reporter adds a *Dubitatur* to it. (a) In a Writ

But regularly in all real Actions brought by an Infant of his own Possession the Parol shall not demur; for the granting that the Parol shall demur is a Law introduced, not for the Delay or Prejudice of the Infant, but for his Advantage. 6 Co. 3. b.  
Cro. Jac. 467.

Therefore in Assises of *Novel Disseisin* and *Mort d'Ancestor*, the Infant has not his Age, because these Actions are brought of his own Seisin, or his Ancestor's dying seised, which may be prosecuted during Minority. 6 Co. 4. b.

So if in Assise the Infant pleads a flat Bar, and the Bar is found against him, yet the Assise shall be taken at large; because the Law not allowing the Parol to demur in this Action, which is *festinum Remedium*, they inquire of the Seisin and Disseisin, that the Infant's whole Title may be before the Court, and he not to suffer by his Pleading. 48 E. 3. 33. 6.  
1 Rol. Abr. 140.  
2 Inst. 411.  
8 Co. 50. a.  
6 Co. 4. b.

In a Writ of Annuity against an Heir he shall have his Age, because he may discharge himself by saying he hath nothing by Descent. 1 Rol. Abr. 140.

So if a Man sues Execution upon a Statute Merchant against an Heir within Age, and ousts him thereby, (b) an Assise lies for the Heir, for he shall have his Age. Co. Lit. 290.  
1 Rol. Abr. 140.

(b) For the Extent is void, which is made upon the Possession of the Infant. *Hestl* 54.

So if a Man sues Execution upon a Recognizance against an Heir within Age, he shall have his Age, tho' he be charged partly as Tenant. 3 Co. 13.  
Co. Lit. 290.  
2 Inst. 89.  
1 Rol. Abr. 140.

So upon a Recognizance in Nature of a Statute Staple on the 23 H. 8. the Infant shall have his Age; for the Statute in this Particular is founded on the Reason, and follows the Course of the Common Law; and this Privilege of Infancy does not only protect the Infant, but (c) all others who are affected by the Judgment; as if there be Father and two Daughters, and the Father dies, one of the Daughters being within Age, Partition being made, the eldest shall not be charged alone, but shall have the Benefit of her Sister's Minority, which puts a Stop to the Execution. Bro. Statute Merchant 33.  
Co. Lit. 290. a.  
Moor, pl. 203.  
Dyer 239. a.  
Co. Ent. 12.  
(c) As if the Consulor of a Statute Merchant die, and his Heir within Age

endow his Mother, the Land in Dower shall not be extended during the Minority of the Heir. *Co. Lit.* 290. — But tho' upon a Judgment in Debt, or upon a Statute or Recognizance there can be no Proceeding against an Infant at Common Law during his Minority, yet it is said there may be in Chancery. 2 Chan. Ca. 164. & vide 1 Lev. 197. 8.

- 1 *Roll. Abr.* 140. So if a Man recovers in an Action of Debt against the Father, who dies, in a *Scire Facias* against the Heir, upon this Judgment he shall have his Age. *Co. Lit.* 290.
- 1 *Roll. Abr.* 140. In a *Scire Facias* against a Tertenant to have Execution of Damages recovered against *J. S.* if the Tertenant be within Age, and in by Descent, he shall have his Age. *Co. Lit.* 290.
- 1 *Roll. Abr.* 139, 141. In a Writ of Customs and (a) Services, which is a Writ of Right in its Nature, and in which Judgment final shall be given, an Infant in by Descent shall have his Age. *9 Co. 85. a.*  
(a) Yet he may be distrained for Rent during his Minority. *9 Co. 95. a.*
- Co. Lit.* 385, 381. In a *Cessavit* by (b) Descent, tho' it be of his own Ceffor, the Infant shall have his Age, because he cannot tell what Arrears there accrued; and if he does not make a true Tender, he loses the whole for ever. *1 Roll. Abr.* 138.  
(b) But if it be a Purchase it seems otherwise, because that is not an ancient Inheritance of the Family, for which he was to be in Ward; for which *vide Plow.* 364. b. *6 Co.* 4. b. *2 Inst.* 401. *Raym* 118. *3 Med.* 222.
- 1 *Roll. Abr.* 137. In (c) a Writ of Dower the Parol shall not demur for Favour of Dower; for the Wife must be subfisted. *3 Bulf.* 141.  
1 *Roll. Rep.* 323. *Cro. Jac.* 393. *2 Brownl.* 118. (c) So if a Woman brings a *Quod ei desorceat* upon a Recovery had of Land which she claimed to hold in Dower, the Parol shall not demur, because it is of the Nature of a Writ of Dower. *1 Roll. Abr.* 137. *3 Bulf.* 135, 138. *1 Roll. Rep.* 251. — But if Tenant in Dower be disseised, and the Disseisor dies seised, his Heir shall have his Age against the Feme. *1 Roll. Abr.* 137. *3 Bulf.* 142.
- Cro. Jac.* 111. So in Dower against an Infant, who makes Default upon the *Grand Cape* returned, it was held, that Judgment shall be given upon the Default; for the Infant shall not have his Age in Dower, which being but for Life, she may be totally defeated thereof by his frequent Defaults. *Cro. Eliz.* 309, 638. *2 Brownl.* 118. *2 Leon.* 59.  
*Cro. Jac.* 392. But in Error to reverse a Fine levied by the Plaintiff and her Husband, the Heir is summoned as Tertenant, and appears, and pleads that he is within Age, and prays that the Parol may demur; Plaintiff counterpleads the Age, shewing that she was intitled to have Dower before the Fine levied, and now is barred of her Dower by this Fine, which is erroneous, and sets forth the Errors, and seeks to be restored to her Writ of Dower: But upon Demurrer and solemn Argument it was adjudged, that the Parol shall demur, and that she shall not have the Advantage to take from him his Age, having by the Fine, so long as it stands in Force, barred herself of her Dower; and therefore the Law shall rather favour the Infant, whose Privilege is immediate, than hers, which is but mediate after the Fine reversed: But in *Moor* it is said, if he had not been Tertenant, he should not have had his Age in this Writ of Error; the Reason seems, because then she could not have recovered her Dower against him, and then it is not reasonable his Nonage should stand in the Way to hinder her from recovering her Dower against another.
- 1 *Roll. Abr.* 137. In an Attaint against the Heir of the (d) Feoffee, the Parol shall not demur for the Nonage of the Defendant, for the Mischief of the Death of the Petit Jury, before his full Age. (d) The same Law in an Attaint against Tenant in Dower within Age, who was the Wife of the Recoverer, and is endowed of his Possession, *1 Roll. Abr.* 738 9.
- 1 *Roll. Abr.* 138. In a *Quare Impedit* the Parol shall not demur for the Nonage of the Patron Defendant, because the Lapfe may incur during his Nonage. *3 Bulf.* 131, 142.  
1 *Roll. Abr.* 138. So if the King presents, in Right of the Heir in Ward, to a Church of which another is Patron, of the Grant of the Father of the Ward, with Warranty of the Land to which this is appendant, who left Assets to the Ward, and the Patron sues by Petition to the King to repeal his

Presentation, shewing the Matter, the Parol shall not demur for the Nonage of the Ward for the Mischief of the Lapſe, and this Suit is in the Nature of a *Quare Impedit*.

In a Writ of Eſtrepeament againſt an Infant he ſhall not have his Age, *Dyer* 104. becauſe this Action is in Nature of a Treſpaſs, and this is done by him-<sup>pl. 13.</sup> ſelf.<sup>2 Inſt. 328.</sup>

In a Writ of Partition between (a) Coparceners, Age does not lie for the Defendant, for nothing is demanded but a Partition.<sup>6 Co. 4. b.</sup>  
<sup>Co. Lit. 171. a.</sup>  
(a) The ſame Law of Joint-tenants and Tenants in common. *Heb.* 179. adjudged.

In a (b) *Per qua Servitia* the Defendant ſhall not have his Age, but ſhall be compelled to attorn, for he is not prejudiced in the Inheritance by the Attornment; for when he comes of full Age he may diſclaim to hold of him, or ſay that he held by leſs Service, notwithstanding this Attornment.<sup>9 Co. 85.</sup>  
<sup>Co. Lit. 315.</sup>  
<sup>2 Brownl. 84.</sup>  
<sup>1 Rol. Abr. 138.</sup>  
(b) The ſame

Law in a *Quid Juris clamat* againſt an Infant. *Co. Lit.* 315. 1 *Rol. Abr.* 138.

In a *Per que Servitia* if the Tenant ſays the Conuſor is dead, his Heir within Age, the Parol ſhall not demur for his Nonage, tho' it may be the Conuſor was Tenant in Tail; for, it ſeems, the Heir, if he was of full Age, could not come to plead this, but the Tenant may plead it, if it be true.<sup>1 Rol. Abr. 138.</sup>

In a *Quid Juris clamat* by him in Reverſion, againſt Tenant in Dower, the Parol ſhall not demur for the Nonage of the Demandant; for he is of full Age, or within Age, he ought to warrant the Land to the Tenant in Dower, becauſe of the Reverſion, by Force of an Act in Law.<sup>1 Rol. Abr. 138.</sup>

But if an Infant in Reverſion brings a *Quid Juris clamat* againſt Tenant for Life, the Parol ought to demur; (c) for he hath a Warranty againſt his Leſſor by ſpecial Deed, to which the Plaintiff who is within Age cannot bind himſelf.<sup>1 Rol. Abr. 138.</sup>  
<sup>6 Co. 4. a.</sup>  
(c) So where the Tenant for Life hath

a Privilege not to be impeached of Waſte, &c. *Co. Lit.* 320. a. 3 *Bulf.* 137. 9 *Co.* 85. 1 *Rol. Rep.* 323.

In a Writ of *Meſne* the Parol ſhall not demur for the Nonage of the Demandant, becauſe it is brought for the Wrong and Damage done to the Demandant himſelf.<sup>6 Co. 3. b.</sup>  
<sup>9 Co. 85.</sup>  
<sup>1 Rol. Abr. 138-9.</sup>

In a *Contributio facienda* by one Coparcener againſt another, the Parol ſhall not demur for the Nonage of the Tenant, tho' he ſays that his Anceſtor died ſeiſed, and held *ſine Contributio facienda*.<sup>1 Rol. Abr. 139.</sup>

In a *Scire Facias* (d) againſt the Heir of him againſt whom the Recovery was had, if the Heir be in by Deſcent from another Anceſtor, than he againſt whom the Recovery was had, he ſhall have his Age.<sup>1 Rol. Abr. 139.</sup>  
(d) But in a *Scire Facias* brought by

an Infant the Parol ſhall not demur for the Nonage of the Demandant. 1 *Rol. Abr.* 139. — But where it ſhall demur in a *Scire Fac.* to execute a Remainder limited to the Anceſtor, *vide Moor* 16. pl. 59, 35. pl. 114. 1 *And.* 24. *Dalf.* 37. *Kelw.* 204. *N. Bendl.* 121. pl. 152.

If a Man brings a (e) Writ of Error againſt the Heir of him that recovered, being within Age, and in by Deſcent in the Land, the Parol ſhall not demur for his Nonage, tho' perhaps he hath a Release, or other Matter to bar the Plaintiff, which he hath not Knowledge to plead within Age.<sup>1 Rol. Abr. 139.</sup>  
<sup>But where Age ſhall be granted in a Writ of Error, and</sup>

where not, *vide* 3 *Bulf.* 138, 142. 1 *Rol. Rep.* 323. *Cro. Jac.* 392. *Moor* 847. pl. 1148. (e) Age lies not in a Writ of Deceit, *per* 3 *Bulf.* 135. 1 *Rol. Rep.* 251. becauſe the Summoners and Pernors may die. *Cro. Jac.* 392.

In a Petition to the King in the Nature of a *Formedon* in Remainder, the Parol ſhall demur for the Nonage of the Petitioner.<sup>*Dyer* 156.</sup>  
<sup>*Dalf.* 22.</sup>  
<sup>*Moor* 35.</sup>  
<sup>*Kelw.* 205.</sup>

In

*Dyer* 157.  
2 *Hawk. P. C.*  
161, 162.

In an Appeal of Murder the Parol shall not demur for the Nonage of the Plaintiff, 2 *Inst.* 320. said to have been adjudged and approved by continual Experience of late Time; and the Reason of Failure of Battel is of no Force; for a Man of seventy may have an Appeal, and the Defendant shall be ousted of Battel.

2 *Inst.* 257.

At Common Law if a Man had been disseised, and the Disseisee or Disseisor had died, the Heir within Age, in a Writ of Entry *sur Disseisin*, brought by the Heir of the Disseisee, or against the Heir of the Disseisor, being within Age, the Parol should have demurred till the full Age of the Heir respectively.

2 *Inst.* 257.

So notwithstanding the Disseisor had died (a) pending a Writ of *Novel Disseisin* against him.

(a) But by the Common

Law, if the Grandfather had been disseised, and brought an Assise, and died pending the Writ, and after the Father had brought a Writ of Entry *sur Disseisin*, and pending this Writ the Father had died, if the Son had immediately brought a Writ of Entry, the Parol should not have demurred for his Nonage. 6 Co 4 b.

2 *Inst.* 291.

At Common Law in a *Mordancestor*, *Aiel*, *Besaiel*, or *Cosinage*, if the Tenant had pleaded a Feoffment or Release from a collateral Ancestor, with Warranty, in Bar, &c. the Parol should have demurred.

(b) 3 E. 1.  
*cap.* 47.

(c) So tho' he dies before Purchase of the Writ; for this is put only to shew the Mischief of this particular Case,

By the (b) Statute of *Westm.* 1. *cap.* 47. it is Enacted, 'That if one (c) Purchase an Assise, and the principal Disseisor dies before the Assise passed, the Plaintiff shall have a Writ of Entry (d) against (e) his (f) Heir or Heirs, of what Age soever; (g) so if the Disseisee die before he hath purchased, his Heir or Heirs shall have, &c. so that for the Nonage of the Heirs of either, &c. the Plea shall not be delayed, but, as much as can, fresh Suit must be made (b) after the Disseisin; so in Case of Prelates, &c. where there can be no Descent, &c.'

whereas the Body of the Act is general. 2 *Inst.* 257. (d) This extends only to a Writ in the *Per*, and not in the *Post*; so that if the Heir of the Disseisor makes a Feoffment in Fee, and the Feoffee dies, his Heir within Age, in a Writ of Entry against him he shall have his Age. 2 *Inst.* 257. — So it extends not to the Vouchee or *Prayee* in *Aid.* 2 *Inst.* 257. 2 *Leon.* 148. — If the Heir of the Disseisor takes Husband, and has Issue within Age, and dies, and the Disseisee brings a Writ of Entry against the Tenant by the Curtesy, and he prays in Aid of the Heir within Age, he shall have his Age; for this is a Writ of Entry in the *Post*, being against Tenant by Curtesy. 2 *Inst.* 257. (e) This extends to the Heir of the Heir; so that in this special Case a Writ of Entry in the *Per* and *Cui* is within the Act 2 *Inst.* 257-8. (f) Special Heir, as in Gavelkind, Borough English, &c. within this Act. 2 *Inst.* 258. (g) By this Clause express Provision is made in Case the Disseisee dies before Purchase of his Writ. 2 *Inst.* 258. (h) Intended after the Death of the Disseisor, and fresh Suit regularly is within a Year and Day after his Death, within which Time continual Claim is to be made. 2 *Inst.* 258.

(i) 6 E. 1.  
*cap.* 2.

(k) This put only for Example; for it extends to Mother, Brother, Sister, Uncle, &c.

after the Death of any of which a *Mordancestor* lies. 2 *Inst.* 291. — But this Act extends not to Actions *Ancestorel Droiturel*, but giving the Infant a Trial during his Minority, it gave it in such Actions as he might not be foreclosed of his Right; but at his full Age might have Recourse to a Writ of a higher Nature, and therefore it extends not to any *Fermedon*, *Dum non compos*, *Infra Etatem*, *Sur cui in vita*, &c. 2 *Inst.* 291. yet vide *Bro. Age*, 5.

## 2. Where the Parol shall demur without any Plea pleaded.

6 Co. 2. b. 4 a.  
*Dyer* 137. a.

The general Rule herein is, that where a naked Right in Fee descends, of which the Ancestor was once in Possession, there in an Action Ancestorel brought by the Infant the Parol shall demur without Plea; but the Parol shall not demur without Plea where the Ancestor died seised, or where the Action is brought of the Seisin or Possession of the Infant.

Therefore in a Writ of Right, as Heir to his Ancestor, (a) the Parol shall demur without any Plea, because this is an Action *Ancestor* *Droiturel*, and he lays the Esplees in his Ancestor.

*cester, cap. 2. 2 Inst. 291* (a) Tho' the Battel may be deraigned by Champions. *Dyer* 137. pl. 24.

So in a *Formedon in Reverter* the Parol shall demur without Plea, because he claims as Heir in Fee-simple to the Reversion, and not *per Formam Doni*, and therefore the Right of the Fee would be bound.

But on a *Formedon in Descender* and *Remainder* the Parol shall not demur without Plea, (b) because *Voluntas Donatoris in Charta sua manifeste expressa de cetero observetur*, and being founded on what is exactly expressed in the Deeds, tho' it be a *Droiturel* Action, yet it may be prosecuted during Minority; but if the Tenant plead in Bar a Warranty and Affets, there the Parol shall demur, because that concerns also all the other Inheritance of the Infant.

In a *Ser cui in Vita* the Parol shall demur for the Nonage of the Demandant, without any Plea pleaded.

In a Writ of *Warrantia Chartæ* brought by an Infant the Parol (c) shall not demur for his Nonage, tho' the Warranty was made to his Ancestor.

pendant denies the Deed. 1 *Rel. Abr.* 141.

In *Replevin* against an Infant if he avows upon the Plaintiff, and the Plaintiff shews forth the Release of the Father of the Infant to hold by less Services, yet the Parol shall not demur.

In *Trespas Vi & Armis* against an Infant who justifies, for a Rent *ant* *hujusmodi*, as Heir to his Father, if the other shews forth a Deed made by the Ancestor in Discharge, yet the Parol shall not demur, but he ought to answer to the Deed immediately.

In a Writ of (d) Right of Ward the Parol shall not demur for the Nonage of the Demandant, tho' this be a Writ of Right.

(d) So in *Escheat*, *Cessavit*, *Droit sur Disclaim* brought by an Infant, because he hath the Seignory in Possession, in respect of which he claims, and no Right to the Land was ever in the Ancestor. 6 Co. 3. b. *Dyer* 137. pl. 25.

If an Infant aliens within Age, and dies within Age, and his Heir brings a (e) *Dum fuit infra Ætatem*, the Tenant may pray that the Parol may demur, and yet the Action did not descend, but the Right only; for the Father could not have this Action, because he died within Age, said in (f) *Markal's Case*; and seems to be intended without Plea pleaded.

(e) So in a *Dum non fuit compos Mentis*. 6 Co. 4. (f) 6 Co. 4. b.

If in a *Scire Facias* to execute a Fine, by which a Remainder was limited to the Grandmother of the Plaintiff, whose Heir, &c. the Defendant prays the Parol may demur, yet he shall answer over, because he does not plead the Deed of his Ancestor.

adjudged; the rather, because no Freehold is demanded by the Writ, but an Execution of the Fine only. *Kelw.* 204. S. C. adjudged, upon the Reason in *Dalf. Moor* 35. pl. 114. S. C. adjudged. *Moor* 16. pl. 59. seems to be the same Case adjudged, tho' the particular Estate was determined in the Life of the Demandant's Father; and said, if the Defendant had pleaded the Deed of the Ancestor, &c. it should have demurred. *N. Bendl.* 121. S. C. adjudged. 6 Co. 3. a. S. C. cited. *Dyer* 138. pl. 27. like Point cited.

## 3. Upon what Plea pleaded Shall the Parol demur.

6 Co. 3. b. In an Action of the Possession of the Infant himself, the Parol shall  
1 Rol. Abr. not demur upon any Plea pleaded.  
141.

6 Co. 3. b. As in a Writ of Entry of a Disseisin done to himself, brought by an  
1 Rol. Abr. Infant, if the Tenant pleads the Feoffment of the Father of the Deman-  
141. dant, with Warranty to him, yet the Parol shall not demur, because  
this is brought of his own Possession.

2 Inst. 411. So in an Assise the Parol shall not demur for the Nonage of the De-  
8 Co. 50. mandant, tho' the Deed of his Ancestor be pleaded in Bar, because this  
6 Co. 4. b. is brought of his own Possession, and the Circumstances shall be inquired  
in it.

1 Rol. Abr. In a *Formedon in Descender* if the Tenant pleads the Feoffment of the  
141. Ancestor of the Demandant, with Warranty and (a) Affers, and the  
(a) The same Demandant (b) denies the Deed, the Parol shall demur for the Nonage  
Law, if a of the Demandant.  
collateral

Warranty be  
pleaded in Bar of this Action. 1 Rol. Abr. 141. (b) But whether without denying the Deed the  
Parol shall demur, *quare*; & vide 1 Rol. Abr. 141.

1 Rol. Abr. In a *Quare Impedit* if a Feoffment of an Acre to which an Advowson  
141. is appendant, with Warranty of the Ancestor of the Defendant, is plead-  
ed, with Affets from the same Ancestor, tho' the Defendant within Age,  
yet the Parol shall not demur for the Mischief of the Lapse incurring in  
the mean time.

1 Rol. Abr. In Action Real if the Tenant pleads in Bar the Feoffment of the An-  
142. cestor of the Demandant, with Warranty to J. S. and his Assigns; whose  
Assignee he is, and says, that Affets descended to the Plaintiff; to which  
the Demandant says, nothing descended; in this Case the Parol shall  
demur, because tho' the Feoffment and Warranty is not in Question,  
but only the Affets, which the Infant may well try, yet if he takes this  
Issue, the Deed of the Ancestor shall be held to be confessed by him.

1 Rol. Abr. So for the same Reason if in a *Formedon in Descender* the Tenant  
142. pleads a Feoffment by the Ancestor of the Demandant to A. and B.  
the Father and Mother of the Tenant, and to the Heirs of the Father  
with Warranty, and that they are dead, and avers that Affets are de-  
scended to the Demandant within Age, tho' the Demandant says, that  
B the Mother of the Tenant, is yet living.

1 Rol. Abr. In an (c) Assise (d) against an Infant if the Issue be, whether the Te-  
142. nant be a *Bastard* or *Mulier*, which is to be tried by the Bishop, by  
(c) But which his Blood is to be bound perpetually, yet the Parol shall not demur,  
otherwise it because this is of his own Wrong, and there shall be no Delay in this  
is in a *For- Writ.*  
medon in De-

scender; for  
there if the Issue be, whether the Tenant be a Bastard, the Parol shall demur. 1 Rol. Abr. 142  
(d) But otherwise it is if the Issue be, whether the Demandant be a Bastard. 1 Rol. Abr. 142.

## 4. For the Nonage of what Person Shall the Parol demur.

1 Rol. Abr. The Parol shall not demur for the Nonage of the King, because the  
142. Law always adjudges him of full Age.

1 Rol. Abr. In an Action brought by Baron and Feme for the Inheritance of the  
142. Feme, the Parol shall not demur for the Nonage of the Baron, because  
in the Right of the Feme.

1 Rol. Abr. In a Writ of *Mesne* brought by Baron and Feme in Right of the  
142. Feme, the Parol shall not demur for the Nonage of the Feme.



In *Detinue* against an Executor upon a Delivery to the Testator, the Parol shall not demur for the Nonage of the Executor. 1 *Rel. Abr.* 142.

In Action of Debt brought against Baron and Feme, upon an Obligation of the Ancestor of the Feme, the Parol shall demur for the Nonage of the Feme.

In a *Præcipe quod reddat* against Baron and Feme of Land that the Feme had by Descent, the Parol shall demur for the Nonage of the Feme, tho' the Baron be of full Age. 1 *Rel. Abr.* 142.

A Feme received for Default of her Husband shall have her Age, tho' the Baron was of full Age. 1 *Rel. Abr.* 142.

## 5. In Respect to what Estate or Interest shall the Parol demur.

If an Infant be in by (a) Purchase, he shall not have his Age.

*Carter* 88.

143. (a) If an Infant be in by Abatement, and not by Descent, he shall not have his Age. 1 *Rel. Abr.* 143. — But if the Heir of the Disseisee enters, he shall have his Age. 1 *Rel. Abr.* 144. — So if the Tenancy escheats to an Infant who is in by Descent in the Seignory, he shall have his Age. *Kelw* 105.

As if there be a Lease for Life, the Remainder to the right Heirs of 7. S. who is dead at the Time, his Heir within Age, he shall not have his Age when he comes in by *Aid Prayer*, for he hath it by Purchase. 1 *Rel. Abr.* 143.

If an Infant hath an Estate in Possession by Purchase sufficient to answer the Action, yet if he hath the Residue of the Estate by Descent, he shall not have his Age. 1 *Rel. Abr.* 143.

As if the Father and Son and Heir purchase to them and the Heirs of the Father, and after the Father dies, and a real Action is brought against the Son, he shall not have his Age, altho' he hath the Remainder in Fee by Descent. 1 *Rel. Abr.* 143.

If Lessee for Life (b) surrenders to an Infant who hath the Reversion by Descent, he shall not have his Age. 1 *Rel. Abr.* 143.

(b) For *quoad*  
Strangers the Estate for Life hath Continuance. *Co. Lit.* 338. b.

If the Father enfeoffs his Son and Heir in Fee (c) with Warranty, and dies, the Son shall have his Age, because the Warranty is extinct, and therefore in lieu thereof he shall be adjudged (d) in by Descent. 1 *Rel. Abr.* 143. 4.

without Warranty; for he may elect to be in of the one Estate or of the other. 1 *Rel. Abr.* 144. (d) So if Tenant in Tail infeoffs his Issue, and dies, the Issue shall have his Age, for he is remitted, and so in by Descent. 1 *Rel. Abr.* 144.

If an Infant be enabled by Custom to have and alien his Land at a certain Time, as at fifteen Years of Age, or when he can measure a Yard of Cloth, after this Time, and before his full Age of twenty-one, he shall have his Age; for the Custom being to be construed strictly does not extend to this collateral Thing. 1 *Rel. Abr.* 144.

In a *Formedon in Reverter* if the Demandant makes himself Heir to the Donor as Heir at Common Law, and the Tenant claims as younger Son, as Heir to the Donor by the Custom, and prays the Parol to demur for his Nonage, yet it shall not demur, because they both claim to be Heir to the same Person. 1 *Rel. Abr.* 143.

In a *Nuper obiit* by the Aunt against the Niece, and a Demand of the Seisin of the Father of the Aunt, who was the Grandfather of the Tenant, the Tenant who is in by Descent from her Mother shall not have her Age, because they are one Heir, and of equal Condition as to Privity of Blood, where the common Ancestor died last seised, as the Case must be intended. 1 *Rel. Abr.* 143.  
6 *Co.* 4. b.  
S. P. cited,  
and said, for  
it is principally to try  
the Privity  
of Blood.

But

- <sup>1</sup> *Rol. Abr.* But if Land descends to *A.* and *B.* Coparceners, and they enter, and have Issue, and die seised, in a *Nuper obiit* by one of them against the other within Age, the Parol shall demur for the Nonage of the Tenant, because their common Ancestor did not die last seised.
- <sup>143.</sup>
- <sup>1</sup> *Rol. Abr.* If a Devise be to the Heir in Tail, and if he dies, &c. that another shall sell it, the Devisee shall not have his Age, because he hath the Estate-Tail by Purchase.
- <sup>144.</sup>
- <sup>1</sup> *Rol. Abr.* If a Gift be made to the Father for Life, the Remainder in Tail to the Son, the Remainder to the right Heir of the Father, and after the Father dies, and the Fee descends upon the Son within Age, yet he shall not have his Age, because he hath the Estate-Tail by Purchase.
- <sup>144.</sup>
- <sup>1</sup> *Rol. Abr.* So if a Gift be made to the Father for Life, the Remainder to a Stranger in Tail, the Remainder to the Son in Tail, the Remainder to the right Heirs of the Father, and after the Stranger dies without Issue, and after the Father dies, and the Fee descends upon the Son within Age, yet he shall not have his Age, because he hath the Tail by Purchase.
- <sup>144.</sup>
- N. Bendl.* 265. If *A.* being Tenant in Tail enfeoffs *B.* to the Use of *A.* and his Wife for Life, and after to the Heirs of *A.* and *A.* dies, and the Wife grants her Estate to *C.* and his Heirs during the Life of the Wife, and *C.* enters, and dies, and the Lands descend to his Heir, against whom the Issue in Tail brings a *Formedon*, the Defendant shall not have his Age, because he is in only as an Occupant, and no Estate of Inheritance descended.
- Waller and Lamb*, adjudged.
- <sup>1</sup> *And* 21. *S. C.* adjudged.
- Croter* 88. *S. C.* cited.

### 6. Where for the Nonage of the Vouchee.

- <sup>1</sup> *Rol. Abr.* If an Infant be (*a*) vouched and bound to Warranty by the Deed of his Ancestor, the Parol shall demur for the Nonage of the Infant.
- <sup>144.</sup>
- (*a*) When for the Nonage of the Vouchee in a Writ of Entry *per Disseisin*, notwithstanding the Statute of *Westminster* 1. cap. 46. vide 2 *Inst.* 257. *Dyer* 137. pl. 24.
- <sup>1</sup> *Rol. Abr.* If two Coparceners in Gavelkind are vouched as one Heir, the Parol shall demur for the Nonage of the youngest, if he be seised; yet he is vouched but for his Possession.
- <sup>144.</sup>
- <sup>1</sup> *Rol. Abr.* So if one Coparcener be vouched, and hath Aid of the other Coparcener who is within Age, the Parol ought to demur.
- <sup>144.</sup>
- <sup>1</sup> *Rol. Abr.* If a Feme Tenant in Dower vouches the Heir of her Husband, and the Husband of the Heir, the Parol shall not demur for the Nonage of the (*b*) Baron, his Wife being of full Age, because the Baron is vouched only for the Inheritance of the Feme.
- <sup>144.</sup>
- (*b*) But the Parol ought to have demurred, if both had been within Age, or the Feme only. <sup>1</sup> *Rol. Abr.* 144 5.
- <sup>1</sup> *Rol. Abr.* If the youngest Son enter into the Inheritance descended, the Parol shall not demur for his Nonage, if he be vouched as Heir within Age, if the eldest Son be of full Age, who is Heir in Right, because he cannot be Heir by Continuance.
- <sup>145.</sup>
- <sup>1</sup> *Rol. Abr.* If a Bastard be vouched within Age by reason of his Possession, the Parol shall demur for his Nonage, because he may be Heir by Continuance all his Life, without Claim to the contrary.
- <sup>145.</sup>
- Co. Lit.* 244. *S. C.* 101.
- <sup>1</sup> *Rol. Abr.* If an Infant be vouched by Lessee for Life by reason of the Reversion, which he hath by Descent, the Parol shall demur, altho' he hath not the Freehold by Descent.
- <sup>145.</sup>
- <sup>2</sup> *Inst.* 455. At Common Law if the Husband had aliened the Lands of his Wife, with Warranty, and died, and in a *Cui in Vita* by the Wife, or a *Sur cui in Vita* by the Heir of the Wife, the Alience had vouched the Heir of the Husband within Age, the Parol should have demurred till the full Age of the Vouchee.

But by the Statute of (a) *Westm. 2. cap. 40.* it is Enacted, That if (a) 13 E. 1. the Husband aliens the Right of his Wife, (b) the Suit of her or her cap. 40. But Heir, after the Death of her Husband, shall not be delayed by the Non- since the 32 age of the Heir (c) that ought to warrant, but the (d) (e) Purchasor H. 8. cap. 28. shall (f) tarry till the Age of his Warrantor to have his (g) Warranty. (by which an Entry is given to the Wife or her Heir after an Alienation by her Husband) this Act is of little Use. 2 *Inst.* 456. (b) Ex- tends only to a *Cui* or *Sur cui in Vita*, which are the proper Actions upon an Alienation by the Hus- band; for if the Wife is Tenant in Tail, and the Baron aliens, and dies, and she dies, her Issue cannot have a *Sur cui in Vita*, but a *Formedon*, in which the Purchasor may vouch the Heir of the Baron, and for his Nonage the Parol shall demur. 2 *Inst.* 455. (c) So that it extends only to the Heir of the Baron that aliened. 2 *Inst.* 455. (d) Intended only of *Ipse emptor*, not his Heir. 2 *Inst.* 456. — So of the immediate Purchasor, and not his Alienee, tho' he may vouch the Heir of the Baron as Assignee. 2 *Inst.* 455. 4 Co. 50. a. — So intended only where the Purchasor is Tenant in Deed, not where he comes in as Vouchee or Tenant by Receipt, and vouches the Heir, &c. 2 *Leon.* 148. 1 Co. 15. a. 4 Co. 50. a. (e) Of any Estate of Freehold. 2 *Inst.* 456. (f) When he shall have a Re-sum- mons. 2 *Inst.* 456. (g) Whether in Law or Deed. 2 *Inst.* 456.

## 7. Where for the Nonage of the Prayee in Aid.

If in (b) Action against Tenant by the Curtesy he prays (i) in Aid 1 *Rol. Abr.* 145. of the Heir within Age, the Parol shall demur. (b) But if Error is brought against Tenant by the Curtesy, the Parol shall not demur for the Nonage of him in Reversion, per 1 *Rol. Rep.* 251. said by *Houghton arguendo, quod Coke concessit*, because he is not Tenant. (i) Where for the Nonage of the Prayee in Aid and Tenant by Receipt in a Writ of Entry, notwith- standing the Statute *Westm. 1. cap. 46. vide* 2 *Inst.* 257. *Dyer* 137. pl. 24. 2 *Leon.* 148.

If Lessee for Life hath Aid of him in (k) Remainder within Age, 1 *Rol. Abr.* 145. who is in by Descent, the Parol shall demur; *secus* if he were in by (k) So if Purchase. Lessee for Life hath Aid of him in Reversion by Descent. 1 *Rol. Abr.* 145.

If there be Lessee for Life, the Remainder to the right Heirs of J. S. 1 *Rol. Abr.* 145. who is dead, and after the right Heir dies, his Heir within Age, and the Lessee hath Aid of him, the Parol ought to demur, for he is in by Descent.

So if J. S. at his Death hath two Daughters his Heirs, and after the 1 *Rol. Abr.* 145. one dies, and her Part descends to her Daughter within Age, the Parol ought to demur for her Nonage, tho' the Aunt is in by Purchase.

In an Annuity against a Person, if he hath Aid of the Ordinary and 1 *Rol. Abr.* 145. Patron within Age, yet the Parol shall not demur for the Nonage of the Patron; for the Charge lies not upon the Patron, but upon the Parson. 1 *Rol. Rep.* 323. S. C. cited.

If two in Reversion by Descent are received upon Default of the 1 *Rol. Abr.* 145. Lessee, and the one is within Age, the Parol shall demur.

If a Feme in by Descent be received for Default of her Husband, the 2 *Inst.* 342. Parol shall demur for her Nonage, tho' the (l) Statute be *parata petenti* (l) *Viz.* 13 E. 1. cap. 3. which *vide* *respondere.* explained 2 *Inst.* 341.

In an Avowry for a Rent-charge reserved upon a Purparty, if the 1 *Rol. Abr.* 145. Plaintiff Lessee for Life hath Aid of him in the Reversion within Age, who is in by Descent in the Reversion, yet the Parol shall not demur, because the Land is not in Demand.

### 8. In what Cases if the Parol demur against one, it shall against another.

- 45 E. 5. 23. If two are vouched, if the Parol demurs for the Nonage of one, it  
1 Rol. Abr. 146. shall for the other also.
- 1 Rol. Abr. If Aid is prayed of two Coparceners, viz. the Aunt and the Niece,  
146. and the Aunt hath the Remainder by Purchase, and the Niece is in within Age, and hath the Remainder by Descent, the Parol shall demur for both.
- 1 Rol. Abr. So if Aid be prayed by one Coparcener of two other Coparceners, of  
146. which one is within Age, and the other of full Age, the Parol shall demur for all.
- 1 Rol. Abr. If the Tenant vouch himself and J. S. as Heirs, and J. S. is within  
146. Age, the Parol shall demur for both.
- 1 Rol. Abr. In a (a) *Dum fuit infra Ætatem* by two Coparceners of the Seisin of  
146. their Ancestor, for the Nonage of one Demandant the whole Parol ought to demur.  
(a) So in a  
*Non compos Mentis* by two Coparceners of a Seisin of their Ancestor the Parol shall demur for both, for the Nonage of one. 1 Rol. Abr. 146.
- 1 Rol. Abr. In a Writ of Entry *sur Disseisin* by two Coparceners, of which one is  
147. within Age, *qui non prosequitur* upon the Summons, yet the Parol shall demur against the other also.
- 1 Rol. Abr. If a Writ of Error be brought against the Heir of the Recoverer  
147. within Age, and a *Scire Facias* against the Tertenant, if the Parol demurs for the Heir, yet it shall not demur as to the Tertenant; for the Heir shall not be at any Prejudice if it is reversed as to the Tertenant.
- 1 Rol. Abr. If four enter into (b) a Recognizance, and after one dies, his Heir  
147. within Age, in a *Scire Facias* against the Heir and the rest, the Parol shall demur against all.  
3 Co. 13. a.  
(b) So where two are bound in a Statute, and one dies, his Heir being within Age. *Hest. 59. Lit. Rep. 72.*
- 1 Rol. Abr. In a *Scire Facias* against the Tertenants to have Execution of Damages  
147. recovered against J. S. if the Parol demurs against one of the Tertenants for his Nonage, it shall demur against all.
- Co. Lit. 164. a. In a *Scire Facias* if two Coparceners are received upon the Default of  
3 Co. 13. a. the Lessee, and the Parol demurs for the Nonage of one of the Coparceners, it shall demur for both.
- Dyer 239. If in Debt upon an Obligation against B. and C. Sons and Heirs of  
pl. 59. the Obligor, and against D. the Daughter and Heir of A. who was  
Havertry ver. another of the Sons and Heirs of the Obligor in Gavelkind, Process is  
Inver. continued till the Uncles are outlawed, and the Niece waived, and after  
N. Bendl. 148. the Uncles are pardoned, and bring a *Scire Facias* against the Plaintiff,  
pl. 205. who thereupon declares against them *simul cum* the Niece, and the  
Moor 74. Uncles plead their Niece is but of the Age of seven, *unde non intendunt*  
pl. 205. *quod durante Minori Ætate sua* they ought to answer, &c. yet the Parol  
1 And. 10. shall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Re-summons could be sued  
pl. 22 against her, but the Uncles only, because she never appeared in Court.  
S. C. adjudged.

9. In what Cases the Demurrer of the Parol for Part shall be for all.

In a Writ of Error upon a Judgment for divers Things against an Infant upon a Recovery by his Ancestor, if the Infant disclaims for Part, by which the Judgment is to be reversed for Error therein, yet for the Nonage of the Infant the Parol shall demur for the rest, and this shall make the Parol to demur also for that in which the Infant hath disclaimed, because it is but one Record; and therefore if he hath his Age as to Part, he shall have it for the whole.

The same Law in an Action against an Infant if he acknowledges the Action of the Demandant for Part, (a) yet if the Parol demurs for the rest, it shall demur for all.

nant may confess the Action for Part, and pray his Age for the rest.

If an Infant brings a Writ of (b) Entry *sur Disseisin* to his Father, and the Tenant pleads the Release of the Father as to Part of the Land in Demand, by which the Parol is to demur for this, yet it shall not demur for the rest.

the *Per Age* is taken away by *Westm. 2. cap. 47.* which *vide*

In an (c) Assise by three Coparceners, if the Tenant claims as Tenant by the Curtesy of the whole, and prays in Aid of one of the Plaintiffs in Reversion within Age, and hath Aid of him, by which the Parol ought to demur for the third Part that belongs to the Infant, and not for the rest, yet because the Assise shall not be taken by Parcels, it shall demur for the whole.

*Novel Disseisin* even at Common Law the Parol should not have demurred.

10. Of the Prayer of Age and Counterplea.

The granting that the Parol shall demur in Judgment of Law is in Favour of the Infant, therefore the Court *ex Officio* ought to grant it, tho' the Tenant will answer.

Where Age is granted, or the Parol demurs, the Writ does not abate; but the Plea is put without Day until full Age, at what Time there shall be a Re-summmons.

In a *Formedon* if the Tenant vouches *J. S.* as Cousin and Heir of, and for his Nonage prays that the Parol may demur, he ought to shew how he is Cousin.

If in Dower the Tenant vouches one within Age, in Favour thereof he ought to shew a Deed.

If a Man hath Aid of an Infant, and of the King, because the Infant is in Ward to him, after a *Procedendo* the Parol shall not demur upon Demand for the Nonage of the Ward; tho' this ought to have been granted, if he had demanded it at the Time of the *Aid Prayer*; for the *Procedendo* commands the Justices to proceed, and he ought to have shewn this in Chancery to stay the *Procedendo*.

A Counterplea of Age is like an Estoppel, and therefore ought to be very plain and certain to every Intent.

If a Man says in an Action (in which Age lies) that his Ancestor was seised in Fee, and died seised, and this descended to him within Age, and

(a) That he and prays his Age, (a) it is a good Counterplea (b) that his Ancestor is a Bastard, did not die seised.

Brother, or that his Father was attainted, &c. *Dyer* 137. pl. 26. 3 *Bulf.* 144. *vide*, and the several Authorities there cited, 1 *Roll. Rep.* 325. and the Books there cited. *Cro Jac.* 395 (b) In a like Case the Demandant traverses the Descent, and Day given the Tenant to advise what to do. *Hob.* 266.

32 *E.* 3. 55.  
1 *Roll. Abr.*  
146.

If an Infant upon Default of the Tenant prays to be received, because the Tenant is Tenant by the Curtesy after the Death of his Mother, the Reversion to him by Descent as Heir to his Mother, and prays the Parol may demur, it is a good Counterplea of the Age, that the Land was given to the Mother and her first Husband in special Tail, and the Husband died without Issue, and she took the Tenant for her second Husband, so the second Husband in by Abatement.

*Amcotts ver.*  
*Amcotts.*

1 *Sid.* 252.  
1 *Lew* 163.  
*Raym.* 118.  
1 *Keb.* 869,  
900. S. C.  
adjudged.

In a Writ of Error out of the Common Pleas the only Question was, whether upon a Plea by the Defendant to have the Parol demur, Issue being joined by the Infant that sued by his Guardian, and it being tried, and found against the Infant, whether a peremptory Judgment should be given against him, or only a *Respondeas Ouster*: It had been argued and much laboured in C. B. that it should be only a *Respondeas Ouster*; but after great Debate, they held the Law to be manifestly clear, that every dilatory Plea that receives its Trial by the Country shall be peremptory, let it be of what Nature soever, tho' this Case was a Case of as much Compassion as could be, and the Court would have shewn the Infant any lawful Favour; and of the same Opinion was the Court of B. R. upon the Writ of Error.

## Informations.

- (A) Of the Nature and several Kinds of Informations.
- (B) In what Cases they lie.
- (C) In what Manner they are to be laid.
- (D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.

### (A) Of the Nature and several Kinds of Informations.

**A**N Information may be defined an Accusation or Complaint exhibited against a Person for some criminal Offence, either immediately against the King, or against a private Person, which, from its Enormity or dangerous Tendency, the Publick Good requires should be restrained and punished, and differs principally from

from an Indictment in this, that an Indictment is an Accusation found by the Oath of twelve Men, whereas an Information is only the Allegation of the Officer who exhibits it.

This Difference between Informations and Indictments has made (a) some Men conceive, that this kind of Proceeding was utterly unlawful, as not being only contrary to the original Frame and Nature of our Laws, but also contrary to (b) *Magna Charta*, and several other Statutes, which require that no Man shall be put to answer, &c. but upon Indictment or Presentment.

(a) *Vide* Sir Francis Win-  
nington's Ar-  
gument,  
5 Mod. 456.  
and 1 Show.  
106, &c. —

And in 2 Hawk. P. C. it is said to have been holden, that the King shall put no one to answer for a Wrong done principally to another, without an Indictment or Presentment, but that he may do it for a Wrong done principally to himself; for which is cited Theol. b. 1. cap. 4. sect. 9, 10, &c. Finch 356. Fitz. *Actio for le Case*, &c. — Also from the Abuses made of them they have been complained of as unlawful, as particularly in the Reign of H. 7. when by Force of a Statute made in the 11th Year of that Reign, which empowered Justices of Assize and Peace to proceed on all Penal Statutes by Information, they were made use of by Emfson and Dudley to the great Oppression of the People: But this Statute was repealed by 1 H. 8. cap. 6. 2 Hal. Hist. cap. 20. (b) Cap. 29. and 5 E. 3. cap. 9. 25 E. 3. cap. 4. 25 E. 3. cap. 3. and 42 E. 3. cap. 3.

But tho', as my Lord Hale observes, in all Criminal Causes the most regular and safe Way, and most consonant to the Statute of *Magna Charta*, &c. is by Presentment or Indictment of twelve sworn Men, yet he admits that for Crimes (c) inferior to Capital ones the Proceedings may be by Information; and this, from the (d) long and frequent Practice, is now certainly established as Part of the Law of the Land; and therefore at this Day the following kinds of Informations may be exhibited, wherever the Nature of the Offence deserves such a Proceeding.

2 Hal. Hist.  
P. C. cap. 8.  
(c) But no  
Information  
will lie for  
a Capital  
Crime, or for  
Mistprison  
of Treason.  
Law. 5 Mod.

2 Hawk. P. C. 260. 2 Hal. Hist. P. C. cap. 20. (d) That Informations were at Common Law. 5 Mod. 463. per Holt C. J. & totam Curiam. — Et vide 1 Show. 106, &c.

1<sup>st</sup>, For an Offence principally and more immediately against the King an Information may be exhibited in the Name of the King's Attorney General, and such Information may be filed without any Application or Leave of the Court, and the Party shall be obliged to answer the same; also the Statute 4 & 5 W. 3. which requires a Recognizance for Payment of Costs from Persons exhibiting and prosecuting Informations, does not extend to Informations filed by the King's Attorney General, and it is (e) said that the Court will not quash such Information on Motion, but will oblige the Party to demur or plead thereto.

2 Hawk. P. C.  
260. & vide  
Carth. 465-6.  
That no such  
Information  
can be  
brought on  
a Penal Sta-  
tute.  
(e) 1 Salk. 572.

2<sup>dly</sup>, On Application, and Leave of the Court, grounded on Motion and Affidavit of some Misdemeanor, which, if true, doth from its evil Tendency merit such Prosecution, the Court allows of the filing of an Information in the Name of the Master of the Crown-Office; and of such kind of Informations there are numberless Precedents in the Crown-Office.

2 Hawk. P. C.  
261.  
2 Hal. Hist.  
P. C. cap. 20.

3<sup>dly</sup>, Where by many Penal Statutes the Prosecution upon them is by the Acts themselves limited to be by Bill, Plaint, Information, or Indictment, there, without doubt, the Prosecution may be by Information as well as by any other of these Methods; also of common Right such an Information, or an Action in the Nature thereof, may be brought for Offences against Statutes, whether they be mentioned by such Statutes or not, unless other Methods of Proceeding be particularly appointed, by which all others are impliedly excluded.

But for this  
vide Tit. *Acti-  
ons Qui tam*,  
or *Actions on  
Penal Sta-  
tutes*.

4<sup>thly</sup>, Informations in Nature of (f) a *Quo Warranto* may be, and frequently are, exhibited, with Leave of the Court, for usurping Privileges, Franchises, &c. which in some Respects is (g) a Civil Suit, as it is used

(f) For the  
Writ of *Quo  
Warranto*,  
and how it  
differs from

an Information in Nature of a *Quo Warranto*, vide 2 Inst. 282, 495. Latch 46. 1 Sid. 86. Old N. B. 107. Cro. Jac. 259, 260, 528. 3 Bulf. 54. Cro. Car. 311. — Of the Process on such Information, Carth. 503. 1 Salk. 374 Comb. 19. — For the Judgment thereon, Palm. 1, 2. 2 Rol. Rep. 113. Cro. Jac. 260. 1 Salk. 374 4 Mod. 55, 58. Carth. 218. (g) And being a kind of Civil Proceeding, there ought to be no great fine set on the Party.

as a proper Means to try a Right, tho' it punishes the Misdemeanor, such as the Usurpation, &c.

## (B) In what Cases an Information Will lie.

2 Hawk. P. C. 260. and several Authorities there cited.

HERE we shall lay down what hath been collected by Serjeant *Hawkins*, and is, as he says, every Day's Practice, agreeable to numberless Precedents, viz. either in the Name of the King's Attorney General, or of the Master of the Crown-Office, to exhibit Informations for Batteries, Cheats, Seducing a young Man or Woman from their Parents, in order to marry them against their Consent, or for any other wicked Purpose, (a) Spiriting away a Child to the Plantations, Rescuing Persons from legal Arrests, Perjuries, and Subornations thereof, Forgeries, Conspiracies, (whether to accuse an innocent Person, or to impoverish a certain Set of lawful Traders, &c. or to procure a Verdict to be unlawfully given, by causing Persons bribed for that Purpose to be sworn on a *Tales*,) and other such like Crimes, done principally to a private Person, as well as for Offences done principally to the King; as for Libels, seditious Words, Riots, false News, Extortions, Nuisances, (as in not repairing Highways, or obstructing them, or stopping a common River, &c.) Contempts, as in departing from the Parliament without the King's Licence, disobeying his Writs, uttering Money without his Authority, escaping from legal Imprisonment on a Prosecution for a Contempt, neglecting to keep Watch and Ward, abusing the King's Commission to the Oppression of the Subject, making a Return to a *Mandamus* of Matters known to be false; and in general any other Offences against the Publick Good, or against the first and obvious Principles of Justice and common Honesty.

Carth. 14, 15.  
The King  
ver. Darby.

An Information was exhibited against *D.* an Attorney of *C. B.* for speaking scandalous and reproachful Words of Sir *John Kay*, Knight of the Shire for the County of *York*, and a Justice of Peace, &c. concerning his said Office of Justice of the Peace, and the exercising thereof; and upon Demurrer to this Information it was argued, that it would not lie for scandalous Words spoken only of a particular Person, because he might have an Action on the Case to recompence him in Damages; tho' it was admitted, that such a Proceeding might be warranted for Libels, or for dispersing defamatory Letters, because by such Means the publick Peace might be disturbed, and Discords fomented among Neighbours, which might at last be a publick Injury, but that there was no such Mischief in the present Case: On the other Side it was insisted, that this Information was founded on sufficient Matter, because this Prosecution is not only as it respects the Person of Sir *John Kay*, but it relates to him as he is a publick Magistrate, and one who is subordinate to the Government, and therefore such defamatory Words are a Reproach to the supreme Governor, by whom Magistrates are intrusted, and from whom they derive their Authority, and it will not be denied but that Words reflecting on the publick Government are punishable at the Suit of the King by Information; and for this Reason the Court held that an Information would lie, and thereupon gave Judgment against the Defendant, and fined him an hundred Marks.

Hill. 15 & 16  
Car. 2. in B. R.  
Rex versus  
Starling and  
other Brew-  
ers of London.

An Information was exhibited by the Attorney General for conspiring to destroy the King's Revenue of the Excise; And whereas the King by Indenture, &c. *prolat'*, had farmed the Excise of *London*, *Middlesex*, and

1 Lev. 125. 1 Sid. 174. 1 Keb. 650. S. C.



Southwark to *A. B. and C.* rendering 11800*l.* per Ann. Monthly, &c. that the Defendants, and others *ignot*, &c. *illicite, factiose, & seditiose consultaverunt & conspiraverunt ad destruend' & depauperand' Farmarios Excise prædict'*, &c. and many other Facts were laid in the Information tending to the destroying the Excisemen, depauperating them, destroying the King's Revenue of Excise, pulling down the Excise-House, raising a Tumult amongst the poor People, &c. But the Jury that were to try the Issue were unwilling to find this Matter, tho' expressly proved, fearing it might be construed no less than Treason, and so would only find that such and such of the Defendants *illicite, factiose, & seditiose se assemblerunt, & illicite, factiose, & seditiose consultaverunt, & conspiraverunt ad depauperand' Farmarios Dom' Regis Excise prædict'*, prout prædict' *Attornat' Gen' Dom' Regis, &c. & quoad totam aliam materiam in Informatione contentam* find them Not guilty, and find *J. S.* Not guilty of the whole. It was moved in Arrest of Judgment, that here is no Offence at all found; for to conspire to depauperate the King's Farmers is no Offence, for it may be done by lawful Means; and that they are laid to be the King's Farmers is but a Description of their Persons, not that it was at the King's Revenue of Excise the Conspiracy struck, and the *assemblerunt* is not the Charge, for then it ought to have been laid *riotose & routose*, but only leading to the Conspiracy; for they must assemble before they can consult and conspire. It was answered by the King's Counsel, that the *illicite assemblerunt* is an Offence against the Law, and as properly and fully laid as could be; for *riotose* is where the Assembly is with Intent to commit a Riot, and *routose* for a Rout; but an Assembly may be illegal and punishable, and yet the Intention of that assembling may be good, as 21 *H. 7. Bro. Tit. Riots 1. per Fineux*; as if Men meet to prevent the Breach of the Peace between *A. and B.* *A.* going to Market, and *B.* threatening to beat him there, and to this Assembly no properer Epithet could be given than *illicite*; but besides, all manner of Combinations and Confederacies are unlawful without Respect to their End, 27 *Aff. 44. Moor, Lord Gray's Case, and Cro. Ja.* the Case of the Puritans petitioning; but this Conspiracy being to depauperate another Man, is unlawful in its End; and to answer the Objection that hath been made, it might be said, that altho' the depauperating of another Man may be by lawful Means, and the Consequence of a lawful Act, yet that is because it is not in the Intention of the Party, but it is *Damnum absque Injuria*; but for a Number of Men to design and conspire the depauperating of another, cannot certainly be lawful, for there the Damage to the third Party is their only Aim and End, and it is as well against the Law of Charity and common Society; and this might be said, if there were nothing of the King's Farmers in the Case; but here the Inducement to the whole Charge in the Information is, that the Defendants, &c. *machinantes defraudare & deprivare dictum Dom' Regem de Redditu suo prædict'*, & *prædictos Farmarios, &c. destruere & depauperare*, did so and so; now this Inducement in the whole is applicable to every Branch of the Charge, and the Jury having found those Charges as they are laid, *scilicet, Modo & Forma prout, &c.* they have found consequently that it was done by the Defendants, *machinantes, &c.* which makes it in their Intention to strike at the King's Revenue, as well as in Consequence. It was also urged for the Defendants, that for a bare Conspiracy, without any Act done in Prosecution of it, no Information would lie: But *Curia cont.* for tho' there must be some Fact to be as Evidence of the Conspiracy, as 9 *Co. Poulter's Case*, yet it is the Conspiracy that is the Crime, and that being found, it is enough. It was also urged by the King's Counsel, that the *Modo & Forma prout* in the Verdict extends to all the Charges of Fact that were done in Prosecution of this Conspiracy, and the Acquittal *quoad tot' al' materiam, &c.* extends to the distinct Charges of Facts that have no Relation to this Conspiracy:

But

But *Windham* Justice said, the *Modo & Forma prout* could by no means make the Verdict comprehend other Matter of Fact than was expressly found. It was moved by the King's Counsel, that they might inform the Court of the Heinousness of this Conspiracy, and how it was proved to be upon Evidence to the Jury that tried it, to aggravate the Offence, and induce the Discretion of the Court to increase the Fine; and the Case of *Machin* and *Tully* was cited, where a Battery being found by *Nisi Prius* against them, the Court informed themselves of the Heinousness of it by Affidavit, and thereupon vacated a Fine that was set in a Judge's Chamber, and set a high Fine upon the Defendants: But the Court refused it, saying, that were a Way to let in those Matters of which the Jury has acquitted them, by suffering Affidavits to be made; but in *Machin's* Case the Jury found the Defendants guilty of the whole; and what needs Aggravation of this, which appears so foul as it is found? The Court after unanimously concurred, that Judgment ought to be given for the King, tho' as to the Offence found there was some Variety of Opinion; *Windham* distinguished betwixt a Confederacy and a Conspiracy, that for a Conspiracy there ought to be some Fact done in Execution of it; so an Indictment cannot be maintained of a Man as a common Thief, or Champertor, or Foretaller, without laying some Fact of those Offences; and in this he grounded himself upon 29 *Aff.* 45. but he held, that here the Defendants are found guilty of a Confederacy, which is not a Word of Art, but may be expressed in other Terms, and such an Offence will this Matter found amount unto; he held the Information as to the unlawful Assembly not good, because they wanted *Vi & Armis*; as to all the subsequent Facts, he held the Defendants acquitted; and as to the Intention of defrauding the King of the Rent, &c. he held the Acquittal did extend, because they were acquitted of the Facts to which that was to be applied; but as to the Confederacy the Verdict has found enough, and tho' it were to a private End it were unlawful; but here it is more, and that which will aggravate it highly; for the Customers of the King are publick Persons, as the King's Revenue is of a publick Concern, and it is set forth in the Information that these were Farmers of a very great Value; it is one Thing to beat a private Man, and another Thing to beat a publick Officer, or the King's Servant; if a Man should strike the Sheriff, that has the Character of a publick Officer, it would be a high Offence. *Twisden* held, that *Vi & Armis* was not necessary, and that they are found guilty of an unlawful Assembly; and in that my Lord Chief Justice concurred; as also that the Intention of defrauding and depriving the King of his said Rent is implicitly found within the *Modo & Forma prout*, &c. for so shall the *machinantes*, &c. be applied. *Twisden* and *Keeling* concurred, that for a Conspiracy alone, without any Prosecution, Information lay; and *Twisden* said, a Confederacy is a farther Degree of a Conspiracy; and they all agreed, that the King's Revenue being concerned did highly aggravate the Offence; 2 *H.* 4. 7. and 8 *H.* 5. *b.* were cited, that for Maintenance of that a Monk should be able to contract, and *Probi Homines de Dale* should be a Corporation. Lord Chief Justice cited old *Magna Charta*, where there is a Statute against such as should undervalue Lands in the King's Hands. So Judgment was given for the King; but the settling of the Fine was respited, because they would consider as well *Qualitatem Delinquentis* as *Quantitatem Delicti*. In this Case were cited 3 *E.* 3. 19. 43 *Aff.* pl. 38. Afterwards, the same Term, *Starling* was fined 300 Marks, and the rest of the Brewers 100 Marks apiece, but with some Apology by the Court for the Smallness of the Fine.

(C) In What Manner they are to be laid.

**R**EGULARLY the same Certainty that is required in an Indictment is in like Manner required in an Information; but it has been (a) held not to be necessary to repeat the Words *dat Cur' hic intelligi & informari* in the Beginning of every distinct Clause, if the Want of them may be supplied by a natural and easy Construction.

In an Information against *Roberts* the Ferryman over the River *Mercy*, which parts *Anglesea* from *Carnarvonshire* in *Wales*, it was laid generally, viz. that this was an antient Ferry Time out of Mind, and that 1 d. was the usual Rate for the Passage of a Man and Horse, 7 d. for 20 Cattle, 2 d. for 20 Sheep, &c. that *Roberts* being the common Ferryman, between 7 Septembris Anno 2. and the Day of exhibiting this Information, *injuste, oppressivo, & deceptivo cepit & extorsit de diversis Ligis & Subditis Domini Regis ignotis* to the Attorney General, passing that Way, *diversas Denariorum summas exceden' antiquam Ratam & Pretium pro Passagio & Transportatione suis & Averiorum suorum, videlicet, pro Passagio & Transportatione cujuslibet Personæ cum Equo suo 2 d. & pro quibuscumque 20 Catallis 2 s. & sic secund' Ratam predict' pro majori vel minori numero Averiorum, &c.* The Defendant was found guilty, and it was moved in Arrest of Judgment, that the Information was too general and uncertain, because it did not alledge that any particular Person, or any certain Number of Cattle, were ferried over within the Time laid in the Information; neither did it mention any particular Person from whom the extorted Rates were taken, which it ought to do, that the single Offence might certainly appear to the Court; and after great Deliberation, the whole Court was of that Opinion; and *per Holt Ch. Justice*, in every such Information a single Offence ought to be laid and ascertained, because every Extortion from every particular Person is a separate and distinct Offence; and therefore they ought not to be accumulated under a general Charge, as it is done in this Case, because each Offence requires a separate and distinct Punishment, according to the Quantity of the Offence; and it is not possible for the Court to proportion the Fine or other Punishment to it, unless it is singly and certainly laid.

Tit. Tit.  
Ind. Elements.  
(a) 1 Salk 377.  
Raym. 34.  
2 Hawk. P. C.  
261.  
Carr. 226.  
The King  
ver Roberts.

(D) Of filing an Information, the Proceedings thereon, and the Provisions made herein by Statute.

**I**T seems to be the established Practice at this Day not to admit of the filing of any Information (except those exhibited in the Name of his Majesty's Attorney General,) without first making a Rule on the Persons complained of to shew Cause to the contrary; which Rule is never granted but upon Motion made in open Court, and grounded upon Affidavit of some Misdemeanor, which, if true, doth either for its Enormity or dangerous Tendency, or other such like Circumstances, seem proper for the most publick Prosecution; and if the Person, on whom such Rule is made, having been personally served with it, do not at the Day given him for that Purpose give the Court good Satisfaction by Affidavit that there is no reasonable Cause for the Prosecution, the Court generally grants the Information; and sometimes, upon special Circumstances, will

2 Hawk. P. C.  
262.

grant it against those who cannot be personally served with such Rule; as if they purposely absent themselves, &c.

2 Hawk. P.C.  
262 3

But if he shew good Cause to the contrary, as that he has been indicted for the same Cause, and acquitted, or that the Intent is to try a Civil Right which has not been yet determined, or that the Complaint is trifling or vexatious, &c. or where the Motion is for an Information in the Nature of a *Quo Warranto*, if he can shew that his Right hath been already determined on a *Mandamus*, or that it hath been acquiesced in many Years, or that it depends upon the Right of his Voters, which hath not been tried, or that it doth not concern the Publick, but is wholly of a private Nature, the Court will not grant the Information without some particular Circumstances, the Judgment whereof lies in Discretion.

As to the Provisions made herein by Statute, by the 4 & 5 W. & M. cap. 18. reciting, that divers malicious and contentious Persons had, more of late than Times past, procured to be exhibited and prosecuted Informations in their Majesties Courts of King's Bench at *Westminster* against Persons in all the Counties of *England*, for Trespasses, Batteries, and other Misdemeanors; and after the Parties so informed against had appeared to such Informations, and pleaded to Issue, the Informers had very seldom proceeded any farther, whereby the Persons so informed against had been put to great Charges in their Defence; and altho' at the Trials of such Informations Verdicts had been given for them, or a *Noli prosequi* entered against them, they had no Remedy for obtaining Costs against such Informers; it is Enacted, ' That after the first Day of ' *Easter Term* in the Year 1693. the Clerk of the Crown in the said ' Court of King's Bench for the Time being shall not, without express ' Order to be given by the said Court in open Court, exhibit, receive, ' or file any Information for any of the Causes aforesaid, or issue out ' any Process thereupon, before he shall have taken or shall have delivered to him a Recognizance from the Person or Persons procuring ' such Information to be exhibited, with the Place of his, her, or their ' Abode, Title, or Profession, to be entered, to the Person or Persons ' against whom such Information or Informations is or are to be exhibited, in the Penalty of twenty Pounds, that he, she, or they will ' effectually prosecute such Informations or Information, and abide by ' and observe such Orders as the said Court shall direct; which Recognizance the said Clerk of the Crown, and also every Justice of the Peace ' of any County, City, Franchise, or Town Corporate, (where the ' Cause of any such Information shall arise,) are by the said Statute ' impowered to take; after the taking thereof by the said Clerk of the ' Crown, or the Receipt thereof from any Justice of the Peace, the said ' Clerk of the Crown shall make an Entry thereof upon Record, and ' shall file a *Memorandum* thereof in some publick Place in his Office, ' that all Persons may resort thereunto without Fee: And in Case any ' Person or Persons, against whom any Information or Informations for ' the Causes aforesaid, or any of them, shall be exhibited, shall appear ' thereunto, and plead to Issue, and that the Prosecutor or Prosecutors ' of such Information or Informations shall not at his and their own ' proper Costs and Charges within one whole Year next after Issue joined ' therein procure the same to be tried, or if upon such Trial a Verdict ' pass for the Defendant or Defendants, or in Case the same Informer ' or Informers procure a *Noli prosequi* to be entered, then in any of the ' said Cases the said Court of King's Bench is authorised to award to ' the said Defendant or Defendants his, her, or their Costs, unless the ' Judge, before whom such Information shall be tried, shall at the Trial ' of such Information in open Court certify upon Record, that there ' was reasonable Cause for exhibiting such Information; and in Case the ' said Informer or Informers shall not within three Months next after the ' said

‘ said Costs taxed, and Demand made thereof, pay to the said Defendant  
‘ or Defendants the said Costs, then the said Defendant and Defendants  
‘ shall have the Benefit of the said Recognizance to compel them there-  
‘ unto.

‘ Provided, That nothing herein shall extend or be construed to extend  
‘ to any other Information than such as shall be exhibited in the Name  
‘ of their Majesties Coroner, or Attorney in the Court of King’s Bench  
‘ for the Time being, commonly called the Master of the Crown-  
‘ Office.’

In the Construction hereof it hath been holden,

1. That if Procefs be issued on such Information before such Recog- <sup>2 Hawk. P.C.</sup>  
nizance is given as the Statute directs, the same may be set aside and <sup>263.</sup>  
discharged on Motion.

2. That this Statute extends to all Informations except those exhibited <sup>Carth 502.</sup>  
in the Name of his Majesty’s Attorney General, so that an Information <sup>The King</sup>  
in Nature of a *Quo Warranto*, tho’ a proper Remedy to try a Right, in <sup>ver. The Town</sup>  
respect of which it may not in Strictness come within the Words *Fref-* <sup>of Hertford.</sup>  
*passes*, &c. yet being also intended to punish a Misdemeanor, and also <sup>1 Salk 276.</sup>  
as the Proceedings therein may be as vexatious as in any other, the same <sup>S. C. ad-</sup>  
is within the Purview of the Statute, which being a remedial Law, shall <sup>judged.</sup>  
receive as large a Construction as the Words will bear.

3. That no Costs can be had on this Statute on an Acquittal at a Trial <sup>2 Hawk. P.C.</sup>  
at Bar, not only because the Clause that gives Costs, unless the Judge <sup>263.</sup>  
certify a reasonable Cause, seems only to have a View to Trials at *Nisi*  
*prius*, but also because a Cause, which is of such Consequence as to be  
thought proper for a Trial at Bar, cannot well be thought within the  
Purview of the Statute, which was chiefly designed against trifling and  
vexatious Prosecutions.

4. That if there be several Defendants, and some of them acquitted, <sup>1 Salk. 194.</sup>  
and others convicted, none of them can have Costs.

5. That wherever a Defendant’s Case is such as authorizes the Court <sup>2 Chan. Ca.</sup>  
to award him his Costs, he has a Right to them *ex Debito Justitiæ*; for <sup>191.</sup>  
it seems a general Rule, that where Judges are impowered by Statute <sup>2 Hawk. P.C.</sup>  
to do a Matter of Justice, they ought to do it of Course. <sup>263.</sup>

By the 9 *Annæ*, cap. 20. it is Enacted, ‘ That in Case any Person  
‘ or Persons shall usurp, intrude into, or unlawfully hold and execute  
‘ the Office or Franchise of Mayor, Bailiff, Portreeve, or other Office  
‘ within a City, Town Corporate, Borough, or Place in *England* or  
‘ *Wales*, it shall and may be lawful to and for the proper Officer of the  
‘ Court of Queen’s Bench, the Court of Sessions of Counties Palatine,  
‘ or the Court of Grand Sessions in *Wales*, with the Leave of the said  
‘ Courts respectively, to exhibit one or more Information or Informa-  
‘ tions in the Nature of a *Quo Warranto*, at the Relation of any Person  
‘ or Persons desiring to sue or prosecute the same, and who shall be  
‘ mentioned in such Information or Informations to be the Relator or  
‘ Relators against such Person or Persons so usurping, intruding into, or  
‘ unlawfully holding and executing any of the said Offices or Franchises,  
‘ and to proceed therein in such Manner as is usual in Cases of Informa-  
‘ tions in the Nature of a *Quo Warranto*; and if it shall appear to the said  
‘ respective Courts, that the several Rights of divers Persons to the said  
‘ Offices or Franchises may properly be determined on one Information,  
‘ it shall and may be lawful for the said respective Courts to give Leave  
‘ to exhibit one such Information against several Persons, in order to  
‘ try their respective Rights to such Offices or Franchises; and such  
‘ Person or Persons, against which such Information or Informations in  
‘ Nature of a *Quo Warranto* shall be sued or prosecuted, shall appear  
‘ and plead, as of the same Term or Sessions in which the said Infor-  
‘ mation or Informations shall be filed, unless the Court where such

‘ Infor-

Information shall be filed shall give further Time to such Person or Persons, against whom such Information shall be exhibited, to plead; and such Person or Persons, who shall sue or prosecute such Information or Informations in the Nature of a *Quo Warranto*, shall proceed thereupon with the most convenient Speed that may be.

And it is further Enacted, That in Case any Person or Persons, against whom any Information or Informations in the Nature of a *Quo Warranto* shall in any of the said Cases be exhibited in any of the said Courts, shall be found or adjudged guilty of an Usurpation or Intrusion into, or unlawfully holding and executing of the said Offices or Franchises, it shall and may be lawful to and for the said Courts respectively, as well to give Judgment of Ouster against such Person or Persons of and from any of the said Offices or Franchises, as to fine such Person or Persons respectively for his or their usurping, &c. and also to give Judgment that the Relator or Relators in such Information named shall recover his or their Costs of such Prosecution; and if Judgment shall be given for the Defendant or Defendants in such Information, he or they, for whom such Judgment shall be given, shall recover his or their Costs therein expended against such Relator or Relators; such Costs to be levied by *Capias ad Satisfaciendum*, *Fieri Facias*, or *Elegit*.

And it is further Enacted, That the Statute for the Amendment of the Law, and all the Statutes of Jeofails, shall be extended to Informations in Nature of a *Quo Warranto*, and Proceedings thereon, for any the Matters in the said Act mentioned.

## Injunction.

- (A) The several Kinds of Injunctions, and when to be granted.
- (B) What shall be a Breach thereof, and how punished.
- (C) How dissolved.

### (A) Of the several Kinds of Injunctions, and when to be granted.

(a) An Injunction to stay Restitution upon an Indictment of forcible Entry. *Moor* 820. pl. 1108. — Injunction to stay an Interloper's Trading to the *East Indies*, till the Validity of the *East India Company's* Patent had been determined. 1 *Vern.* 127. 2 *Chan. Ca.* 165. — An Injunction to stay an Action at Law for Money lost at Gaming, tho' all the Circumstances of Fraud were denied by the Answer. 1 *Vern.* 489. 2 *Vern.* 71. — An Injunction denied to enjoin a Person from overstocking a Common, where he had granted Common in his Down to *J. S.* for 100 Sheep. 2 *Vern.* 116.

Injunctions issue out of the Courts of Equity in several Instances; the most usual Injunction is, to (a) stay Proceedings at Law; as (b) if one Man brings an Action at Law against another, and a Bill is brought to be relieved either against a Penalty, or to stay Proceedings at Law, on some equitable Circumstances, of which the Party cannot have the Benefit at Law; in such Case the Plaintiff in Equity may move for an Injunction either upon an Attachment, or praying a *Dedimus*, or praying a further Time to answer; for it being suggested in the Bill, that the Suit is against Conscience, if the Defendant be in Contempt for not answering, or pray Time to answer, it is contrary to Conscience to proceed at Law in the mean time; and therefore an Injunction is granted of Course; but this Injunction only stays Execution touching the Matters in Question, and there is always a Clause giving Liberty to call for a Plea to proceed to Trial, for Want of it, to obtain Judgment; but Execution is staid till Answer or farther Order.

(c) That the Court of Chancery would not grant an Injunction in a Criminal Matter under Examination in B. R. and that if they did, the Court of B. R. would break it, and protest any that would proceed in

Contempt of it, 6 Mod. 16. per Holt C. J. — But where A. having obtained Judgment in Ejectment in B. R. against B. and had Execution awarded, but the Under Sheriff refused to execute it; whereupon by Rule of that Court he was ordered to attend, and for not attending an Attachment was awarded against him; and B. after all this Proceeding having, on his Bill exhibited in Chancery, obtained an Injunction, it was moved in Chancery, that this Injunction might not extend to stay Proceedings against the Under-Sheriff for his Contempt to the Court of B. R. for that he was prosecuted for a Contempt at the King's Suit, and it was unnatural for the King by his Injunction to stay his own Suit in another Court, the Offence being committed before the Bill exhibited; but the Motion was denied. 1 Vern. 25. (h) So tho' the Court will not proceed against a Member that has Privilege of Parliament; yet if a Parliament Man sues at Law, and a Bill is brought in Chancery to be relieved against that Action, the Court will make an Order to stay Proceedings at Law till Answer or further Order. 1 Vern. 329.

Where Tenant for (c) Life is committing Waste in cutting down young Timber, or (d) breaking up or ploughing antient Meadow or Pasture, or doing other Waste, the Tenant in Tail shall have an Injunction upon a Certificate of filing of the Bill, and shewing an Affidavit of Waste committed, and this till Answer and further Order; for Timber once cut down cannot be set up again.

Hard. 96. 1 Vern. 23. (c) So on a Motion to stay a Jointress Tenant in Tail, after Possibility,

Exc. from committing Waste, the Court held, that she being a Jointress within the 11 H. 7. ought to be restrained, being Part of the Inheritance, which by the Statute she is restrained from aliening. Abr. Eq. 221. Cook and Winford. — So where A. being Tenant for Life, Remainder to B. for Life, Remainder to the first and other Sons of B. in Tail Male, Remainder to B. in Tail, and B. (before the Birth of any Son) brought a Bill against A. to stay Waste, on Demurrer to this Bill, because the Plaintiff had no Right to the Trees, and none that had the Inheritance was Party; yet the Demurrer was over ruled, because Waste is to the Damage of the Publick, and B. is to take Care of the Inheritance for his Children, if he has any, and has a particular Interest himself, in Case he comes to the Estate. Abr. Eq. 400. Dayrell and Champness. — But where a Jointress who had a Covenant that her Jointure should be of such a yearly Value, which fell short, tho' her Estate was not without Impeachment of Waste, yet the Court would not prohibit her committing Waste so far as to make up the Defect of her Jointure. Abr. Eq. 400. (d) But where the Plaintiff let a Farm to the Defendant at an annual Rent, and Part of it being Pasture Land, the Defendant covenanted, amongst other Things, not to break up or plow any Part of it, and that if he did plow any Part of it, he would pay at the Rate of 20 s. per Ann. for every Acre; and on Motion for an Injunction to stay Waste in plowing, per Cur. the Parties themselves have here agreed the Damage, and have set a Price for plowing, and therefore will not grant any Injunction, and declared, if the Defendant was Plaintiff against paying 20 s. per Acre for plowing, they would not relieve him. 2 Vern. 119. Woodward and Gyles.

So if a Man be Tenant for Life without Impeachment of Waste, with Remainder to his first and every Son in Tail, tho' by Virtue of that Clause without Impeachment of Waste, he may fell Timber, and alter any Rooms of the House at his Pleasure; yet if he should pull down the House, or any Part of the Buildings thereunto belonging, Equity would enjoin him; but not if he pull down to rebuild; for tho' the Clause without Impeachment of Waste gives an (e) absolute Property in the

Vide Lord Eynard's Case, 2 Vern. 339, 738. 1 Salk. 161. Preced. Chan. 454. Such a Tenant not only enjoined committing

Waste, but decreed to put the House, &c. in the same Repair it was before. (e) In 1 Vern. 23. it is said, that the Estate being without Impeachment of Waste, no Prohibition or Injunction is to be granted. — But by Preced. Chan. 454 such a Clause does not give Leave to fell and cut down the Trees which were for the Ornament or Shelter of a House, much less to destroy or demolish the House.



Timber, that he may do therewith what he will, yet he is but Tenant for Life of the Lands and Houses; and therefore if he pulls them down in order to vex a Son that has disobliged him, he acts with an ill Conscience, and ought to be restrained in Equity.

Also it is every Day's Practice to grant an Injunction for building on another Man's Ground, and such Injunction shall go to stay that new Building till Answer and further Order; and so in the Case of stopping up ancient Lights.

2 *Stow.* 260.  
1 *Vern.* 120,  
275.

So Injunctions have frequently been granted to stay the printing and selling Almanacks, Bibles, and other Books, in Behalf of Patentees and Owners of such Books; but the Patent under Seal is ever produced in open Court.

There is also an Injunction granted to stay Trial at Law; this is never granted but upon Notice; as where one files his Bill, and it appears to the Court that the Plaintiff's Equity must arise out of the Defendant's Answer, in this Case the Court will, and often does, grant an Injunction, and that the same may extend to stay Trial.

There is an Injunction called a perpetual Injunction, for quieting a Man in the Possession of his Estate; this is generally either upon a plain equitable Title, or where one, two, or more Verdicts have gone against a Man; this Injunction is to quiet the Plaintiff and his Heirs for ever; and all claiming by, from, or under him; and this is very often granted, and in many Instances the Justice of the Court calls for it.

*Preced. Chan.*  
*Lord Bath*  
*ver. Sherwin.*

Also it has been attempted in Chancery, after three or four Ejectments, by a Bill of Peace to establish the prevailing Party's Title; but this has been constantly denied, where the Title was merely at Law; and my Lord *Cowper's* Reasons herein were, that it would be too great Arrogance in him to alter the Course of the Law; for that every Termor may have an Ejectment, and every new Ejectment supposes a new Demise, and the Costs in Ejectment are a Recompence for the Trouble and Charges to which the Possessor is put; but where the Suit begins in Chancery for Relief touching pretended Incumbrances on the Title of Lands, and the Court has ordered the Plaintiff to pursue an Ejectment at Law, there after one or two Ejectments tried, and the Right settled to the Satisfaction of the Court, the Court hath ordered a perpetual Injunction against the Defendant, because there the Suit is first attached in that Court, and never began at Law; and such precedent Incumbrances appearing to be fraudulent and inequitable against the Possessor, it is within the Compass of the Court to relieve against it.

1 *Vern.* 156.  
*Lady Poines's*  
*Case.*

A Trustee having contracted to sell an Estate to one Person, and the *Cestui que Trust* having actually sold it to another, who moved for an Injunction to quiet him in the Possession, being disturbed by the Trustee, it was held by my Lord Keeper, that an Injunction for quieting the Possession is only grantable where the Plaintiff has been in Possession for the Space of three Years before the Bill exhibited, upon a Title yet undetermined, or in Case the Cause hath been heard, and Judgments passed upon the Merits of the Cause by the Court.

1 *Vern.* 22,  
308.  
*Shew. P. C.*  
17

There is an Injunction to prevent Multiplicity of Suits; as where many Suits are depending, and are likely to happen, from one and the same Thing, the Court will here interpose, and grant an Injunction; they will direct a proper Issue to try the whole, and all the rest shall be bound by the Verdict, or else there might be twenty Actions, and as many Verdicts, where one (a) proper Direction or Issue ends the whole, and it is only directing one Issue to prevent many more.

(a) As where  
several Tenants of a  
Manor claim

the Profits of a Fair. 1 *Vern.* 266. — So to settle the Boundaries of Lands. *Preced. Chan.* 261.

1 *Vern.* 269.

If a Person is sued at Law for irregularly serving the Process of the Court of Chancery, it is said that an Injunction will be granted to stay the



the Proceedings at Law ; for the Irregularity is only punishable in that Court.

Where two Courts have a concurrent Jurisdiction of the same Thing, that Court shall retain the Cause which is first possessed of it; as between the Exchequer and Chancery, the County Palatines and Chancery; but if Legacies are given to Infant Children by a Stranger, and their Father being appointed their Guardian by the Spiritual Court, sues the Executor there for Recovery of them, (a) Chancery will grant an Injunction against his proceeding in that Court; because the Spiritual Court cannot order the Legacies to be put out at Interest for the Childrens Benefit, as the Chancery may do, tho' they may compel the Father to give good Security with two Sureties; so where a Husband sues in the Spiritual Court for a Legacy given his Wife, an Injunction will be awarded, because that Court cannot compel him to make an adequate Settlement or Provision for his Wife; but if the Executor be ordered by such a Time to bring in the Money, which he neglects to do, no Injunction will be granted, because the Bill might have been brought only for Delay, and the Executor might at any Time he pleased dismiss his own Bill.

(a) That Chancery will grant an Injunction to stay Proceedings in the Spiritual Court. *Preced. Chan.* 287.

There are other Injunctions which are never denied; as in an Ejectment, where the Party agrees to give Judgment in Ejectment to prevent Trial, to give a Release of Errors, and to consent not to bring a Writ of Error, and to this it is sometimes added to deliver Possession, as the Court upon hearing shall direct; this forwards the Defendant at Law, and he could have no more if he were to proceed to Trial.

Where a Mortgagee brought a Bill to foreclose, and pending the Suit an Advowson appendant to the mortgaged Manor became void, and the Mortgagee being hindered from presenting, brought his *Quare Impedit*, and the Court granted an Injunction, (b) tho' he had no Bill filed.

2 *Vern.* 401.

(b) An Injunction is

never to be granted before Bill filed. 4 *Inst.* 92. 1 *Vern.* 156. S. P. said.

Where a Cause abated by the Death of the Lady Gerard, and the Defendant was her Executor, who being served with a Copy of the Bill of Revivor, and my Lord Keeper's Letter, would not appear, being in Privilege; and upon Motion an Injunction was granted, tho' the Cause was not revived; and the Case of *Armstrong* and *Jackson* was cited, where before a Demurrer determined the Plaintiff had an Injunction on Motion.

*Abr. Eq.* 285. *Duke Hamilton versus Macclesfield.*

So where the Lord Wharton had an Injunction to quiet him in the Possession of the Mines in Question, and upon hearing of the Cause an Issue was directed to try, whether the Mines in Question were within the Plaintiff's or Defendant's Manor; the Issue was tried at Bar, and found for the Plaintiff, then the Plaintiff died, and a Bill of Revivor was brought, and before the Time for answering was out, or the Cause revived, the Plaintiff moved for an Injunction to stay the Lord Wharton's working the Mines, having Affidavit that since the Verdict against him he had trebled the Number of Workmen, and between that and *Candlemas* would work out the Mines; and an Injunction was granted, tho' the Cause was not revived.

*Abr. Eq.* 285. *Robinson and Lord Wharton.*

(B) What

## (B) What shall be a Breach thereof, and how punished.

Lane 96.  
Bent's Case.

IF there be a Suit in Equity concerning Title to a Close, and thereupon an Order is made, that the Defendant shall suffer the Plaintiff to enjoy the Close till, &c. and notwithstanding the Defendant upon a Title of Common puts in his Cattle, this is no Breach of the Injunction; for the Common was not in Question by the Bill.

1 Salk. 322.  
Booth and  
Booth  
6 Mod 288.  
S. C. in B. R.  
(a) That a  
Common  
Law Court  
will not en-  
large the  
Term in E-

A. obtained Judgment against B. but was hung up from taking out Execution for a Year and a Day by Injunction out of Chancery, and the Question was, whether he could after take out Execution without a *Scire Facias*, and it was held, that he could not: 1<sup>st</sup>, Because the Common Law Court cannot take (a) Notice of Chancery Injunctions. 2<sup>dly</sup>, Because it had been no (b) Breach of the Injunction to have taken out a Writ of Execution, and to have continued it by. *Viccomes non misit Breve.*

jeatment where the Plaintiff has been hung up by an Injunction out of Chancery. 1 Salk. 257.  
(b) That a Person may enter so as to invade himself to an Action for Recovery of the mesne Profits; notwithstanding an Injunction. 2 Vern. 519.

1 Vern. 207.  
Childrens ver.  
Saxby.

Where a Defendant having taken out Execution in Breach of an Injunction of the Court of Chancery, and some of the Bailiffs who served the Execution having, as was alledged, found out a Place in a Wall in the Plaintiff's House, that was made up again with Bricks, wherein was hid 150*l.* and having taken away the Money, and done great Spoil to the Plaintiff's Goods, it was ordered by the Lord Chancellor, that the Defendant should make good this Money to the Plaintiff, and should satisfy all other Damage which the Plaintiff would swear he had sustained; and this Order was confirmed by the succeeding Lord Keeper; tho' it was objected, that the Order was unreasonable, in making the Plaintiff Judge of his own Damage, that the Defendant came into Possession by Course of Law, and the Bailiffs were legal Officers, who, if they did any thing amiss, the Party ought to take his Remedy at Law against them, and the Defendant ought not to be answerable for their Misdemeanors; but the Lord Keeper held the Order to be just, and he thought it an idle Practice in the Court to put a Thief to his Oath to accuse himself; for he that has stolen will not stick to forswear it; and therefore *in Odium Spoliatoris* the Oath of the Party injured should be a good Charge upon him that has done the Wrong.

As concerning the Breach of Injunctions, it hath been of late practised to commit the Party on Affidavit of the Breach, and personal Notice given to him, but never on Notice to his Clerk; whereas by the antient Rule where a Man is guilty of the Breach of an Injunction, upon an Affidavit made thereof, the Plaintiff's Clerk in Court issues out an Attachment against him of Course, he is arrested thereon, gives Bail to the Sheriff, enters his Appearance with the Register; so the Court has hold of him; the Plaintiff files Interrogatories in the Examiner's Office to examine him; the Interrogatories are *Verbatim* according to the Affidavit; and if the Party does neglect to attend and be examined, it is a Motion of Course to examine him in four Days, or stand committed; if he confesses the Contempt, he must submit, own his Fault, beg Pardon, and pay Costs; but if he denies it by his Examination, the Plaintiff descends to prove it upon him; then the Plaintiff moves to refer it to a Master, to see whether the Party is guilty of the Contempt laid to his Charge, or not; here again he hath Liberty to be heard, and may except

to the Report, and bring it on for the Judgment of the Court; and if the Court is of Opinion that he is guilty of the Contempt, he must stand committed, and pay the Costs; but if the Court is of a contrary Opinion, (as it sometimes happens) he is acquitted, with Costs.

### (C) How dissolved.

THE Methods of dissolving Injunctions are various; when the Answer comes in, and the Party hath cleared his Contempt by paying the Costs of the Attachment, (if there is one,) he obtains an Order to dissolve *Nisi*, and serves it on the Plaintiff's Clerk in Court; this Order takes Notice of the Defendant's having fully answered the Bill, and thereby denied the whole Equity thereof, and being regularly served, the Plaintiff must shew Cause at the Day, or the Defendant's Counsel, where there is no Probability of shewing Cause, may move to make the Order absolute, unless Cause, sitting the Court.

The Plaintiff must shew Cause either on the Merits, or upon filing Exceptions; if upon the Merits, the Court may put what Terms they please on him; as bringing in the Money, or paying it to the Parties, subject to the Order of the Court, or giving Judgment with a Release of Errors, and consenting to bring no Writ of Error, or to give Security to abide the Order on hearing, or the like; and to this Order is generally added a Clause, that the Plaintiff shall speed his Cause to a Hearing.

If the Plaintiff shews Cause upon Exceptions filed, he must procure the Report in four Days of the Insufficiency of the Answer; and if the Motion is made at either of the last Seals after *Hilary* or *Trinity Term*, the Court sometimes puts the Plaintiff upon opening the Exceptions, and they judge whether they are material, or not; the Reason of this is, because the Defendant, if the Motion should be reported sufficient, hath no Opportunity to move the Court till the Seal before the next Term, and is thereby very greatly delayed; if the Court think the Exceptions material and necessary, they will grant the Motion; if otherwise, they will deny it, as the Case appears; and to this is sometimes added a Clause to the Order, especially when the Motion is made at the last Seal, that the Plaintiff shall procure the Report in four Days, or his Injunction to stand dissolved without further Motion; whereas it is not so in open Term, or at any of the Seals save the last; and this Clause being added, the Court needs not to hear the Exceptions opened, which oftentimes take up too much Time.

If the Master reports the Answer sufficient, it is a Motion of Course to dissolve the Injunction on the Answer's being reported sufficient; but yet the Plaintiff may shew Cause on the Merits; for there are many Instances where the Plaintiff's Counsel may think the Answer not full, and yet may be mistaken, and notwithstanding this, the Plaintiff may have good Cause on the Merits for Continuance of his Injunction; and it seems reasonable that he have Liberty to do it; but this must be done on Notice given to the other Side; he cannot do it when the Defendant's Counsel come to move to dissolve the Injunction, on the Answer's being reported sufficient; because as this is a Motion of Course, the Party is not prepared to speak to the Merits; but he may have Liberty on Notice given.

If the Plaintiff who hath an Injunction dies pending the Suit, in Strictness the whole Proceedings are a nated, and the Injunction with them; but even in this Case the Party shall not take out Execution

without special Leave of the Court; he must move the Court for the Plaintiff to revive his Suit within a Time limited, or the Injunction to stand dissolved; and as this is never denied, so if the Suit is not revived, the Party takes out Execution. There are some Instances where a Plaintiff may move to revive his Injunction; but as that rarely happens, so it is rarely granted, especially where the Injunction hath been before dissolved: But where a Bill is dismissed, the Injunction and every Thing else is gone, and Execution may be taken out the next Day.

## Inns and Innkeeper.

- (A) Inns by what Authority created, and how far within the Statutes concerning Alehouses.
- (B) Who shall be said a common Innkeeper; and therein of the Privileges allowed him by Law.
- (C) Of the Duties enjoined Innkeepers by Law: And herein,
1. To what Things the Duty of an Innkeeper extends.
  2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices.
  3. Of the Offence of refusing to harbour or entertain a Guest.
  4. In what Cases chargeable for Things stolen or lost.
  5. Who is such a Guest as may charge an Innkeeper.
  6. Of the Manner in which he is to be charged.
- (D) Of the Innkeeper's Remedies against his Guests.

- (A) Inns by what Authority created, and how far within the Statutes concerning Alehouses.

<sup>2</sup> *Rel Abr* 84.  
*Palm* 567.  
<sup>1</sup> *Bull.* 109  
*Godb.* 345.  
<sup>2</sup> *Rel Rep.*  
 545.  
<sup>2</sup> *Keb.* 506.  
*Silk.* 45.

**I**T seems to be agreed at this Day, that any Person may set up a new Inn, unless it be inconvenient to the Publick, in respect of its Situation, or to its Increasing the Number of Inns, not only to the Prejudice of the Publick, but also to the Hindrance and Prejudice of other antient and well-governed Inns: For the keeping of an Inn is no Franchise, but a lawful Trade, open to every Subject, and therefore

fore there is no Need of any (a) License from the King for that Purpose.

Inns were allowed in the Eyre. 2 *Rel. Rep.* 343. — But this is made a *Quere* in *Palm.* 374. and in *Hutton* 100. it is said, that there was no such Thing in the Eyres; but because that Strangers, which were Aliens, were abused and evilly intreated in Inns, it was, upon Complaint thereof, provided that they should be well lodged, and Inns were assigned to them by the Justices in Eyre. — In *Cro. Jac.* 528. there is an Instance of one outlawed on a *Quo Warranto* for keeping an Inn.

But as Inns from their Number and Situation may become Nuisances, they may be suppressed, and the Parties keeping them may at Common Law be (i) indicted and fined, as being guilty of a publick Nuisance; and in like Manner may they be dealt with, if they usually harbour Thieves, or Persons of scandalous Reputation, or suffer frequent Disorders in their Houses.

erecting four several Inns *ad Commune Nocturnitum*; and it was ruled, that for several Offences of the same Nature several Persons may be indicted in the same Indictment; but then it must be laid *separaliter exererunt*, and for Want of the Word *separaliter* the Indictment was quashed. 2 *Hal. Hist.* P. C. 174.

He who has an Inn by Prescription may lawfully enlarge it upon the same Land which has been used with it, either by erecting new Buildings thereon, or turning Stables into Chambers of Entertainment; and he shall have the same Privilege in such new Part, as in any other Part of his House.

Also it is agreed, that the Statute of (c) 5 & 6 E. 6. cap. 25. and other Statutes concerning the Licensing of Alehouses, &c. do not extend to Inns, unless an Inn degenerate into an Alehouse by suffering disorderly Tippling, &c. in which Case it shall be deemed as such.

1 *Sand.* 249. 4 *Mol.* 144. *Carth.* 151, 263. *Skin.* 293. 1 *Shaw.* 259. *Comb.* 405. And note, That as to the Licensing of Alehouses the Justices of Peace are the sole Judges, and have a discretionary Power of granting or refusing such License, and will not be compelled thereto by *Mandamus*, or otherwise.

## (B) Who shall be said a common Innkeeper; and therein of the Privileges allowed him by Law.

A Person who makes it his (d) Business to entertain Travellers and Passengers, and provide Lodging and Necessaries for them and their Horses and Attendants, is a common Innkeeper; and it is no way material whether he have any Sign before his Door, or not.

be assigned *per Hospitalem Domini Regis* to harbour a Man, he is not bound to take Charge of the Goods of his Guest. 1 *Rel. Abr.* 2. *Lyer* 158 in Margin. — An Infant Innkeeper not chargeable. 1 *Rel. Abr.* 2. *Jeus* of a Person *non compos.* *Cro. Eliz.* 622.

But tho' it be the Entertaining of Passengers that makes a Man an Innkeeper, yet it is said, that if a Person having put up a Sign before his Door afterwards pull it down, he thereby discharges himself of the Burthen of an Innkeeper; but if after the taking down his Sign he uses to harbour Men, it is as much a common Inn as if he had a Sign.

It hath been adjudged, that a Person living at *Ipsium* and lodging Strangers for drinking the Waters in the Season, and selling them Victuals and Beer, and to no other Persons except such Lodgers, is not an Innkeeper, so as to have Soldiers quartered on him, pursuant to the Statute 4 & 5 H. 3. cap. 13. for he is not such an *Hospitator* against whom an Action judged.

Action lies for refusing to entertain a Guest; also in this Case the Lodgers have such an Interest in their Rooms, that they may maintain an Action of Trespass against any one who should enter into them against their Will.

*Cro. Car. 271.* A Person who receives Cattle to agist, on an Agreement to pay so much a Week for them, cannot retain them till Payment, as an Innkeeper may the Horse of his Guest, unless there be a special Agreement to that Purpose.

*Cro. Car. 549.* An Innkeeper is distinguished from other Traders, in that he cannot be a Bankrupt; for tho' he buys Provisions to be spent in his House, yet he does not properly sell them, but utter them at such Rates as he thinks reasonable, and the Attendance of his Servants, Furniture of his House, &c. are to be considered; and the Statutes of Bankruptcy only mention Merchants that use to buy and sell in Gross, or by Retail, and such as get their Living by buying and selling, so that their principal Subsistence is by buying and selling; but the Contracts with Innkeepers are not for any Commodities *in Specie*, but they are Contracts for House-Room, Trouble, Attendance, Lodging, and Necessaries, and therefore cannot come within the Design of such Words, since there is no Trade carried on by buying and bartering Commodities.

*3 Bull. 270.* For the Security and Protection of Travellers, Inns are allowed certain  
*Co. Lit. 47.* (a) Privileges, such as that the Horse and Goods of a Guest cannot be  
*2 Vern. 129* distrained, &c.  
*(a) In 1 Rol.*

*Abr. 650.* it is said, that by some Opinions, Travellers Horses depastured by an Innkeeper pay no Tithes by the Common Law.— But the contrary hereof is holden in *Hard. 35.*

*Hill. 25 &* Also the Law takes Care of the Reputation of an Innkeeper; and  
*26 Car. 2.* therefore where in Case for Words the Plaintiff declared, that he was  
*Southwel and* possessed of certain Stables *in quodam loco vocat' Bell-Savage Inn*, that he  
*Allom.* had Accommodation for Travellers, and that he got his Living by the  
*Raym. 231.* exercising of that Faculty; that the Defendant was possessed of another  
*S. C.* Inn, and that a Person not known inquiring for the *Bell-Savage Inn*,  
(whither he was directed, to set up his Horse,) he said these Words,  
*This is Bell-Savage Inn*; and at another Time he said to another Person,  
*You have nothing to do there, he is broke and run away, there is no Entertainment for Man or Horse*; by reason of which Words he lost his Customers; and on Not guilty pleaded, the Jury having found for the Defendant as to the first Words, and as to the last for the Plaintiff, it was adjudged clearly for the Plaintiff; and *Hale C. J.* held farther, that if a Man keeps an Inn, and another that lives just by him, designing to get away his Customers, tells a Person who inquires for such Inn, that no one lives there, this is actionable; also it was said by *Hale* to have been adjudged actionable to dissuade a Person from going to an Inn, by telling him the Small-Pox was there.

## (C) Of the Duties enjoined Innkeepers by Law: And therein,

### 1. To what Things their Duty extends.

*9 Co. 81.* THE Duty of Innkeepers extends chiefly to the entertaining and  
*1 yer 158* harbouring of Travellers, finding them Victuals and Lodgings, and  
*Pro. Action fur* securing the Goods and Effects of their Guests; and therefore if one  
*Case 76, 92.* who

who keeps a common Inn refuse either to receive a Traveller as a Guest into his House, or to find him Victuals or Lodging, upon his tendering him a reasonable Price for the same, he is not only liable to render Damages for the Injury in an Action on the Case, at the Suit of the Party grieved, but also may be indicted and fined at the Suit of the King.

For he, who takes upon himself a publick Employment, must serve the Publick as far as his Employment goes; therefore an Innkeeper shall not only answer for his own Neglects, but also for the Neglects of those who act under him, tho' he should expressly caution against it.

But the Duty of an Innkeeper does not extend to the finding of his Guest with Cloaths or Wearing Apparel.

Also if the Guest be assaulted and beat within the Inn, he shall have no Action against his Host; for the Charge of the Host extends to the Moveables only, and not the Person of the Guest.

If a Man comes to a common Inn to harbour, and desires that his Horse be put to Grass, and the Host put him to Grass accordingly, and the Horse is stole, the Host shall not be charged; because by Law the Host is not bound to answer for any Thing out of his Inn, but only for those Things that are *infra Hospitium*.

2 Brownl. 255 S. P. per Cur.

But if the Owner does not require the Host to put his Horse to Grass, but the Host does it of his own Head, if the Horse be stole, he shall answer for it.

8 Co. 32. b.  
4 Leon. 96  
2 Brownl. 255.  
S. P. per Cur.

Also if the Host upon the Command of the Guest puts the Horse to Grass, and by the voluntary and wilful Negligence of the Host the Horse is stole, as if the Host voluntarily leaves open the Gates of the Close, by which Means the Horse strays out, and so is stole or lost, an Action (a) on the Case lies against the Host.

(1) This, it seems, must

be intended a special Action on the Case, and not on the Custom of the Realm; for which *vide Rot. Est. 23, 24. HERN'S PLEAD 250.*

## 2. Of the Offence of selling corrupt Commodities, or at exorbitant Prices.

Innholders are restrained from selling at exorbitant Prices, and may be indicted if they extort any greater or larger Sums than those Rates and Prices that are (b) imposed on their Commodities.

Cartb. 190.  
Skin. 291.  
An Innkeeper indicted

for taking too great a Price for Oats. *Cro. Jac. 609.* (b) Proclamation was made in Court for the County of *Middlesex* for the Rates and Prices of Hostlers, viz. Hay for a Night and Day for one Horse 9d. with Litter, Hay for one Day 4d. for one Horse, without Hay 2d. Oats 8d. by the Peck, and not more. *Raym. 162.*

And to this Purpose it is Enacted by 21 Jac. I. cap. 21. 'That all Hostlers or Innholders shall sell their Horse-Bread, and their Hay, Oats, Beans, Pease, Provender, and all kind of Victual, both for Man and Beast, for reasonable Gain, having Respect to the Gain for which they shall be sold in the Markets adjoining, without taking any thing for Litter. And it is further Enacted by the said Statute, That every Hostler and Innkeeper dwelling in any Town or Village being a Township, and no City, Town Corporate, or Market-Town, wherein any common Baker, having been an Apprentice to the Trade for seven Years, is dwelling, may make within his House Horse-Bread, sufficient, lawful, and of due Assise according to the Price of Grain and Corn. And it is further Enacted, That if the Horse-Bread which any of the said Hostlers or Innholders shall make be not sufficient, lawful, and of due Assise according to the Price of Grain and Corn as

Et vide 23  
E. 3. cap. 6.  
and 1 Hawk.  
P. C. 235.

‘ aboveſaid, or that if any of them ſhall offend in any Thing contrary to  
 ‘ this Act, the Juſtices of Aſſiſe, Juſtices of Oyer and Terminer, Ju-  
 ‘ ſtices of Peace in every Shire, Liberty or Franchiſe within this Realm,  
 ‘ Sheriffs in their Turns, and Stewards in their Leets, may inquire, hear,  
 ‘ and determine the ſaid Offences of the ſaid Hoſtlers and Innholders,  
 ‘ who ſhall be fined for the firſt Offence according to the Quantity of  
 ‘ the Offence, and for the ſecond Offence ſhall be imprifoned for one  
 ‘ Month, and for the third Offence ſhall ſtand upon the Pillory.’

2 H. 6. 53.  
 1 Rol. Abr.  
 95.

If an Innkeeper ſell corrupt Wine or Viſuals, an Action lies againſt him; alſo if his Servant ſell ſuch corrupt Wine or Viſual, an Action on the Caſe lies againſt the Maſter, tho’ he did not order the Servant to ſell it to any particular Perſon.

### 3. Of the Offence of refuſing to harbour or entertain a Guest.

Dyer 158.

pl. 33.

2 Brownl. 254

2 Rol. Rep.

345.

Kelw. 50.

Palm. 367.

Godb. 346.

1 Salk. 388.

Carth. 150.

S. P. admitted.

Dyer 158.

1 Rol. Abr. 3.

Bro. Action ſur Caſe 76.

Bro. Contract 43.

9 Co. 87. b.

5 E. 4. 2. b.

Dalt. cap. 7.

1 Show. 268.

Aſſor 867.

pl. 1229.

In 2 Brownl.

254. it is ſaid

by Coke C. J.

lick as far as his Employment extends.

that an Inn-

keeper is not bound to receive a Horſe, unleſs the Maſter be lodged there. — And herewith in 1 Salk.

388. my Lord C. J. Holt agrees; but the other three Judges differ from him, becauſe by the keeping

of the Horſe the Innkeeper has Gain, tho’ it would be otherwiſe of a Trunk, or other dead Thing.

It has been already obſerved, that if one who keeps a common Inn  
 (a) reſuſe either to receive a Traveller as a Guest into his Houſe, or to  
 find him Viſuals or Lodging, upon his (b) tendering him a reaſonable  
 Price for the ſame, he is not only liable to render Damages for the Injury  
 in an Action on the Caſe, at the Suit of the Party grieved, but may  
 alſo be indicted and fined at the Suit of the King.

(a) Without a reaſonable Excuse; and therefore if he reſuſe  
 under Pretence that his Houſe is already full of Guests, if this be falſe, an Action on the Caſe lies.  
 (b) That he is not bound to let him have Meat unleſs paid before-hand;  
 for the Hoſt is not bound to truſt. Bro. Action ſur Caſe 76. Bro. Contract 43. 9 Co. 87. b.

Alſo it is ſaid, that an Innkeeper may be compelled by the Conſtable  
 of the Town to receive and entertain a Perſon as his Guest.

Alſo an Innkeeper, or a Perſon keeping a Livery Stable, is obliged to  
 receive a Horſe, tho’ the Owner does not lodge in his Houſe; for by  
 taking upon him a publick Employment, he is obliged to ſerve the Pub-  
 lick as far as his Employment extends.

— And herewith in 1 Salk. 388. my Lord C. J. Holt agrees; but the other three Judges differ from him, becauſe by the keeping  
 of the Horſe the Innkeeper has Gain, tho’ it would be otherwiſe of a Trunk, or other dead Thing.

### 4. In what Caſes chargeable for Things ſtolen or loſt.

Dyer 266.

8 Co. 32. a.

Poph. 178.

Noy 79.

Latch 179.

Fitz. Hoſtler 5.

Bro. Action

ſur le Caſe 41.

(c) There-

fore if an

innkeeper be ſo diſtempered that he is not of a ſound Memory, and a Guest knowing thereof, Inns

there, where his Goods are ſtole, an Action on the Caſe lies againſt the Innkeeper; for he cannot

diſſemble himſelf by ſaying he was not then of a ſound Memory. Cro. Eliz. 622. Croſs and Andrews, ad-

judged. 1 Rol. Abr. 2. S. C. — But an Infant Innkeeper ſhall not be charged, for his Privilege ſhall

be preferred and take Place of the Cuſtom. 1 Rol. Abr. 2. Vide Head of Infants. (d) If the Innkeeper

goes Abroad, he muſt anſwer for the Goods of his Guest; for he ought to have a Servant to take Care

of them in his Abſence. 11 H. 4. 45. 1 Rol. Abr. 4. — But if an Inn is broke open, and the Goods of

Guests taken away by the King’s Enemies, the Innkeeper is not anſwerable. Plow. 9. b.

Innkeepers are clearly chargeable for the Goods of Guests ſtolen or  
 loſt out of their Inns, and this without any Contract or Agreement for  
 that Purpoſe; for the Law makes them liable in Reſpect of the Reward,  
 as alſo in Reſpect of their being Places appointed and allowed of by  
 Law, for the Benefit and Security of Traders and Travellers.

And this Duty and Burthen, enjoined Innkeepers by Law, they cannot  
 diſcharge themſelves of, under Pretence of (c) Sickneſs, Want of Under-  
 ſtanding, (d) Abſence from their Houſes, &c.

innkeeper be ſo diſtempered that he is not of a ſound Memory, and a Guest knowing thereof, Inns  
 there, where his Goods are ſtole, an Action on the Caſe lies againſt the Innkeeper; for he cannot  
 diſſemble himſelf by ſaying he was not then of a ſound Memory. Cro. Eliz. 622. Croſs and Andrews, ad-  
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 be preferred and take Place of the Cuſtom. 1 Rol. Abr. 2. Vide Head of Infants. (d) If the Innkeeper  
 goes Abroad, he muſt anſwer for the Goods of his Guest; for he ought to have a Servant to take Care  
 of them in his Abſence. 11 H. 4. 45. 1 Rol. Abr. 4. — But if an Inn is broke open, and the Goods of  
 Guests taken away by the King’s Enemies, the Innkeeper is not anſwerable. Plow. 9. b.



But if a Person comes to an Innkeeper, and desires to be entertained by him, which the Innkeeper refuses, because his House is already full, whereupon the Party says, he will shift among the rest of the Guests, and there he is robbed, the Host shall not be charged.

*Bendl 60. pl. 101. Dyer 158. 1 And 20. adjudged.*

It is said in *Dyer*, that if the Host require his Guest to put his Goods in such a Chamber under Lock and Key, and that then he will warrant their Safety, or else not, and notwithstanding the Guest suffers them to lie in an outer Court, where they are stole, no Action lies against the Host; for they were not lost thro' the Neglect of the Host, but of the Guest.

*Dyer 266. Spenser's Case. — But in Moor 78. pl. 207, 158. pl. 299. the S. P. seems to be holden*

otherwise, and that the Host cannot discharge himself of this Branch of his Duty by such a Declaration as this.

If the Host delivers the Key of the Chamber where the Goods are to the Guest, and he leaves the Door open, and the Goods are stole, yet an Action lies against the Host; for at his Peril he ought to keep safely the Goods of his Guests.

*8 Co. 35. a. in Caly's Case.*

If the Guest is robbed by his Servant, or by one that comes with him, or by one that desires may be lodged with him, he shall have no Action against the Host; for it was the Folly of the Guest to keep such a Servant or Company, and there is no Default of good Custody in the Host.

*8 Co. 33. a. in Caly's Case. Cro. El. 2. 285. Fitz. Regler 1, 2. S. P.*

It seems the Host is answerable, tho' the Guest does not acquaint him what Goods, &c. he has.

*8 Co. 33. a. But it is said, that if an*

Host demands of his Guest what Money or Goods he has, and he tells him none, or less in Truth than he has, if afterwards they are lost, the Host is not answerable. *Moor 158. pl. 299 per Anderson. But Windham, Periam cont.*

## 5. Who is such a Guest as may charge an Innkeeper.

If an Host invites one to Supper, and the Night being far spent, invites him to stay all Night, if he is after robbed, yet shall not the Host be charged; for this Guest was no (a) Traveller.

*2 Brownl. 214. 8 Co. 32. b. 1 Rol. Abr. 7. S. P.*

*Skin. 276. S. P.* (a) By the ancient Law the first Day he was called a Traveller, the second Day a Hogenind, and the third Day a menial Servant, for whom the Host should answer in the Leet as for his servant, *per Lat. b 88.*

If a Man comes to an Inn with a Hamper, in which he hath several Goods, and goes away, leaving this with the Host, and (b) two Days after comes again, but in the Time of his Absence this is stole, he shall have no Action against the Host; for at the Time of the stealing he was not his Guest, and by the keeping the Hamper the Host had no Benefit, and therefore shall not be charged with the Loss of it in his Absence.

*1 Rol. Abr. 3, 338. Cro. Jac. 188. Noy 126. S. C. adjudged between Jolly and Clerk. (b) Other. Popl. 179.*

wise if he had returned the same Night. *Moor 877.*

But if A. comes with Goods to an Inn in London, and stays there for a Week, Month, or longer, and is there robbed of them, he shall have an Action against his Host; tho' perhaps being at the End of his Journey, he cannot then be said *transiens*, according to the Writ in the Register.

*Latch 127. Popl. 179. Dyer 158. b. in Margin.*

But if an Attorney hires a Chamber in an Inn for the whole Term, he is *quasi* a Lessee, and if robbed, the Host not answerable.

So if a Man upon a special Agreement boards or sojourns in an Inn, and is robbed, the Host shall not answer for it.

*Lat. b 127. Hetley 49*

1 *Roll. Abr.* 3. So if the Guest (a) deliver the Goods to the Host upon another Account, he shall not be charged if lost or stolen.  
(1) But how far a Man shall be charged with the safe Custody of Goods by a general Acceptance, *vide Co. Lit.* 89. 1 *Roll. Abr.* 338. and *Tit. Barment.*

1 *Roll. Abr.* 3. If a Man comes to an Inn with a Horse which he rides, and leaves it with the Host, and goes away from the Inn for several Days, and in his Absence the Horse is stole, yet shall the Host be charged for it, because he had Benefit by the Continuance of the Horse with him, inasmuch as he is to be paid for it, and so the Owner is a sufficient Guest to maintain an Action.

*Cro. Jac.* 224. If a Man's (b) Servant, travelling on his Master's Business, comes to an Inn with his Master's Horse, which is there stole, the Master may have an Action against the Host, because the (c) absolute Property is in him.  
*Telv.* 162.  
*Dyer* 158. in Margin  
*Noy* 79.

1 *Roll. Abr.* 3.  
(b) But if a Person takes another's Horse and rides him to an Inn, where he is stole, the Owner shall not have an Action against the Host, but must take his Remedy against the Taker. 1 *Roll. Abr.* 3.  
(c) It is said, that if a common Carrier is robbed in his Inn, the Owner, and not the Carrier, shall have the Action. *Dalf.* 8. But this, it seems, is not Law, being founded on a Supposition that the Carrier is not answerable to the Owner.

*Telv.* 162. So if A. sends Money by his Friend, and he is robbed in his Inn, A. shall have the Action.

*Latch* 127. If one Joint-tenant of Goods is robbed, both may have the Action.  
*Poph.* 179.

### 6 Of the Manner in which he is to be charged.

3 *Co.* 32. b. The (d) Form of the Writ is thus, *Cum secundum Legem & (e) Consuetudinem Regni nostri Angliæ Hospitatores, qui Hospitia communia tenent ad hospitandum Homines, &c. transseuntes, & in eisdem Hospitantes, eorum Bona, &c. absque Substractione seu Amissione custodire tenentur, (f) quidam Malefactores quendam Equum (g) ipsius A. &c. (h) infra (i) Hospitium ejusdem the Courte; B. &c. invent' pro Defectu ipsius B. ceperunt, &c.*  
for it is not

a Custom confined to any particular Place, but it is such which is extensive to all the King's People.  
3 *Mod.* 227. *Fitz. Hostler* 2. *Bro. Action sur Case* 41. (f) He need not name them, because by Prescription of Law he hath no Knowledge of them. *Plow.* 129. a. (g) *Per Hetley* 49. it ought to be shewn that the Guest *transseuntes hospitavit*; yet *quare*; for perhaps he was at the End of his Journey. *Latch* 127. *Poph.* 179. and all the Entries are otherwise. (h) The Writ was, 100 l. of the Plaintiff in *Hospitio* of the Defendant *Hospitati ceperunt, &c.* and tho' objected in *Hospitio* referred to the Person, and not to the Money, and that he might harbour in the House of the Defendant, and his Money be stole elsewhere, and that it should have been *ibidem invent' ceperunt*, yet the Writ was adjudged good. *Fitz. Hostler* 2. *Bro. Action sur le Case* 58. (i) And this is well enough, tho' not shewn by what Authority or License held. 2 *Roll. Rep.* 346. *Palm.* 374. *Godb.* 346.

3 *Co.* 32. a. The Writ need not mention that the Defendant (k) keeps *commune* (k) In the *Hospitium*, for it must be so intended; for the Recital of the Writ is, *Hospitatores qui communia Hospitia tenent, &c.* and the latter Words depend upon the former; (l) but the Plaintiff ought to count that he kept *commune Hospitium*.  
(k) In the Writ he may be named Yeoman, but in the Declaration it must be shewn that he is a common Hostler. *Bro. General Brief* 16. *Bro. Action sur Case* 58. *Fitz. Hostler* 2.  
(l) *Vide Dyer* 266 pl. 9. *Hob.* 245. 2 *Leon.* 162.

*Cro. Jac.* 224. If in such Action brought (m) by the Master for Goods stole from his Servant, the Plaintiff lays the Custom that Innkeepers ought safely to keep the Goods of their Guests, and all other Goods into their Inns brought, the Custom is sufficiently alledged to maintain the Action,  
*Beadle and Morris*, adjudged.  
(m) In this Case there is no direct Writ in the Register; but by the Statute of *Westm.* 2. the Clerks shall agree to make a special Writ. *Dalf.* 8, 9.

notwith-

notwithstanding it was objected, (a) there was no such Custom to keep the Goods of others safely. (1) That the Misfeasance thereof is immaterial, for it is the Common Law *Litch 127 per Jones and Dod. 1 St. 245 Hob 18 3 Med 227.*

If in his Declaration the Plaintiff lays the Custom for common Inns, and then lays that he was *Hospitatus in Hospitio, &c.* this is well enough; for it must be intended that it was *commune*, else it is *Domus, & non Hospitium.* *Hob. 245. & vide Rast Int 475. Rob. L. 22.*

The Declaration against an Innkeeper was thus, *Præd' D. com' Hospitat' adtunc & ibidem existens in Stabulum deliberavit* a certain Gelding, to be by him safely kept, at a reasonable Rate, and to be by him safely re-delivered to the Plaintiff, and after Verdict for the Plaintiff, it was objected, that for ought appears the Horse was put into the Defendant's Stable without his Privity, in which Case he is not bound to take any Care of it; for the Words being *præd' D. com' Hospitat' existens* may as well be taken in an Ablative as Dative Case: But the Court held, that the Words being indifferent to an Ablative or Dative Case, they ought to be taken in that Case which makes the Declaration good, and therefore gave Judgment for the Plaintiff. *6 A. 1. 223. Statmon and Davis 1 Salk 404. S. C. but not S. P.*

## (D) Of the Innkeeper's Remedies against his Guests.

**I**NNKEEPERS may detain the (b) Person of the Guest who eats, or the Horse which eats, till Payment, and this he may do without any Agreement for that Purpose; for Men, that get their Livelihood by Entertainment of others, cannot annex such disabling Conditions that they shall retain the Party's Property in Case of Non-payment, nor make such disadvantageous and impudent a Supposition, that they shall not be paid; and therefore the Law annexes such a Condition without the express Agreement of the Parties. *39 H. 6. 18. 3 H. 7. 15. 2 Rel. Abr. 85. Cro. Car 271. Carth. 150. 1 Salk 388. (b) May detain the Person of his Guest. 1 Slow. 269.*

For it would be hard to oblige him to sue for every little Debt, and a greater Hardship that he might not be able to find him who was his Guest. — But if a Person goes into an Inn or Tavern, and calls for Wine, and goes away without paying for it, no Action of Trespass lies against him; for the going into the Inn or Tavern was lawful, and therefore the Vintner must pursue his Remedy by Action of Debt *8 Co. 147.*

If *A.* injuriously take away the Horse of *B.* and put him into an Inn to be kept, *B.* comes and demands him, he shall not have him until he hath satisfied for his Meat; for when an Innkeeper takes a Horse into his Keeping he is not bound to inquire who is the Owner of the Horse, which he is obliged to keep, let him belong to whom it will, and therefore no Reason that the Innkeeper should be obliged to deliver him till he is satisfied. *Yelv. 67. 3 Bull 569. 270. 2 Rel. Abr 85. Poph. 128, 179.*

If *A.* deliver an Horse to an Innkeeper, and *B.* promises that in Consideration that the Innkeeper will deliver over the Horse to *A.* that he, *viz. B.* will satisfy him for his Meat, this is a good Promise; for here is a good Consideration, inasmuch as the Innkeeper loses the Detainer, which is a Damage, and *A.* regains his Horse, that is to his Advantage. *Hutton 101.*

An Innkeeper that detains a Horse for his Meat cannot use him, because he detains him as in the Custody of the Law, and by Consequence the Detention must be in the Nature of a Distress, which cannot be used by the Distrainer. *Moor 87. 2 Rel. Abr. 438.*

*Moor* 8-6.  
*3 Bull.* 271  
*Yeld* 67.  
*1 Rol. Rep.*  
 449.

(a) *1 Vent.*  
*71 S. P.*

*2 Rol. Abr.* 85.

*2 Rol. Abr.* 85.

*2 Rol. Rep.*  
*438. & vide*  
*2 Rol. Abr.* 85.

*2 Rol. Rep.*  
*438.*

*2 Rol. Rep.*  
*438.*

*Skin.* 648.  
*Gilber versus*  
*Berkeley.*

But by the Custom of *London* and *Exeter*, if a Man commit an Horse to an Hostler, and he eat out the Price of his Head, the Hostler may take him as his own, upon the reasonable Appraisement of four of his Neighbours; which was, it seems, a Custom arising from the Abundance of Traffick with Strangers, that could not be known, to charge them with the Action; (a) but the Innkeeper hath no Power to sell the Horse, by the general Custom of the whole Kingdom.

But if *A.* commit the Horse of *B.* to a Hostler in *London*, and he eat out his Head, yet cannot the Hostler sell him; For all Customs being derogatory to the Common Law, are to be taken strictly; and there is no Custom of *London* that hath gone so far as this Case, to authorise one Man to sell and convey the Property of another.

If a Man commit his Horse to an Innkeeper, and he put him to Pasture, he may detain the Horse until he is satisfied for the Meat; for the Pasture of such Persons, set up by the Law for Entertainment, hath the same Privilege with the Stables.

If a Horse be committed to an Innkeeper, it may be detained for the Meat of the Horse, but not for the Meat of the Guest; for the Chattels are only in the Custody of the Law for the Debt that arises from the Thing itself, and not from any other Debt due from the same Party; for the Law is open for all such Debts, and doth not admit private Persons to take Reprisals.

If an Horse be committed to an Innkeeper, and be detained by him for his Meat, and the Owner take him away, the Innkeeper must make fresh Pursuit after him, and retake him, otherwise the Custody of him is lost; for he cannot retake him at any other Time: For if a Distress be rescued, and the Party upon fresh Pursuit do not retake it, the Distress is lost; for no Man that has only a naked Custody can make a Reprisal, when the Thing is out of his Custody; for it is the Power of an Owner and Proprietor, and of him only, to retake such his Property, wherever he finds it.

But if an Horse be committed to an Hostler, and he detain him for his Meat, and after the Owner comes to an Agreement that the Hostler shall retain him till he is satisfied, here he hath not only the Custody of him as a Distress, but also the Property in him as a Pledge; and if the Owner take it from him, he shall not only retake it upon fresh Pursuit, but wherever he meets it; because he had a Property by such Contract, and a Man that hath a Property may retake his own where he meets with it.

Upon Evidence the Case was, a Man had a Horse in an Inn, and came thither and directed that the Innkeeper should not give him any more Food, for he would not be responsible for it; and the Question was, whether for the Food after this Direction given by the Innkeeper to the Horse, he who brought the Horse thither shall be charged, or not; and *Holt* C. J. at first inclined that this is a Discharge, and that the Horse (tho' he might be retained by the Innkeeper,) yet is but in the Nature of a Distress, and it being in the Custody of the Innkeeper in his Inn, this is a Pound Covert, and the Horse afterwards ought to be found and maintained at the Peril of the Innkeeper; but after, *mutata Opinione*, he directed, that this was not a Discharge; for then any Innkeeper might be deceived, and it is the lessening of the Security of an Innkeeper, who may detain, and, by the Custom of *London*, sell the Horse for his Keeping.

# Joint-tenants and Tenants in common.

(A) Of the Nature of their Estates; and therein of the Difference between Joint-tenants and Tenants in common.

(B) What Persons may be Joint-tenants or Tenants in common.

(C) Of what Things there may be a Joint-tenancy or Tenancy in common.

(D) How a Joint-tenancy is created.

(E) How a Tenancy in common is created.

(F) What Words create a Joint-tenancy, and not a Tenancy in common, & e converso.

(G) Of the Duration and Continuance of the Estate, whether given jointly, or in common; and therein where the Inheritance shall be said to be joint or several.

(H) Of the joint and distinct Interest of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

1. In what Acts they must all join.
2. Where the Acts of one will be equally advantageous as if done by both.
3. Where the Acts of one will bind the other, whether to his Advantage or Prejudice.

(I) Of Severance and Survivorship: And herein,

1. Of the Right of Survivorship, and what Things will survive.
2. At what Time the Right of Survivorship is to take Place.
3. What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,
  1. What Disposition with a Stranger will work a Severance.
  2. What Disposition or Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.
  3. At what Time such Disposition must be made to take Effect.
  4. What shall be a total Severance, or but for a limited Time.

5. How

5. How far the Charges or Incumbrances of one Joint-tenant shall affect the Survivor.
6. Of Severance by Operation of Law.
7. Of Severance by Compulsion of Law; and therein of the Writ *de Partitione facienda*.

- (K) Joint-tenants and Tenants in common how to sue, and be sued; and therein of Summons and Severance;
- (L) Of the Remedies which Joint-tenants and Tenants in common have against each other.

(A) Of the Nature of their Estates; and therein of the Difference between Joint-tenants and Tenants in common.

*Lit. sect. 277.*

(a) Or may be created by other

Conveyances, such as Fine, Recovery, Bargain and

Sale, Release, Confirmation, &c. *Co. Lit. 180. b.*

HERE (a) a Feoffment is made to two or more, and their Heirs, or a Lease is made to them for Term of their (b) Lives, they are Joint-tenants; for being jointly infeoffed, &c. they shall jointly hold *per mie & per tout*, and shall jointly implead and be impleaded, which Property is common between them and Coparceners; but Joint-tenants have a sole Quality of Survivorship, which neither Coparceners nor Tenants in common have.

*Lit. sect. 292.*

*Co. Lit. 189. a.*

Tenants in common are those that come to the Land by several Titles, or by one Title and several Rights; as if there be three Joint-tenants, and one alien his Part, the other two are Joint-tenants of their Parts that remain, and hold them in common with the Alienee; so if Joint-tenants make several Feoffments or Gifts in Tail, or Leases for Life, the Feoffees, Donees, or Lessees are Tenants in common.

*Co. Lit. 189. a.*

And as the essential Difference between Joint-tenants and Tenants in common is, that Joint-tenants have the Lands by one joint Title, and in one Right, and Tenants in common by several Titles, or by one Title and by several Rights; this is the Reason, says my Lord Coke, that Joint-tenants have one joint Freehold, and Tenants in common have several Freeholds, tho' this Property is common to them both, viz. that their Occupation is individed, and neither of them knoweth his Part in several.

*5 Co. 27.*

*Co. Lit. 30. a.*

*31. b. 57. b.*

*Bro. Tit.*

*Dower 4. 84.*

*Cro. Eliz. 503.*

*Peck sect. 334*

Hence it appears, that the Wife of a Joint-tenant cannot be endowed; as if Lands are given to two Men and their Heirs, or the Heirs of their two Bodies, and one of them dies, his Wife shall not be endowed, but it shall go to the Survivor, who then is in from the first Feoffor or Donor, and may plead it as an original Feoffment or Gift to himself, and so is paramount her Title of Dower, which is not complete till her Husband's Death; and one Book says, it was the antient Course in Mortgages to make the Estate to two, in order to prevent the Mortgagee's Wife of Dower.

But the Wife of a Tenant in common shall be endowed; for there no Survivorship takes Place, but each Moiety (a) descends to the respective Heirs of the respective Tenant in common, and in such Case the Dower shall be assigned in (b) common too; for she cannot have it otherwise than her Husband had.

that a Writ of Dower will lie against the Heir of the Tenant in common before Partition made. 3 Lev. 84. Sutton and Rolf. (b) And not by Metes and Bounds; for which vide 1 Brownl. 127. 1 Rel. Abr. 682. Perk. sect. 413.

Also if there be two Joint-tenants, and one releaseth to the other, this passeth a Fee without the Word *Heirs*, because it refers to the whole Fee, which they jointly took, and are possessed of by Force of the first Conveyance; but Tenants in common cannot release to each other; for a Release supposeth the Party to have the Thing in Demand; but Tenants in common have several distinct Freeholds, which they cannot transfer otherwise than as Persons who are sole seised.

If Lands be given to A. and B. and the Heirs of A. B. who is only Joint-tenant for Life, cannot surrender his Estate to A. for he is seised with him *per mie & per tout*.

If Land be given jointly to two, upon Condition that they shall not alien, and one of them release to the other, it is no Breach of the Condition.

If there be two Joint-tenants of Land holden by Heriot Service, and one dies, the other shall not pay Heriot Service; for there is no Change of the Tenant, the Survivor continuing Tenant of the whole Land.

And altho' Tenants in common have several Freeholds, yet one Tenant in common cannot disseise the other, otherwise than by an actual Disseisin, as turning him out, and hindering him to enter; but a bare Perception of the Profit is not enough.

## (B) What Persons may be Joint-tenants or Tenants in common.

**A**N Alien and Subject may be Joint-tenants, & *nullum tempus occurrit Regi*; therefore if an Alien and Subject born purchase Lands to them and their Heirs, the Survivorship shall take Place till Office found; but the Office found intitles the King, and severs the Joint-tenancy.

If a Villein and another Person purchase Lands to them and their Heirs, the Lord of the Villein may enter into a Moiety.

Bodies Politick or Corporate cannot be Joint-tenants with each other, neither can a Corporation, whether sole or aggregate, be Joint-tenant with a natural Person; and therefore if Land be given to two Bishops, or Abbots, or Parsons, and their Successors, they are Tenants in common at first, and have no joint Estate for Life; for they take in their politick Capacities in Right of their Churches or Houses; so if Land be given to the King and a Subject, and their Heirs, or if the Crown descend to a Joint-tenant, or if Lands be given to a Layman and a Parson, and to the Heirs of one, and Successors of the other, they are Tenants in common; for the Fee vests in them in several Capacities.

But if a Lease for Years or other personal Thing be given to a Layman and Bishop, &c. they are not Tenants in common, but Joint-tenants; for as no Chattel personal can go in Succession, they must both take in their natural Capacities.

- 21 E 3. 50. b. Disseisors may be Joint-tenants, and upon the Death of one of them  
2 Rol. Abr. 87. the Survivor shall have the whole; for the Right, such as it was, continued jointly in them.
- 21 E 3. 50. b. Infants may be Joint-tenants, and if there be two Infants Joint-  
2 Rol. Abr. 87. tenants, who alien in Fee, and one of them dies, the Survivor shall have the whole; for notwithstanding the Alienation the Joint-tenancy is not severed, by reason of the Possibility of defeating it by Writ *Dum fuit infra Etatem*.
111. f. 291. Baron and Feme may be Joint-tenants; but herein it is to be observed, that Husband and Wife being considered but as one Person in Law, if an Estate be made to Husband and Wife, and a third Person, and their Heirs, the Husband and Wife take but one (a) Moiety, the third Person the other.
- (a) A. purchased a Copyhold Estate, and took Surrender thereof in the Names of himself, his Wife, and Daughter, and their Heirs, which he afterwards, as visible Owner thereof, mortgaged to J. S. On a Bill brought by the Mortgagee against the Mother and Daughter, to discover their Title, and to set aside their Estates as fraudulent against the Mortgagee, who was a Purchaser; it was held by the Court not to be fraudulent, and that the Husband and Wife took one Moiety by Intireties, which the Husband could not alien, nor dispose so as to bind the Wife, and that the other Moiety was well vested in the Daughter. 2 Vern. 120. *Buck versus Andrews*.
- Co. Lit. 187. a. Also Baron and Feme being one Person in Law, there can be no Moieties between them of an Estate given to them jointly during Coverture; and therefore if Lands be given to Husband and Wife, and their Heirs, the Husband cannot during the Wife's Life dispose of any Part of it, but the Whole must go to the Survivor of them.
- Co. Lit. 187. b. But if an Estate be made to a Man and a Woman, and their Heirs, before Marriage, and after they marry, the Husband and Wife have Moieties between them.
- Co. Lit. 187. And as there can be no Moieties between Husband and Wife of an Estate given to them during Marriage, it hath been holden, that if the Husband be attainted and executed, the Wife shall by her Petition regain all such Lands conveyed jointly to her and her Husband.
- Co. Lit. 187. So if the Lord enter on the Husband being his Villein, and having made such Purchase, the Wife surviving shall recover the Whole.
- Co. Lit. 187. It is said, that if a Deed of Feoffment or Grant of a Reversion be made to them whilst sole, and then they intermarry before Livery or Attornment, that they take no Moieties; but if they had been seised of an Use by Moieties before 27 H. 8. cap. 10. and such Use had been executed, by the Statute they should have had the Estate of the Land by Moieties; for they should have the Estate in such Plight as they had the Use.
- Co. Lit. 187. If Husband and Wife vouch and recover by Force of a Warranty made to them when sole, yet they shall have no Moieties in the Estate recovered.
- Co. Lit. 188. If A. make a Feoffment to the Use of himself and such Wife as he shall marry, and afterwards take a Wife, he and his Wife are Joint-tenants, tho' he were seised of a qualified Fee before the Marriage, and the Wife had nothing; for by the Marriage the contingent Estate vested in them both at the same Time by the said Limitation.
- 1 Co. 101. Dyer 340. If A. make a Feoffment to the Use of himself and such Wife as he shall marry, and afterwards take a Wife, he and his Wife are Joint-tenants, tho' he were seised of a qualified Fee before the Marriage, and the Wife had nothing; for by the Marriage the contingent Estate vested in them both at the same Time by the said Limitation.
- 2 Vern. 67. If A. purchase a *Walk* in a *Chase*, and take the Patent thus, to himself and his Wife, and one J. S. for their Lives, and the Life of the longest Liver of them, and afterwards A. dies indebted, this Purchase is not Affets; for it shall be presumed to be intended an (b) Advancement and Provision for the Wife; for she cannot be a Trustee for her Husband; (b) If Father and Son join in Purchase and therefore she shall enjoy the Benefit of it during her Life; but after of Lands on a valuable Consideration, and the Father afterwards devises those Lands, the Court of Chancery will not suppose the Concurrence of the Son was only in Trust for the Father, but that he was made Joint-tenant for his own Advantage; and this, it is said, was the ancient Way of Purchasing to avoid Wardships. 1 Chan. Ca. 28. *Seroupe versus Seroupe*.



her Decease, in Case *J. S.* should survive her, then to be a Trust for the Executor of the Husband, and applied towards the Payment of his Debts.

A Lease is made to *A.* and to Husband and Wife, viz. to *A.* for Life, Husband in Tail, Wife for Years; in this Case each of the three has a several Estate.

If an Estate be limited to Husband and Wife, and the Heirs of the Body of the Husband, they are Joint-tenants for Life, and the Inheritance is so executed in him, that if he makes a Feoffment, this will be a Discontinuance to his Issue; but if he suffers a common Recovery with single Voucher, this will bind neither the Issue nor any Remainders, because his Wife was seised of the Whole jointly with him, and not Part, and there are no Moieties between them, and therefore it cannot be good for any Part; but the Feoffment deals with the Possession, and gives it away by solemn Livery; and therefore to preserve the Warranty, this amounts to a Discontinuance, and the Issue shall be put to his *Formedon in Descender*, and those in Remainder to their *Formedon in Remainder*; and if the Husband levies a Fine, this will bind the Issue, by the Statute *4 H. 7.* and *32 H. 8.*

And as the Husband, being jointly seised with his Wife of the Lands, cannot alien them; so neither can he charge such Lands; and therefore where the Husband in such Case acknowledged a Recognizance, and died, it was held, that the Wife should hold the Lands discharged.

Husband and Wife may be Joint-tenants of a Lease for Years, or other Chattel (*a*) real, as well as of a Freehold or Estate of Inheritance.

(*a*) But if Goods are given to Husband and Wife, the Wife shall not have them by Survivorship, but the Executor of the Husband. *43 E. 3. 10. 1 Rol. Abr. 349.*

So if (*b*) a Statute be acknowledged to Baron and Feme, they are Joint-tenants of this, and the Feme shall have all by Survivorship.

*1 Rol. Abr. 342, 389. S. C. (b) So if an Obligation be made to Baron and Feme, 1 Rol. Abr. 342.*

Also it hath been ruled in Chancery, that where the Husband lends out Money in the Names of himself and his Wife, upon Mortgages and Bonds, and dies, that the Wife is intitled to the Money by Survivorship, if there are Assets sufficient to pay the Husband's Debts.

But where the Husband is jointly possessed of a Leasehold Interest, or other personal Thing, he may dispose of it in his Life-time without the Consent or Concurrence of his Wife.

But if a Lease be made to Baron and Feme for Years, the Baron cannot devise the Term; for the Feme is in by Survivorship before the Devise takes Effect.

Also if a Lease be made to Baron and Feme for their Lives, Remainder to the Survivor, or to the Executors of the Survivor of them, and the Baron grants the Term, and dies, this will not bar the Wife surviving; because the Wife had but a Possibility, and no Interest.

*Poph. 5. Cro. Eliz. 841. Co. Lit. 46. b. 1 Rol. Abr. 344.*

If the Baron be indebted to the King, and purchases Lands for Years to him and his Wife, and dies, this Land shall be put in Execution for the said Debt, because the Baron had Power to dispose of the said Term.

If a (*c*) Rent-Charge be granted to a Man and a Woman for Years, who afterwards intermarry, and after Arrearages incur, and after the Baron dies, the Feme shall have the Residue of the Rent, and also the

a Rent-Service for their Lives, the Rent incurs, and after the Baron dies, the Feme shall have the Arrearages incurred during the Coverture. *29 E. 3. 140. Moor 887. pl. 1248. Hob. 208. Cro. Eliz. 792*

Arrear.

Arrearages in a Writ of Annuity, because they participate of the Nature of the Principal.

*1 Rel Abr* 727. If there be Baron and Feme Joint-tenants for Life, and the Baron sows the Land, and dies before Severance, his Executor shall have the Emblements, and not the Feme; and it is said, there is no Diversity *Co Lit.* 55. b. between this and where the Baron is seised in Right of the Feme. *Noy* 149. S. C. and the Court divided thereupon. *Dyer* 316. S. C. cited in Margin to have been adjudged accordingly. *Cro. Eliz.* 61. cited to have been adjudged; & *vide Owen* 102. and *2 Vern.* 322. where *J. S.* on his Marriage settled Lands to the Use of himself and his Wife for their Lives, and of the Survivor of them, Remainder to the Heirs of their two Bodies; and the Husband dying and leaving the Ground sown with Corn, the Question was, whether the Emblements on the Land settled as aforesaid should go to the Wife, or to the Executors of the Husband, and the Court of Chancery proposed to each to take a Moiety, which was agreed to. *2 Vern.* 322-3.

### (C) Of what Things there may be a Joint-tenancy or Tenancy in common.

*Co Lit.* 181. b. *2 Rel Abr* 87. THERE may be a Joint-tenancy not only of Lands and Tenements, but also of Chattels personal, as well as real, such as Leases for Years, a Horse, &c. for where two come to these by a joint Gift or Purchase, they shall survive, and not go to the Executors of the Party deceased.

*Co Lit.* 182. a. But an Exception is to be made of two Joint-Merchants; for the Wares, Merchandizes, Debts, or Duties that they have as Joint-Merchants or Parceners shall not survive, but shall go to the Executors of the Deceased, and this *per Legem Mercatoriam*, which is Part of the Laws of this Realm, for the Advancement and Continuance of Trade and Commerce; which being *pro Bono Publico*, the Rule is, that *Jus accrescendi inter Mercatores pro Beneficio Commericii Locum non habet*.

*Carth.* 170 l. *Kemp and Andrews.* 1 *Slow.* 188. *Comb.* 474. *3 Lev.* 290. S. C. But tho' there is no Survivorship between Merchants, yet if there are two Joint-Merchants, or two who are jointly possessed of Goods in the Way of Trade, who casually lose them, and afterwards one of them dies, the Survivor alone may, it seems, bring Trover for them; for the Action must necessarily survive, tho' the Interest doth not, otherwise there would be a Failure of Justice; because the Survivor and the Executor of him who is dead cannot join in the Action, for that their Rights are of several Natures, and there must be several Judgments; but it being held clearly, that if this was any Plea, it must have been in Abatement, for which Reason the Books say the principal Point was not determined.

*Lit. fess.* 320. *Co Lit.* 199. a. Also there may be Tenants in common of Chattels real or personal, intire or several, as Leases for Years, Wards, Horses, &c. as when any of those who were Joint-tenants of them grant over their Interest to a Stranger, the Grantee and the other are Tenants in common.

*Co Lit.* 199. a. Also if there be two Tenants in common of a Seignory, and a Ward fall, they are Tenants in common of the Wardship as well of the Body as Land; and so it is if the Land escheat to them, they shall be Tenants in common thereof.

*Co Lit.* 190. a. If a Corody be granted to two Men and their Heirs, in this Case, because the Corody is incertain, and cannot be severed, it shall amount to a several Grant, to each of them one Corody; for the Persons be several, and the Corody is personal.

*1 Vern.* 217. If two take a Lease jointly of a Farm, the Lease shall survive; but the Stock on the Farm, tho' occupied jointly, shall not survive; neither shall

shall a Stock used in a joint Undertaking in the Way of Trade survive; and therefore it is said not to be necessary in Articles of Copartnership to provide against it.

### (D) how a Joint-tenancy is created.

A Joint-tenancy may be created by (a) Fine, Recovery, Bargain and Sale, Release, Confirmation, &c. Co.Lit.180.b.

(a) But it is said, that a Fine sur Conuzance de Droit come ceo, &c. cannot be levied to two, and their Heirs; for the End of Fines being not only to settle the Possession for the present, but for ever, the Admittance of such Fine would not answer that End; for besides the Uncertainty which of the Conuzees should survive and enjoy the Land, the Fine itself cannot operate according to the Limitation; for the Survivor, by the Privilege of Joint-tenancy, shall enjoy the whole, and for ever exclude the Heirs of the other Conuzee; besides, the Fine being equivalent to a Judgment, ought to decide and settle the Right of the Fee. 2 Rol. Abr. 19. Co. Reading on Fines, 5, 9.

Also a Joint-tenancy may be created by (b) a Disseisin; as if two or more disseise another of Lands, &c. to their own Use, they are Joint-tenants, but if to the Use of one of them, he to whose Use is sole Tenant, and the others Coadjutors. Lit se7. 278. Co.Lit. 180. b. (b) And as there may be Joint-tenants by Disseisin,

so there may be Joint-tenants by Abatement, Intrusion, or Usurpation. Co. Lit. 181. a. & vide Vaugh. 189.

If a Disseisin be made to the Use of two, and one agrees at one Time, and another at another Time, yet they are Joint-tenants; for every subsequent Assent is equal to a Command precedent, and if both had commanded the Disseisin, the first Act had been the Act of both, and therefore from that Act done they are now esteemed as Joint-Disseisors. Co.Lit.188.a. 1 Co. 56. 2 Leon. 223.

Yet it is laid down as a general Rule, that Joint-Estates must vest at once, and that therefore if a Lease for Life be made to A. Remainder to the Heirs of J. S. and J. N. then living, the Heirs cannot be Joint-tenants; but it seems that in this Case they are Tenants in common; for when J. S. dies, his Heirs have either a sole Property of the Fee, or have it with others, because there is none in Being to take it with him, and if he had a sole Property of the Fee, it cannot alter without some Act of his own; but he cannot have a sole Property in the whole Remainder, for that were expressly contrary to the Conveyance; he must therefore have a sole Property of the Fee in a Moiety, which is a Tenancy in common. Co.Lit.188.a.

But in Case of an Use, Persons may be Joint-tenants that do not take at the same Time; as if a Man enfeoffs such a one to the Use of himself for Life, and of such a Wife as he shall afterwards take, they are Joint-tenants; for here the Husband has no Property in the Land, neither Jus in Re nor ad Rem, but the Feoffee has the whole Property, at first to the Husband only, and upon the Contingency of the Marriage, to them both intirely; and this is the only Rule in Equity to support the Trust in the same Manner the Parties have limited it; and now by the Statute of Uses it is executed in the same Form it was governed in Equity. Co.Lit.188.a. 13 Co. 56. Dyer 340. 1 Co. 101.

If a Man enfeoffs or levies a Fine to A. in Fee, to the Use of himself and B. and their Heirs, they are at Common Law Joint-tenants of the Use; for the Estate in a Use vests according to the Intent of the Parties, which was to place the intire Use in them, and the Possession only in A. and since the Statute executes the Possession in the same Manner as the Use was, they are not Tenants in common, as one in by the Common

Law, and the other by the Statute, but Joint-tenants by the Words of the Statute.

2 *Rol. Abr.*  
791.

If a Man infeoffs *A.* to the Use of *A.* and *B.* they are Joint-tenants, tho' *B.* gave no Consideration, because the Use is disposed of expressly to him.

13 *Co.* 54.  
*Poph.* 126.

If a Charter of Feoffment be made between *A.* of the one Part, and *B.* and *C.* of the other Part, and *A.* gives Lands to *B.* *Habendum* to *B.* and *C.* and their Heirs, *C.* takes nothing by the *Habendum*, because all the Lands were given to *B.* and consequently *C.* cannot hold those Lands, which are given before to another; but in this Case if the *Habendum* had been to *B.* and *C.* and their Heirs, to the Use of *B.* and *C.* this had been a good Limitation of Use, and consequently the Statute would carry the Possession to the Use, and *B.* and *C.* thereby become Joint-tenants.

2 *Rol. Abr.*  
416.  
6 *Co.* 17.

If Lands are given to a Woman and the Heirs of the Body of her Husband, who is then dead, it is said that the Wife and the Issue of the Husband are Joint-tenants for Life, with Remainder to the Issue in Tail; for since they are named to take in Possession as the Wife, and if they should only take an Estate for Life, the Donor would have again the Land, tho' there were still Heirs of the Body of the Husband; and whoever answers that Description is comprised within the Words of the Gift, therefore they shall also have a Remainder in Tail.

*Cro Eliz.* 431.  
2 *Sid.* 53.  
3 *Lev.* 127.

If a Man has Issue only two Daughters, and devises his Lands to them and their Heirs, this, tho' it be a Devise to the Heir at Law, (for so are the Daughters,) makes them Joint-tenants, in which Survivorship shall take Place; for by the Will the Quality of the Estate is altered.

*Co. Lit.* 188. *a.*

If Lands be devised to two, to have and to hold to one for Life, and the other for Years, they are not Joint-tenants; for an Estate of Freehold cannot stand in Jointure with a Term for Years, nor can a Reversion upon a Freehold stand in Jointure with a Freehold and Inheritance in Possession.

### (E) How a Tenancy in common is created.

*Co. Lit.* 189. *a.*  
(*a*) As if the one and his Ancestors, or they whose Estate he

bath in one Moiety, have holden in common the same Moiety with the other Tenant, which hath the other Moiety, and with his Ancestors, or with those whose Estate he hath undivided Time out of Mind. *Lit. seff.* 310. *Co. Lit.* 195.

*Co. Lit.* 189.

If there be three Joint-tenants, and one alien his Part, the other two are Joint-tenants of their Parts that remain, and hold them in common with the Alience.

*Lit. seff.* 309.

So if there be two Coparceners, and one of them alien her Part, the Alience and other Coparceners are Tenants in common.

*Co. Lit.* 189. *b.*

Also if Joint-tenants make several Feoffments or Gifts in Tail, or Leases for Life, the Feoffees, Donees, or Lessees are Tenants in common.

*Co. Lit.* 190. *a.*

If Land be given to two, *Habend* the one Moiety to one and his Heirs, and the other Moiety to the other and his Heirs, they are Tenants in common.

So if a Man seised in Fee infeoff another of a Moiety, or third or fourth Part, without any Assignment of it in Severalty, the Feoffee and Feoffor are Tenants in common. *Co. Lit. 190. b.*

If there be two Joint-Lessees for Life, and one grant all that belongs to him to another, the Grantee and the other Lessee are Tenants in common as long as both Lessees are alive, and the Lessor shall enter into a Moiety by the Death of either of them; because by such Grant the Jointure was severed, and it makes no Difference in this Case, if the Joint-Lease was made by these Words, *Habend'* to them two for their Lives, and to the Survivor; for *Expressio eorum quæ tacite insunt nihil operatur.* *Co. Lit. 191.*

If there are three Joint-tenants, and one of them release to one of the other two all his Right, as to this third Part, he to whom the Release was made and the other Joint-tenant are Tenants in common; but as to the other two Thirds they continue Joint-tenants as before. *Lit. sect. 304. Co. Lit. 193. a.*

## (F) What Words create a Joint-tenancy, and not a Tenancy in common, & e converso.

AS to the Words which create a Joint-tenancy, and not a Tenancy in common, we must distinguish between the Operations Words have in a Conveyance, and in a last Will or Testament, in which the Intention of the Testator is chiefly to govern; if therefore an Estate be given to two, equally divided, or equally (a) to be divided, these Words in (b) a Conveyance do not make them Tenants in common, or sever the Joint-tenancy, which was at first jointly conveyed to them. *2 Rol. Abr. 90. 3 Co. 39. 2 Vern. 523. (a) That there is no Difference where it is to two equally divided, and where to*

two equally to be divided. *2 Vent. 365, 366. Show. Par. Cases 210.* (b) Copyhold Lands were surrendered to the Use of A. B. and C. and their Heirs, equally to be divided between them and their Heirs respectively; and *Gold and Turton*, Justices, held it a Tenancy in common, by reason of the apparent Intent of the Parties; but *Holt Ch. Justice* held it a Joint-tenancy, and that the Word *equally* imported no more than to have alike, and as to the Word *divided* he held, that did not import a Tenancy in common, for their Possession must be intire & *pro indiviso*, to divide would be to destroy it; and it is strange to create an Estate from a Word which implies only what would destroy it. *1 Salk. 591.* But this Case being cited *Mich. 1730 in Can.* in the Case of *Stringer and Phillips*, was said to have been reversed, according to Lord *Holt's* Opinion.

Therefore it hath been holden, that in Case of a Conveyance there are but two Ways of making a Tenancy in common: 1<sup>st</sup>, Either by limiting the Estate to them to take expressly as Tenants in common: Or, 2<sup>dly</sup>, By limiting a Moiety, or a Third, or other undivided Part to one, and the other Moiety or Third to another, &c. and that the Words *equally divided*, or *equally to be divided*, would not create a Tenancy in common in a Deed; but they should be Joint-tenants where the Chance of Survivorship is equal, and that Chance is the Meaning of the Words *equally to be divided*, or an equal Perception of the Profits. *Stringer ver. Phillips, 1730. at the Rolls.*

Also if a Man make a Feoffment in Fee of 20 Acres to A. and B. *Habendum* one Moiety to A. and the other Moiety to B. this *Habendum* makes them Tenants in common; for tho' the Premises be joint, and therefore of themselves would operate to give a joint Estate and Possession, yet the *Habendum* explaining the Manner of Possessing, is not inconsistent or repugnant, because it makes no Division of that undivided Possession which was given in the Premises. *Co. Lit. 183. b. 190. b. Elib. 172.*

But if a Man conveys his House and four Farms to Trustees, upon Trust that his two Sisters might cohabit in the capital House, and equally divide the Rents and Profits of the four Farms betwixt them, *2 Vern. 525. Clerk verus Clerk* and

and the whole to the Survivor of them, this shall be a Joint-tenancy; for altho' the Words *equally to be divided betwixt them* do sometimes in a Will make a Tenancy in common, yet it is only by Way of Construction, and in Compliance with the Intent of the Testator.

*Moor* 558.

*pl.* 759.

*Lewin and Cox*, adjudged in the Exchequer Chamber by five Judges against two; & vide *Dyer* 25. a. in Margin, and 2 *Roll. Abr.* 89. several Cases to this Purpose.

As a Devise to two equally, and their Heirs, this was held to make them Tenants in common; for in a Will the Intention of the Testator is to govern, and no Words which have a Meaning and tend to illustrate his Intention can be rejected, and therefore the Word *equally* must be construed to have been inserted to make them Tenants in common, else it can have no Meaning at all; and in this Case it was said by one of the Judges, that if the Word *equally* had come after the Devise to the two and their Heirs, it had been more strong to make them Tenants in common.

*Lit. Rep.* 46.

*Faques and Thoroughgood* ver. *Collins*.

*Cro. Car.* 75.

So a Devise of several Houses to five, their Heirs and Assigns, all of them to have Part and Part alike, the one of them to have so much as the other, was held a Tenancy in common.

S. C. adjudged.

*Cro. Jac.* 448.

*King versus Rumbal*.

1 *Roll. Abr.*

833. S. C.

2 *Roll. Abr.*

89. S. C.

3 *Co.* 39. S. P.

resolved. 3

So where a Man devised to his Wife for Life, and after her Decease to his three Daughters, equally to be divided, and if any of them die before the other, then the Survivors to be her Heirs, equally to be divided; and if they all die without Issue, then to others, &c. and it was held, that the Daughters were not Joint-tenants, but that they had several Inheritances in Tail.

*Mod.* 209. S. C. cited, and like Point resolved.

3 *Lew.* 373.

*Blisset and Cranwel*.

So if a Man devise Lands to his two Sons and their Heirs for ever, and the longer Liver of them, to be equally divided between them after his Wife's Death, this shall be a Tenancy in common in the Sons, adjudged by three Judges against one, and that the latter Words being in a Will shall controul the former.

*Hill.* 15 &

16 *Car.* 2.

in B. R.

*Ride versus Atwick*.

1 *Keb.* 692,

754, 773.

S. C.

A Man having three Sons, *William*, *John*, and *Daniel*, and Lands in D. S. and E. devised his Lands in D. to his Son *John* and his Heirs, and his Lands in S. to his Son *Daniel* and his Heirs, and devised that his Wife should have all his Freehold Lands for five Years, paying 10*l.* a Year to *John*, and 6*l.* a Year to *Daniel*; and if either of his three Sons died before the five Years expired, then to be divided equally by them that shall be living: *William* and *John* both died during the five Years; and it was held, that *William's* Part, who died first, should be divided betwixt *John* and *Daniel*, and they to be Tenants in common thereof; but it was likewise held, that when *William* was dead, and his Part divided, that that Clause was executed, so that upon the Death of the second the Will would not carry his Part to the third.

*Trin.* 6 *Annæ*,

in B. R.

*Tuckerman*

and *Jefferies*.

In Trespass for breaking and entering the Plaintiff's Close, it was found by special Verdict, that *A.* was seised in Fee of such a Place, whereof the Close in Question was Parcel, and being so seised, made his Will in Writing, wherein, *inter alia*, he gave to *Jane* the Wife of *B.* and to *Elizabeth* the Wife of *C.* all his Estate, &c. to be equally divided between them, during their natural Lives, and after the Deceases of the said *Jane* and *Elizabeth* to the right Heirs of *Jane* for ever; and found further, that the said *Jane* and *Elizabeth* were Heirs at Law to the said *A.* and that after the Death of *A.* their Husbands entered in their Rights; that *Jane* died before the Trespass, one of the Defendants being her Issue and Heir, and that *C.* entered into the Whole in Right of *Elizabeth* his Wife, and let to the Plaintiff, and thereupon the Defendant entered; and the only Question was, whether this Devise made *Jane* and *Elizabeth* Joint-tenants for Life, so as upon the Death of *Jane* the Whole

survived

survived to *Elizabeth* for Life, or whether upon the Words *equally to be divided between* they were Tenants in common, so as a Cross-Remainder of the Moiety was not to go to the Heirs of *Jane* till after the Death of *Elizabeth*; and it was argued for the Plaintiff, that tho' the Words *equally to be divided* do often in a Will make a Tenancy in common, yet it is not so much the Words themselves, as the Intention of the Testator, that makes such an Estate; for they have no Force of themselves to make such an Estate, but according to the Intent of the Testator; for a Joint-Estate is equally liable to be divided with an Estate in common, 1 *Just.* 186. and one Joint-tenant has no more than a Moiety to grant, to charge, or to dispose of; and therefore the Words *equally to be divided* are no more than what the Law implies, and the only Difference between Joint-tenants and Tenants in common is the Conveyance by which they claim. *Lit. sect.* 292, 298. And in this Case being in a Will, if it had gone no farther than to be equally divided between them, it was agreed it would have been a Tenancy in common. *Styl.* 211. 2 *Rel. Alr.* 89, 90. But here was a manifest Intent that it should go to the Survivor; for it is limited after the Deceases of the said *Jane* and *Elizabeth* to the right Heirs of *Jane*; which is as if he had said, to them, and the Survivor of them, for their Lives; for the right Heirs of *Jane* are to take nothing till *Jane* and *Elizabeth's* Death, and they are to take the whole Estate at the same Time, and not one Moiety at one Time, and another at another; and if his Intent had been so, he would have said so, *viz.* And after the Decease of them, or either of them; for in such Case if the Devisees should take as Tenants in common, the Remainder in the one Moiety must be contingent, so that if the Tenant in common in Fee should survive the other Tenant in common for Life, the Remainder to the right Heirs of *Jane* will be void as to the other Moiety, and there is no other Way to make the whole Devise good, but by making them Joint-tenants for Life; and admitting they were Tenants in common, yet the Defendant has no Title but to the Moiety till after both their Deaths, which has not happened, *Elizabeth* being still living; and to this Purpose were cited *Moor* 7. 4 *Leon.* 14. 2 *Jones* 172. *Rayn.* 452. *Holmes and Meynel.*

On the other Side it was argued, that they were Tenants in common, and that in a Will the Words *equally to be divided between them* have been always construed to make a Tenancy in common, because of the Intent of the Testator, which in a Will is chiefly to be regarded; as if one devise Lands to one and his Assigns for ever, this passes a good Estate in Fee; besides, in this Case there was no Intent to make them Joint-tenants: For, 1<sup>st</sup>, There are no Words of Survivorship; for the Words *after the Deceases of the said Jane and Elizabeth*, are no more than what the Law would have implied, for it could not take Effect otherwise for the Whole, as it will do when it is limited to a Stranger, and his Heirs, and if he die without Issue, then to *B.* and these Words in the principal Case do not carry a necessary Implication that they should be Joint-tenants; for in the mean time it may descend to the Heir at Law, as to a Moiety; and the Reason why *equally to be divided* makes a Tenancy in common in a Will is, because otherwise those Words would be idle, for they import a Division in the Interest. 3 *Lev.* 373. *Styl.* 434. *Bentl.* and *Dalif.* 77.

*Holt* C. J. pronounced the Opinion of the Court, that they were Joint-tenants, notwithstanding the Words *equally to be divided between them*, and the Lands ought to survive to *Elizabeth*: 1<sup>st</sup>, For tho' upon such Words generally they are Tenants in common, yet if it should be so in this Case it would be expressly against the Intent of the Testator, and would defeat the Heirs of *Jane* of Part; for they are to take all together, and not by Moieties, one at one Time, and one at another, but all at once; and if they should be Tenants in common, they must



take by Moieties at several Times. *2dly*, It is exprefs that the Heirs of *Jane* are not to take till after both their Deceafes. *3dly*, If they should be Tenants in common, then the Heirs of *Jane* would be in Danger to lofe a Moiety; for as to that one Moiety, it muft be a contingent Remainder; fo that if *Elizabeth* should die during the Life of *Jane*, the Contingency for that Moiety not happening, it muft defcend to the Heirs at Law of the Teftator, who are *Elizabeth* and the Ifsue of *Jane*, as Coparceners. *4thly*, *Jane* and *Elizabeth* are Heirs at Law to the Teftator, and as fuch the whole would have defcended to them in Coparcenary, if no Will had been made; but here by this Will it is plain the Teftator intended to prefer the Heirs of *Jane* to the Whole; and it was adjudged for the Plaintiff.

2 Vern. 430  
Phillips and  
Phillips.  
Preced. Chan.  
167. S. C.  
(a) Vide  
2 Vern. 556.  
where it is  
held, that  
Survivorship  
muft take  
Place as well in Equity as at Law.

*A.* devifed Lands to Trustees, and their Heirs, in Trust that the Profits fhould be equally divided between his Wife and Daughter during the Wife's Life, and after her Death he devifed the fame to the Ufe of his Daughter in Tail, with Remainders over; the Daughter died during the Mother's Life; and it was held in (a) Chancery, that this was a Tenancy in common, and fhould go to the Administrator of the Daughter during the Mother's Life, and fhould not be a refulting Trust for the Benefit of the Heir.

1 Vern. 353.  
Kew and  
Roufe.

*J. S.* devifed a Term for Years, and all her Intereft therein, to her two Daughters, they paying yearly to her Son 25 *l.* by Quarterly Payments, *viz.* each of them 12 *l.* 10 *s.* Yearly out of the Rents of the Premiffes during his Life, if the Term fo long continued; and my Lord Chancellor held it clearly a Tenancy in common, the 25 *l.* being to be paid by the two Daughters equally in Moieties.

Abr. Eq. 292.  
Edwards and  
Eafion.  
Preced. Chan.  
332. S. C.

A Man having a Mortgage for Years makes his Will, and thereby devifes all his perfonal Eftate, of what Nature foever, to his Executors, in Trust for the Payment of his Debts, and afterwards devifes the Refidue and Overplus of his perfonal Eftate to his two Daughters, equally to be divided between them, and dies; the Debts being fatisfied, the Daughters contract with the Mortgagor for the Purchase of the Equity of Redemption to them and their Heirs; one of the Daughters devifes her Share and Intereft to the Plaintiff, and dies; and it was held, that this Purchase of the Equity of Redemption and Inheritance was a Tenancy in common, the Mortgage devifed to the Daughters being fo, and this Purchase being founded on the faid Mortgage.

Abr. Eq. 292.  
Warner ver.  
Hone.

*J. S.* devifed his Leafehold Houfe to his Wife for Life, and after her Death he devifed it to *A.* and her three Sons, equally amongft them; and it was decreed, that they took it as Tenants in common, tho' there was no Mention of any Division to be made.

Preced Chan.  
163. Hamel  
ver. Hunt.

A Man affigns a Term to Trustees, in Trust to permit himfelf to receive the Profits thereof during his Life, and after his Death in Trust to permit his two Daughters *B.* and *C.* their Executors and Administrators, to receive the Profits during the Refidue of the Term, equally to be divided between them, they paying fo much within two Years to his two other Daughters; and it was held, that this being a Trust of a perfonal Thing, they were Tenants in common, the Father's Intention appearing to be to make feveral and diftinct Provisions for his two Daughters, and the paying the Sums appointed to the Sifters makes them Purchafers.

Carth. 15.  
in Can.

One devifes 200 *l.* to be laid out in the Purchase of Lands, and fettled by Trustees to the Ufe of her Daughter, and the Heirs of her Body, and if fhe died without Ifsue, then to the Ufe of the Children of *A.* (who then had Ifsue *B.* and *C.*) the Daughter died without Ifsue before the Money was laid out, after whofe Death the Trustees laid out the Money in a Purchase of Lands, and fettled the fame on *B.* and *C.* jointly



in Fee, according to the Will, who accordingly enjoyed the same for some Time; and one of them dying, it was held, that this was a Joint-tenancy, which went to the Survivor: But it is said to have been holden by the Court, that if the Money had not been actually laid out in a Purchase, the Survivor would have been intitled but to a Moiety only. *Vide Head of Trusts.*

Also it is said, that if 500*l.* apiece is devised to two Legatees, who take a Mortgage jointly to them both, for securing the Payment of their Legacies, with Interest, and one of them dies, the other shall have nothing by Survivorship, because in this Case the Mortgagees were Trustees for each other, and the Mortgage, which is only as a Security, makes no Alteration in the Case. *Carth. 16.*

One devised 100*l.* to five, equally to be divided between them and the Survivors and Survivor of them, and if *A.* (one of the five,) died before Marriage, her Share to go over to another Person; and it was decreed, that they took this 100*l.* as Tenants in common, and that the Words *and the Survivors or Survivor of them* to make them Joint-tenants would be a Contradiction to the first Words, whereby they were made Tenants in common, and that they should be construed to extend only to such as were Survivors at the Death of the Testator, and therefore inserted to prevent a Lapse, and this is the stronger by the Limitation over of *A.*'s Share upon a Contingency, by which it is plain the Testator did not intend her to be a Joint-tenant with the rest, and as the Devise was to all five, they must all take alike, and not *A.* be Tenant in common, and the other four Joint-tenants. *Abr. Eq. 292-3. Stringer and Phillips, at the Rolls.*

It seems to be the Doctrine of the Courts of Equity, that where two or more purchase Lands, and advance the Money in equal Proportions, and take a Conveyance to them and their Heirs, that this is a Joint-tenancy, that is, a Purchase by them jointly of the Chance of Survivorship, which may happen to the one of them as well as to the other; but where the Proportions of the Money are not equal, and this appears in the Deed itself, this makes them in the Nature of Partners, and however the legal Estate may survive, yet the Survivor shall be considered but as a Trustee for the others in Proportion to the Sums advanced by each of them; so if two or more make a joint Purchase, and afterwards one of them lays out a considerable Sum of Money in Repairs or Improvements, and dies, this shall be a Lien upon the Land, and a Trust for the Representative of him that advanced it, and that in all other Cases of a joint Undertaking or Partnership, either in Trade, or any other Dealing, they were to be considered as Tenants in common, or the Survivors as Trustees for those who were dead. *Vide 1 Vern. 33, 217, 361.*

As where the Commissioners of Sewers had sold and conveyed Lands to five Persons, and their Heirs, who afterwards, in order to improve and cultivate those Lands, entered into Articles, whereby they agreed to be equally concerned as to Profit and Loss, and to advance each of them such a Sum to be laid out in the Manurance and Improvement of the Land; and it was held, that they were Tenants in common, and not Joint-tenants, as to the beneficial Interest or Right in those Lands, and that the Survivor should not go away with the Whole; for then it might happen that some might have paid or laid out their Share of the Money, and others, who had laid out nothing, go away with the whole Estate. *Abr. Eq. 290-1. Lake and Gibson.*

(G) Of the Duration and Continuance of the Estate, Whether given jointly, or in common; and therein Where the Inheritance shall be said to be joint or several.

5 Co. 9.  
1 Sid. 247.  
Raym. 126.

IF an Estate is limited to Husband and Wife during their joint Lives, this is no absolute Estate for their Lives, so as to go to the Survivor; but the Death of either of them determines that Estate.

2 Co. 23, 24.  
Baldwin's  
Case.  
1 And 225.  
Owen 48.

If a Man covenants, grants, demises, and to Farm lets Land to *A.* and *B.* and the Heirs of *B.* *Habendum* to *A.* and *B.* for 300 Years, this is but a Term for Years in *A.* and *B.* tho' there be Words of Inheritance; for it was plainly the Intention of the Lessor to create a Term only by his using the common Words of Demise; besides, the Lessees by the Premises could have but an Estate at Will, because the Words of Inheritance in the Premises of the Deed were not sufficient to carry the Freehold without Livery, which was not made in this Case.

2 Rol. Abr.  
150.

If a Lease be made to *A.* and *B.* for their Lives, and the Life of the longest Liver of them, and they make Partition, and then *A.* dies, the Lessor shall enter into his Part, and there can be no Occupancy, for *B.* has no Title to it, because the Right of Survivorship was lost by the Partition, which destroyed the Joint-tenancy; nor will the Words *to the longest Liver* be of any Use to *B.* because they were void at first, being no more than the Law implied in the Joint-Estate; nor can there be any Occupancy, because after the Partition each of the Lessees have but an Estate for their own Lives in their several Moieties, and consequently the Reversion, which is to commence when the particular Estate determines, must necessarily take Place.

Lit. sect. 285.

If a Lease be made to two, and to the Heirs of one of them, they are Joint-tenants for Life, and one has a Freehold, and the other a Fee; and if he that has the Fee die, the Survivor shall hold the Whole during his Life.

Lit. sect. 283.

If Lands be given to two Men and the Heirs of their Bodies begotten, they have but a Joint-Estate for Life, and several Inheritances; for tho' the Gift be limited to the Descendants of their Bodies, yet it being impossible there should be one Descendant of both their Bodies, they cannot have a Joint Estate-Tail.

So if Lands be given to one Man and two Women, and the Heirs of their Bodies begotten, they have a Joint-Estate for Life, and several Inheritances, because there can be no one Issue of both the Womens Bodies; and if the Man should marry one of them, yet it is not limited in the Donation which of them, in Case of such Intermarriage, should first take.

Plow. 35. a.  
Co. Lit. 183.

So if Land be given to two Men and their Wives, and the Heirs of their Bodies begotten, they have a Joint-Estate for Life, and several Inheritances, but no Joint-Estate in Tail; because tho' the Husband and the Wife of the other may die, and the Survivors may marry; yet the Gift being made to them all, and the Heirs of their Bodies, it is impossible that there should be one Heir or Descendant of all their Bodies, and therefore it can be no Joint-Estate in them all, but they all four take jointly for Life, and each Husband and his Wife have a several Inheritance in a Moiety.

Co. Lit. 25. b.  
Bro. Estate 22.  
Tail 16.

But if Land be given to a Man and a Woman unmarried, and the Heirs of their Bodies, this is a Tail special, for the Possibility that they may marry, and then the Descendants of that Marriage can only inherit: So if the Gift be made to a Man that hath a Wife, and to a Woman

that

that hath a Husband, and the Heirs of their Bodies, this is a Tail special presently in them, for the Possibility that they may marry, and the Descendants of such Marriage may inherit according to the Limitation of the Gift.

If an Estate be limited to Husband and Wife, and the Heirs of their Bodies, and they are divorced *a Vinculo Matrimonii*, they are only Tenants for Life, because they shall not be (a) presumed to intermarry after they are once legally divorced by Church Censures.

3 H. 6. 48.  
7 H. 7. 16  
(a) So if Lands be given to a Man and his

Mother, and the Heirs of their Bodies begotten, they have but a Joint-Estate for Life; but in this Case the Mother and Son have several Inheritances. *Co. Lit.* 184. a.

And in all the Cases above-mentioned where the Inheritances are several, the Reversion depending thereon is several also; and if any of the Donees die without Issue, the Donor shall after the Death of all the Donees enter into a Moiety, or a third Part, &c.

*Co. Lit.* 185. b.

If Lands be given to two Men, and the Heirs of their Bodies begotten, Remainder to them two and their Heirs, they are Joint-tenants for Life, Tenants in common of the Estate-Tail, and Joint-tenants of the Fee.

*Co. Lit.* 185. 4.

## (H) Of the joint and distinct Interests of Joint-tenants and Tenants in common, as to Acts done by or to them: And herein,

### 1. In what Acts they must all join.

IF a Feoffment be made to two or more jointly, they shall all do Homage and Fealty; but if a Feoffment be made to them, Homage and Fealty done to any one of them is sufficient.

*Co. Lit.* 67. b.

Joint-tenants or Tenants in common of an Advowson are regularly to join in Presentation; and therefore if one Joint-tenant or Tenant in common present, or if they present severally, the Ordinary may either admit or refuse to admit such a Presentee, unless they join in Presentation, and after the six Months he may in that Case present by Lapse.

*Co. Lit.* 186. b.  
Where Joint-tenants of an Advowson made Partition by Deed of Covenant

to present by Turns, and held good. *Carth.* 505. 1 *Salk.* 43.

If one Tenant in common of an Advowson doth present alone, this doth not put the other out of Possession, for at the next Avoidance they may join in Presentment.

2 *Roll. Abr.* 372.  
1 *And.* 63.

Or if there be two Joint-tenants seised of an Advowson, and the one doth present without the other, this is no (b) Usurpation upon his Companion, but he may alledge this Presentment in a *Quare Impedit* as a Title for himself to the next Avoidance, and this by reason of the Privy there is betwixt them.

27 *H. 8.* 11 b.  
*Co. Lit.* 186. b.  
(b) So if there be two Joint-tenants, and the one doth

present the other, this doth not gain any Possession; for that it is not strictly and properly a Presentation, but rather a Prayer to be admitted. 14 *H. 8.* 2. b.

Joint-tenants and Tenants in common may, according to the Interests they have, join or sever in making Leases, and such Leases shall bind whether made to commence *in presenti* or *futuro*.

*Co. Lit.* 168.  
*Bro. Tit. Grants* 154.  
1 *Roll. Abr.* 848.

2 *Rol. Abr.*  
447.  
*Co Lit* 47.  
*Vent.* 161,  
162-3.

But if there be two Joint-tenants, and they make a Lease by Parol or Deed Poll, reserving Rent to one only, yet it shall enure to both; but if the Lease had been by Deed indented, the Reservation should have been good to him only to whom it was made, and the other should have taken nothing; the Reason of the Difference is this, where the Lease is by Deed Poll or Parol, the Rent shall follow the Reversion, which is jointly in both Lessors, and the rather, because the Rent being something in Retribution for the Land given, the Joint-tenant to whom it is reserved ought to be seised of it in the same Manner he was of the Land demised, which was equally for the Benefit of his Companion as himself; but where the Lease is by Deed indented, they are estopped to claim the Rent in any other Manner than it is reserved by the Deed, because the Indenture is the Deed of each Party, and no Man shall be allowed to recede from or vary his own solemn Act.

1 *Rol. Abr.*  
877.

If two Tenants in common of Lands join in a Lease for Years by Indenture of their several Lands, this shall be the Lease of each for their respective Parts, and the Cross Confirmation of each for the Part of the other, and no Estoppel on either Part, because an actual Interest passes from each respectively, and that excludes the Necessity of an Estoppel, which is never admitted if by any Construction it can be avoided, as being one of those Things which the Law looks upon as odious, because it chokes and disguises the Truth.

## 2. Where the Acts of one will be equally advantageous as if done by both.

*Co. Lit.* 70. b.  
2 *Inst.* 34.

If there be two Joint-tenants who hold by Knight's Service, and one of them performs the Service by going with the King to War, &c. this shall suffice for both; for tho' they be two Tenants, yet they hold only by one Tenure.

*Owen* 152.  
*Butler versus*  
*Archer.*

If there be two Joint-tenants of Land holden by Heriot-Service, and one dies, the other shall not pay Heriot-Service; for there is no Change of Tenant, the Survivor continuing Tenant of the whole Land.

1 *Salk.* 285.  
6 *Mod.* 44.  
(a) So if two  
Joint-tenants  
be disseised,  
and one enters,

It hath been holden, that the Possession of one Joint-tenant is the Possession of the other, so far as to (a) prevent the Statute of Limitations.

this is in Law the Entry of both, and so it shall be pleaded. *Bridgm.* 129.

*Co. Lit.* 186. b.

Also if two Joint-tenants be of an Advowson, and the one presenteth to the Church, and his Clerk is admitted and instituted, this in respect of the Privity shall not put the other out of Possession; but if that Joint-tenant that presenteth dieth, it shall serve for a Title in a *Quare Impedit* brought by the Survivor.

*Lit. sect.* 306.  
*Co. Lit.* 194. a.

If there be two Joint-tenants by Disseisin, Abatement, or Intrusion, and the Disseisee or Owner of the Land release to one of them, this shall enure only for the Benefit of him to whom the Release was made, who being seised *per mie & per tout* is capable of such a Release, and by the Delivery of the Release the whole Freehold and Inheritance by Operation of Law vesting in him, the Interest of his Companion being by Wrong is immediately devested and vanished.

*Co. Lit.* 194.

But if two Men usurp by a wrongful Presentation to a Church, and their Clerk is admitted, instituted, and inducted, and the rightful Patron releaseth to one of them, this shall enure to them both, for that the Usurpers come not in merely by Wrong, but their Clerk is in by Admission and Institution, which are judicial Acts.

*Lit. sect.* 307.  
*Co. Lit.* 194. b.

So if a Man be disseised, and the Disseisor make a Feoffment to two Men in Fee, if the Disseisee release by his Deed to one of the Feoffees, this

this Release shall enure to both the Feoffees, because they come in by Title and Purchase, and not by Wrong, and are presumed to have a Warranty annexed to their Estate, which is greatly favoured in Law.

If a Feoffment be made to *A.* and *B.* by Deed, and Livery is made to *A.* in the Absence of *B.* in the Name of both, the Livery is good to pass the Estate to both; but if the Feoffment had been without Deed, and the Livery given to one in the Name of both, it should operate to him only; because the Parties are united in a Deed, they all take as one; therefore Livery to one in the Name of the rest, is an actual Delivery to them all; but without Deed they are not so united; and therefore the Delivery to one in the Name of several, is no actual Delivery to the rest, but the whole Estate must reside in him to whom it is delivered, and a subsequent Assent cannot take it out of him, such Assent being not so solemn as the Feoffment; besides, in the Case of the Feoffment by Deed *A.* may be looked upon as the Attorney of *B.* to receive Livery, and therefore the Estate shall immediately vest in *B.* because every Man is presumed to assent to a Grant for his Advantage; but the Feoffment without Deed will admit of no such Construction, because no Man can receive Livery as Attorney to another without an Appointment by Deed.

*Co. Lit. 49. b.*  
359.  
2 Vent. 202,  
205.  
5 Co. 95. a.  
2 Rol. Abr. 9.  
2 Leon. 23.  
Mutton's  
Case.

So if a Feoffment be made to *A.* and *B.* and the Feoffor gives a Letter of Attorney to deliver Seisin, and the Attorney gives Livery to *A.* in the Absence of *B.* in the Name of both, this is a good Livery; for tho' the intire Possession be delivered to one only, yet they being Joint-tenants by the Deed of Feoffment, such Livery to one makes no Alteration or Change of the Possession, because if the Livery had been made to both, each had been placed in the Possession.

*Co. Lit. 49.*  
2 Rol. Abr. 8.

So if a Lease for Years to *A.* and *B.* the Remainder to *C.* in Fee, and Livery is made to *A.* in the Absence of *B.* whether the Conveyance be by Deed or without, the Livery is good, and vests the Remainder in *C.* because by the bare Demise *A.* and *B.* have an Interest, each being equally intitled to the whole Possession, either may invest himself in the whole Possession by Entry, or receive the Possession from the Lessor by the Solemnity of Livery; and therefore when the whole Possession is delivered by the Lessor, and Livery is made to *A.* in the Absence of *B.* in the Name of both, this Livery is sufficient to vest the Remainder in *C.* because *A.* had as much Power to receive the Possession of the Whole, as if the Lease for Years had been made to him only, he and *B.* being Joint-tenants by the Demise, and thereby seized *per mie & per tout*.

*Co. Lit. 49.*  
5 Co. 94.  
2 Rol. Abr. 3.

If a Surrender be made of a Copyhold Estate to *A.* and *B.* and their Heirs, and *A.* comes in within the Time of the Proclamations, but *B.* does not, whether *A.* shall have the Whole, or a Moiety shall be forfeited, *dubitatur*.

*Yelv. 1. &*  
*vide Tit.*  
*Copyhold.*

### 3. Where the Acts of one will bind the other, whether to his Advantage or Prejudice.

Herein we must observe, that regularly every Act done by one Joint-tenant for the Benefit of him and his Companion shall bind the other; but no injurious Act of one Joint-tenant alone shall prejudice his Companion.

*Bridgm. 129.*  
2 Co. 67.

Therefore if there be two Joint-tenants of a Seignory, and one disseises the Tenant, this shall suspend but a Moiety of the Seignory; for his Companion shall not be prejudiced by his injurious Act, to which he was no Party, and therefore after such Disseisin the Disseisor is liable to the Distress of his Companion for his Moiety of the Seignory.

*Co. Lit. 148. b.*  
9 Co. 153. b.

- 2 *Inst.* 516. If there be two Joint-tenants, and one of them levies a Fine, this does not bar his Companion, unless he omits to make his Claim within five Years after his Title accrued.
- Co. Lit.* 197. b. If there be two Tenants in common of an Advowson, and they bring a *Quare Impedit*, and the one doth release, yet the other shall sue forth and recover the whole Presentment.
- Dalf.* 44. pl. 33. If two Joint-tenants make a Feoffment on Condition that if they paid such a Sum before a certain Day they might re-enter, and before the Day one of them releases this Condition to the Feoffee, this shall not bind his Companion.
- Co. Lit.* 197. b. If two Tenants in common be of the Wardship of the Body, and a Stranger doth ravish the Ward, and the one Tenant in common releases to the Ravisher, this shall go in Benefit of the other Tenant in common, and he shall recover the Whole, and this Release shall not be any Bar to him.
- Co. Lit.* 80. b. *Bridgm.* 129. But if two Joint-tenants be of a Ward, and the one disparageth the Heir, both shall lose the Wardship; for the Words of the Statute are, *Et omne commodum, &c.*
- 2 *Inst.* 302. Two Joint-tenants for Years, or for Life, one of them doth Waste, this is the Waste of them both as to the Place wasted; yet the Words of the Statute of *Gloucester* are, *Homo qui tient*; but treble Damages shall be recovered against him who did the Waste only.
- Co. Lit.* 35. a. *2 Co.* 67. *Perk.* 397. If there be two or more Joint-tenants of Land whereof a Woman is dowable, and one of them assign her Dower thereout, this is good, and shall bind the others, because they were compellable to assign it in such Manner; but if one of them had assigned her a Rent thereout, in lieu of Dower, this shall not bind the rest, because they could not have been compelled to it by Suit.

## (I) Of Severance and Survivorship: And herein,

### 1. Of the Right of Survivorship, and what Things will survive.

- Co. Lit.* 181. **T**HE *Jus accrescendi*, or Right of Survivorship, takes Place only between Joint-tenants; as where Lands are given to two Men and their Heirs, the Survivor shall have the Whole; for being limited to them and their Heirs, the Feoffor or Donor hath thereby transferred the absolute Property to them; but how the Word *Heirs* came to signify the Heirs of one of them, so as to exclude the Heirs of him who died first, is not easy to be determined, and can be accounted for no otherwise than that both Joint-tenants being intitled to the Whole during their respective Lives, the Survivor having continued longest in Possession was therefore presumed to have done most Service to the Feud, and upon that Account was allowed to transmit it to his Heirs; also, says my Lord Chief Justice *Holt*, the Common Law does not love to multiply Tenures.
- 1 *Salk.* 392. *Co. Lit.* 181. b. So if Lands be given to two Men for Life or Years, they are Joint-tenants, and the Survivor shall hold the Whole for his Life, or according to the Number of Years limited in the Conveyance.
- Co. Lit.* 181. b. But if a Man letteth Lands to *A.* and *B.* during the Life of *A.* if *B.* die, *A.* shall have all by Survivorship; but if *A.* die, *B.* shall have nothing.

A naked Trust or Authority cannot survive; but a Trust coupled with an Interest shall survive together with it. *Co.Lit. 181. b. But for this vide Head of Trusts.*

If a Lease be made to *A.* and *B.* for their Lives, and the Life of the longest Liver of them, and they make Partition, and then *A.* dies, the Lessor shall enter into his Part; for *B.* has no Title to it, because the Right of Survivorship was lost by the Partition, which destroyed the Joint-tenancy; nor will the Words *to the longest Liver* be of any Use to *B.* because they were void at first, being no more than the Law implied in the Joint-Estate. *Co.Lit. 191. a. 2 Rol. Abr. 150.*

Two Joint-tenants of a Rent-charge or Rent-Service, and one of them dies, the Survivor shall recover all the Arrearages which incurred and became due in the Life-time of his Companion. *35 H. 6 20. b. 15 E. 3. Affize 18. 2 Rol. Abr. 86.*

Two Joint-tenants sow their Land with Corn, and one of them dies, the Corn sown shall go to the Survivor, and the Moiety shall not be to the Executors of the Person deceased; for they are supposed to carry on the Cultivation of the Soil by a (*a*) Joint-Stock. *1 Rol. Abr. 727.*

(*a*) So if two Joint-tenants sow their Land, and one of them lets his Moiety for Years, and he who did not let dies, the other shall have the Corn as Survivor. *Owen 102.*

But if Husband and Wife are Joint-tenants, and the Husband sows the Land with Corn, and dies, the Crop shall go to the Executors of the Husband, as it seems; for this Land is not cultivated by a Joint-Stock, but is totally the Corn of the Husband, and the Property of it seems not to be lost by committing it to the Joint-Possession, no more than if it had been sown in the Land of the Wife only. *1 Rol. Abr. 727. Et vide supra Letter (B), and the Authorities there cited.*

So if there be two Tenants in common, and one of them sow the Land, and die, his Executors shall have the Corn; because they have different Interests, and are supposed to cultivate by different Stocks, and not by a joint one. *Perk. sect. 523.*

## 2. At what Time the Right of Survivorship is to take Place.

This Right is to take Place immediately upon the Death of the Joint-tenant, whether it be a natural or civil Death; as if there be two Joint-tenants, and one of them enters into Religion, the Survivor shall have the Whole. *Co.Lit. 181. b.*

Also it is laid down as a Rule, that there shall be no Right of Survivorship, unless the Thing be in Jointure at the Instant of the Death of him who first dieth; *Nihil de re accrescit ei qui nihil in re quando Jus accresceret habet.* *Co.Lit. 188. b.*

Therefore if there be two Joint-tenants of a Rent, and one of them disseise the Tenant of the Land, this is a Severance of the Jointure for a Time; for the Moiety of the Rent is suspended by Unity of Possession, and therefore cannot stand in Jointure with the other Moiety in Possession, so that if during such Suspension one Joint-tenant dies, there can be no Survivorship. *Co.Lit. 188. b.*

Two Femes Joint-tenants of a Lease for Years, one of them taketh Husband, and dieth, yet the Term shall survive; for tho' all Chattels real are given to the Husband, if he survive, yet the Survivor between the Joint-tenants is the elder Title, and after the Marriage the Feme continued sole possessed; for if the Husband dieth, the Feme shall have it, and not the Executors of the Husband; but otherwise it is of personal Goods. *Co.Lit. 185. b.*

### 3. What Disposition will work a Severance, and defeat the Right of Survivorship: And herein,

#### 1. What Disposition with a Stranger will work a Severance.

*Co. Lit. 186. a.* Altho' Joint-tenants are seised *per mie & per tout*, yet to divers Purposes each of them hath but a Right to a Moiety; as to enfeof, give, or demise, or to forfeit or lose by Default in a *Præcipe*; and therefore where there are two or more Joint-tenants, and they all join in a Feoffment, each of them in Judgment of Law gives but his Part.

*Co. Lit. 186. a.* So if there be two Joint-tenants, and they both make a Feoffment in Fee, a Gift in Tail, or Lease for Life, &c. upon Condition, and that for Breach thereof one of them shall enter into the Whole, yet he shall enter but into (a) a Moiety, because no more in Judgment of Law passed from him.

(a) But every Joint-tenant may warrant the Whole; because a Man may warrant more than passeth from him. *Co. Lit. 186. a.*

*Co. Lit. 136. a.* If one Joint-tenant bargains and sells his Moiety, and dies before the Deed is inrolled, yet the Deed being afterwards inrolled shall work a Severance *ab initio*, and support by Relation the Interest of the Bargainee.

*270. Fac. 53.* But if one Joint-tenant bargains and sells all the Lands, and before Enrollment the other dies, his Part shall survive; for the Freehold not being out of him, the Jointure remains, and tho' afterwards the Deed is inrolled, yet only a Moiety shall pass; for the Enrollment by Relation cannot make the Grant of any better Effect than it would have been if it had took Effect immediately.

*Co. Lit. 185.* If a Recovery be had against one Joint-tenant, who dieth before Execution, the Survivor shall not avoid this Recovery, because that the Right of the Moiety is bound by it.

*2 Vern. 63.* If one Joint-tenant agrees to alien, and does it not, but dies, this That such an Agreement does not bind at Law. *Co. Lit. 184. b. 185. a.*

*Preced. Chan. 124. Moyse and Giles.* Two Joint-tenants of a Church Lease, one whereof being taken sick in a Journey, to sever the Jointure and provide for his Wife sends for the Schoolmaster of the Town, (who was the only Person he could get to come at him,) and acquainted him with his Intentions, and desired him to prepare an Instrument for that Purpose; the Schoolmaster drew a kind of Deed of Gift of the Lease from the sick Man to the Wife, which he executed, and died; and this being to the Wife, and void in Law, she would have made it good in Equity, but was dismissed, being voluntary and without Consideration.

#### 2. What Disposition of Conveyance by one Joint-tenant or Tenant in common, with his Companion, will work a Severance.

*22 H. 6. 42. b.* The proper Conveyance by one Joint-tenant to another, and what will most effectually sever the Joint-tenancy, is a Release; but one Joint-tenant cannot enfeof his Companion, because they are both already seised



seised (a) *per mie & per tout*; and this Manner of Conveyance passing by (a) And Livery, cannot operate so as to give him what he already has; but therefore Tenants in common cannot release to each other; for a Release supposeth if there be the Party to have the Thing in Demand, but Tenants in common have two Joint-tenants, and several distinct Freeholds, which one cannot transfer to the other with- one release out the Solemnity of Livery. to the other; this passeth a

Fee without the Word *Heirs*, because it refers to the whole Fee, which they jointly took, and are possessed of by Force of the first Conveyance. *Co. Lit.* 9, 200.

But tho' a Release be the proper Conveyance from one Joint-tenant to another, yet if the Jury find that the one Joint-tenant did grant or convey to another, this amounts to a Release; for they having found the substantial Part, the Court is to apply the Words according to the Operation they have in Law; but every such Conveyance must be pleaded as a Release.

So if there be two Joint-tenants for Life, and one is a Feme Covert, and the Baron and Feme levy a Fine to the other Joint-tenant, and thereby grant *totum & quicquid* in the Land for the Life of the Wife, upon the Death of the other Joint-tenant the Lessor may enter, for the Fine incurred by Way of Release, and then the other Joint-tenant must have claimed the Whole from the first Feoffment, so could have had the Whole but for his own Life.

An Agreement between Joint-tenants of an Advowson, that they should be Tenants in common, and that each of them should present, amounts to a Severance and Release.

If there be two Joint-tenants of a Rent, the one may release to the other; but if the Rent be behind, the one cannot release his Interest in the Arrearages to another.

One Joint-tenant or Tenant in common may let his Part for (b) Years or at Will to his Companion; for this only gives him a Right of taking the whole Profits, when before he had but a Right to the Moiety thereof, and he may contract with his Companion for that Purpose, as well as he may with any Stranger.

Joint-tenants for 100 Years, and the Son takes a Lease from the Father of Lands for 15 Years, to begin, &c. the same shall conclude the Son to claim the whole Term or Parcel of it by Survivorship.

A Partition or Severance between Joint-tenants of a (c) Freehold must be by Deed, because by the Notoriety of Investiture they take it jointly; and to alter that a Matter of Solemnity is required, which is a Deed; but Tenants in common may make a Partition without Deed, because that is only a setting out by Metes and Bounds, according to the first Investiture, which gave each of them distinct Moieties.

Deed before the Statute 29 Car. 2. of Frauds and Perjuries. *Co. Lit.* 187. a.

### 3. At what Time such Disposition must be made to take Effect.

Regularly every Disposition by one Joint-tenant to bind his Companion must be (d) an immediate Disposition; for the surviving Joint-

(d) That if one Joint-tenant covenants to stand seised to the Use, &c. of the Moiety of his Companion after his Death, no Use shall arise, because but a bare Possibility. *Noy* 14. And tho' he survive his Companion. *Moor* 776. — If two Joint-tenants be of a Term, and the one of them grant to J. S. that if he pay to him 10*l.* before *Michaelmas*, that then he shall have his Term; the Grantor dieth before the Day, J. S. pays the Sum to his Executors at the Day, yet he shall not have the Term, but the Survivor shall hold Place; for it was in Nature of a Communication. *Co. Lit.* 184 5. — That an Agreement by one Joint-tenant to alien will not be decreed in Equity. *2 Vern.* 65.

tenant

tenant claiming the Whole by the original Investiture, the Whole must descend to him, unless his Companion hath disposed of it from him in his Life-time.

*Co. Lit.* 185. a. But if two Joint-tenants are in Fee, and one lets his Moiety to *J. S.* for Years, to begin after his Death, this is good, and shall bind the other, if he survives, because this is a present Disposition, and binds the Land from the Time of the Lease made, so that he cannot after avoid it.

*Lit. sect.* 289. But a Devise for Years in such Manner by one Joint-tenant will not bind the other surviving, because that is no present Disposition, nor binding on the Devisor himself, inasmuch as he may revoke or cancel his Will, and so destroy that Devise.

*Lit. sect.* 287. Also if there be two Joint-tenants of Lands, and one of them devises away that which belongs to him, and dies, this is a void Devise, and the Devisee takes nothing, because the Devise does not take Effect till after the Death of the Devisor, and then the surviving Joint-tenant takes the Whole by a prior Title, *viz.* from the first Feoffment; but in this Case if the Devisor survives the other Joint-tenant, then the Devise is good for the Whole, because he being the surviving Joint-tenant, has the Whole by Survivorship, and then the Words of the Will are sufficient to carry the whole Estate; besides, at the Time of making the Will, tho' he was not sole Tenant, yet he was seised *per mie & per tout*, and it is impossible to fix upon any particular Part which he meant to devise, because he could not then call one Part of the Land more his own than another, and the most genuine Construction seems to give the whole Land, since he was seised *per tout* of it at the Time of the Devise.

*Co. Lit.* 59. b. Also if there are two Joint-tenants, and one of them surrenders his Moiety to the Use of his last Will, and dies before the Surrender is presented, having made his Will, this is a Severance of the Jointure; for being presented it relates to the Time of the first Surrender.

*Poph.* 96. If two Joint-tenants for Life are, and one of them makes a Lease for Years of his Moiety, either to begin presently, or after his Death, and dies, this Lease is good and binding against the Survivor; the Reason whereof is, that notwithstanding the Lease for Years, the Joint-tenancy in the Freehold still continues, and in that they have a mutual Interest in each other's Life, so that the Estate in the Whole, or in any Part, is not to determine or revert to the Lessor till both are dead; for the Life of the one, as well as of the other, was at first made the Measure of the Estate granted out by the Lessor, and therefore so long as either of them lives, if the Joint-tenancy continues, he is not to come into Possession; now these Joint-tenants having a reciprocal Interest in each other's Life, when one of them makes a Lease for Years of his Moiety, this does not depend for its Continuance on his Life only, but on his Life and the Life of the other Joint-tenant, whichsoever of them shall live longest, according to the Nature and Continuance of the Estate whereout it was derived; and then so long as that continues, so long the Lease holds good, and by Consequence such Lessee shall hold out the surviving Joint-tenant and the Reversioner till the Estate whereout his Lease was derived be fully determined.

*1 Co.* 96. But if a Rent were reserved on such Lease, this is determined and gone by the Death of the Lessor; for the Survivor cannot have it, because he comes in by Title paramount the Lease, and the Heirs of the Lessor have no Title to it, because they have no (a) Reversion or Interest in the Land.

*1 Co.* 139. (a) But *quare* if the Executors or Administrators cannot maintain an Action of Debt or Covenant, either upon the Covenant in Law, or express Covenant, for Payment of the Rent, if there be any.

*A.* and *B.* Joint-tenants for their Lives, *A.* by Indenture leases the Moiety which he holds in Jointure with *B.* to *C.* for sixty Years from the Death of *B.* if he the said *A.* shall so long live, and demises the other Moiety to *C.* for sixty Years from his own Death, if *B.* shall so long live; then *A.* dies, and *B.* survives; and it was adjudged that this Lease was void for both Moieties; for by the first Words it was a good Lease from *A.* of his Part upon the Contingency of his surviving *B.* but that never happened, and as to *B.*'s Part *A.* had not Power to lease or contract for it during the Life of *B.* tho' he had happened after to survive him, for that was but a bare Possibility, which could not be leased or contracted for, and therefore the Lease was void in the whole.

*Cro. Jac.* 91.  
*Moor.* 11074  
*Whitlock* ver.  
*Horton.*

*A.* and *B.* Joint-tenants for their Lives, *A.* leases his Part for sixty Years, if he and *B.* so long live; then *B.* surrenders his Part, and takes back a new Estate; then *A.* dies, living *B.* and it was adjudged, that this Lease made by *A.* was determined by his Death; for the Joint-tenancy, which would have given them or their Lessees an Interest in each other's Life, is by the Surrender of *B.* determined and gone, and then the Lease of *A.* stood single upon his own Life, and consequently by his Death is determined; so it would be if after such Lease for Years by one Joint-tenant they had made Partition of the Joint-Estate, and then the Lessor had died, his Lease would be at an End, because the Joint-tenancy, which should have supported it after his Death, is by the Partition defeated and gone.

*Cro Jac.* 377.  
1 *Roll. Rep.*  
309.  
3 *Bull.* 130.  
2 *Roll. Abr.*  
131.  
*Daniel* and  
*Waddington.*

#### 4. What shall be a total Severance, or but for a limited Time.

It hath been holden in Equity, that if three Persons are jointly interested in the Trust of a Term for Years, and one of them mortgages his third Part, that hereby the Joint-tenancy is wholly severed, and that it was not like the Case where a Person makes his Will, and afterwards mortgages his Estate, in which it was agreed to be no total Revocation; for my Lord *Cotter* held, that a Joint-tenancy was odious in Equity, and not like the Case of a Will, which might have been for the Benefit of the Mortgagor, and not have been revoked; but that it was to the Disadvantage of the Mortgagor that the Joint-tenancy should continue; for thereby, if he happen to die first, all his Estate and Interest goes from his Representatives to the Survivor.

*Salk.* 158.  
*York* versus  
*Stone.*

If there be two Joint-tenants of a Rent, and one of them disseise the Tenant of the Land, this severs the Joint-tenancy for a Time, the Moiety of the Rent being suspended by Unity of Possession, and therefore cannot stand in Jointure with the other Moiety in Possession.

*Co. Lit.* 188. a.

If two Joint-tenants be of a Term, and the one grants Parcel of the Term to a Stranger, by this the Jointure of all is severed.

*Cro. Eliz.* 33.  
*Sym's* Case.

#### 5. How far the Charges or Incumbrances of one Joint-tenant shall affect the Survivor.

Regularly all Grants or Charges by one Joint-tenant out of the Land fall off with his Life, and cannot affect the Survivor, because there being no immediate Disposition of the Land itself, that comes whole and intire to the Survivor under the first Title, and by Consequence over-reaches all intermediate Charges or Grants thereof by the other Joint-tenant who is dead.

*Lit. fess.* 296.  
*Co. Lit.* 184. b.  
*Bridgm.* 43.

*Co. Lit. 184. b.* Therefore if one Joint-tenant acknowledge a Recognizance, or a Statute, or suffereth Judgment in an Action of Debt, &c. and dieth before Execution had, it shall not be executed (a) afterwards; but if Execution be sued in the Life-time of the Conusor, it shall bind the Survivor; also in all these Cases, if he that Charges survive, it shall bind for ever.

(a) So if one Joint-tenant in Fee-simple be indebted to the King, and dieth, after his Decease no Extent shall be made upon the Land in the Hands of the Survivor. *Co. Lit. 185. a.*

*Co. Lit. 186. b.* But if one Joint-tenant grant *Vestrum*, or *Herbagium terræ*, for Years, and dies, this shall bind the Survivor. So if two Joint-tenants are of a Water, and one grants a separate Piscary for Years, and dies, this shall bind the Survivor; because in these Cases, the Grant of the one Joint-tenant gives an immediate Interest in the Thing it self whereof they are Joint-tenants.

*Co. Lit. 184. b.* Also, tho' a Statute or Recognizance acknowledged by one Joint-tenant shall not bind his Companion, unless Execution was taken out in the Life-time of him who acknowledged it; yet if after such Acknowledgment, the Jointenant who acknowledged it had released to his Companion, the Land would be chargeable with the Statute, tho' he who acknowledged it had died before Execution, because his Acceptance of the Release prevents his claiming by Survivorship.

*2 Sand. 28.* So if one Joint-tenant in Fee acknowledges a Recognizance, and afterwards both Joint-tenants bargain and sell the Lands to a Stranger, who reconveys it to them, and then he who acknowledged the Recognizance dies, the Moiety of the Land shall be charged with the Recognizance notwithstanding the Survivorship.

## 6. Of Severance by Operation of Law.

*2 An. 202.* If a Man hath Issue three Sons, and he devises to his two youngest Sons Lands to them jointly for their Lives, and the eldest Son, who hath the Reversion in Fee, dies, by which it descends to the second Son, this by Operation of Law is a Severance of the Joint-tenancy.

*2 Co. 60. b.* So if there be three Joint-tenants for Life, and the Reversion is granted to one of them, the Jointure is severed as to the third Part of him to whom the Reversion is so granted.

*Co. Lit. 132. b.* S. P. *Cro. Eliz. 570, 481. S. P. 2 Sand 386. S. C. cited. 2 Co. 58.*

*2 Co. 58.* If two Joint-tenants levy a Fine and declare no Uses, they are seised as before.

*Hob. 25.* If Land be given to two jointly with Warranty, and one of them makes a Feoffment of his Part, the Warranty is lost as to him, but the other may vouch for his Moiety; but if they make Partition, the Warranty is lost as to both by the (a) Common Law.

(b) But if they make Partition pursuant to the Statute 31 & 32 H. 8. the Warranty remains, because they do it by Compulsion. *Co. Lit. 187. 6 Co. 12. b.*

*Co. Lit. 185. a.* If one Joint-tenant in Fee take a Lease for Years of a Stranger, by Deed indented, and dieth, the Survivor shall not be bound by the Conclusion, because he claims above it, and not under it.

7. Of Severance by Compulsion of Law; and therein of the Writ de Partitione facienda.

At Common Law Joint-tenants and Tenants in common were not compellable to make Partition, except by the Custom of some Cities and Boroughs. *Lit. Sect. 200 Co. Lit. 187.*

But now by the 31 H. 8. cap. 1. reciting the Inconveniencies which Joint-tenants and Tenants in common lay under, from one Joint-tenant's or Tenant's in common Occupying the whole Land, or Receiving the whole Profits, it is enacted, *Sec. 2.* 'That all Joint-tenants and Tenants in common that now be, or hereafter shall be of any Estate or Estates of (a) Inheritance in their own Rights, or in Right of their Wives, of any Manors, Lands, Tenements or Hereditaments within this Realm of England, Wales, or the Marches of the same, shall and may be co-acted and compelled by Virtue of this present Act, to make Partitions between them of all such Manors, Lands, Tenements and Hereditaments, as they now hold, or hereafter shall hold as Joint-tenants or Tenants in common by Writ de Partitione facienda, in that case to be devised in the King, our Sovereign Lord's Court of Chancery, in like Manner and Form as Coparceners by the Common Laws of this Realm have been, and are compelled to do, and the same Writ to be pursued at the Common Law. (a) The Statute 32 H. 8. cap. 32. gives the like Remedy to Joint-tenants and Tenants in common for Life or Years.

'Provided that every of the said Joint-tenants or Tenants in common, and their Heirs, after such Partition made, shall and may have Aid of the other, or of their Heirs, to the Intent to deraign the Warranty Paramount, and to recover for the Rate as is used between Coparceners after Partition made by the Order of the Common Law.

Before these Statutes the Writ of Partition was confined to Coparceners; also it lay against the Alienee of a Coparcener, for a Coparcener cannot by her Alienation devert the Right of her Sister to divide the Estate, nor can she destroy her Writ of Partition; but the Alienee had no such Writ of Partition, because such Alienee took an undivided Moiety; nor was the Alienee under the Reasons on which the Law had founded such Right of Division, which was, that the Inheritance might be separated after Marriage into distinct Families; and for the same Reasons the Tenant by the Curtesy, tho' he came in by the Act of Law, could not have this Writ, tho' it lay against him by the surviving Coparceners. *Co. Lit. 175. a. 167. a. Dyer 98. b.*

But now by Force of these Statutes, the Alienee of one Parcener may have a Writ of Partition against the other Parcener, because they are Tenants in common. *Co. Lit. 175. a.*

So Tenant by Curtesy shall have a Writ of Partition upon the Statute 32 H. 8. cap. 32. for tho' he is neither Jointenant nor Tenant in common, yet being in equal Mischief with those to whom the Statute gives this Remedy, he is within the Equity thereof. *Co. Lit. 175. b.*

But if three Coparceners are, and a Stranger purchase the Part of one of them, he cannot join with either of the two Coparceners in a Writ of Partition, either at Common Law or by Force of the Statute; for the Words of the Preamble of the Statute are, *And none of them by the Law doth or may know their several Parts, &c. and cannot by the Laws of this Realm make Partition without their mutual Assents:* Now in this Case one of them, viz. the Parcener may have a Writ of Partition at Common Law, and therefore cannot come within the Preamble and Intent of the Act, and so cannot join with the Purchaser in a Writ of Partition brought upon it. *1 And. 30 pl. 72. Co. Lit. 175. b. Kelw. 208. Dyer 128. Bendl. 42. pl. 16.*

It

*Cro. Eliz.* 742, 743. & vide *Cro. Eliz.* 759. 2 *Lutw.* 1018. 3 *Leon.* 231. It hath been holden, that a general Writ by Joint-tenants or Tenants in common grounded on this Statute, and concluding *contra formam Statut.* is sufficient, without reciting the Case particularly, so as to bring it within the Statute; for the framing of the Writ is left to the Clerks in Chancery, and must be according to the Form which they have devised.

*Cro. Eliz.* 759. In this Writ Partition may be demanded of the View of Frank-pledge, together with a Manor; for tho' it be not severable of it self, nor partible, yet the Profits thereof may be divided, or it may be divided thus; that the one shall have it at one Time, and the other at another; also being demanded with the Manor, it may well be intirely allotted to one, and the Land in Recompence to another.

*Poth* 245. In this Action there are two Judgments, the first is *Quod Partitio fiat inter Partes Prædictas de tenementis Prædict. cum Pertinen.* and upon this there goes out a judicial Writ to the Sheriff to make Partition, which recites, first the Writ of Partition and Judgment, and then commands the Sheriff, together with twelve Men of the Vicinage, &c. to go in (a) The Sheriff must go in Person, otherwise upon Information thereof the Court will stay the Filing of the Return, and award a new Writ, for the Writ being his Commission, he cannot deviate from it; but if the Sheriff returns that he was there in Person, and this Return is received and filed, then any Information to the contrary comes too late; because by the filing it is become Matter of Record, against which no Averment *in Pais* lies; neither can the Party have Error upon the Return. *Cro. Eliz.* 9. 10. *Clay's Case.*

(a) Person to the Tenements to be divided, and there in the Presence of the Parties, (if they appear on Summons to be made) by the Oaths of those twelve Men, to make an equal and fair Partition, and allot to each Party their full and just Share, and then Return the Inquisition of the Partition annexed to the Writ, under the Seals of the Sheriff, and the Jurors, whose Names are likewise to be returned.

*Co. Lit.* 169. When the Inquisition is thus returned, upon Motion made to the Court, the second Judgment is given in this Manner: *Ideo considerat' est per cur. quod Partitio firma & stabilis in perpetuum teneatur.*

1 *Rel. Abr.* 750. Lord Berkley and Countess of Warwick. *Cro. Eliz.* 655. Moor 643. Noy 71. S. C. adjudged. *Cro. Jac.* 324. 2 *Bulf.* 104. In a Writ of Partition, if the Judgment be given *quod Partitio fiat*, and thereupon a Writ is directed to the Sheriff to make Partition, no Writ of Error lies hereupon, for the Judgment is not compleat till the Sheriff's Return; and the second Judgment which the Law requires hereupon, viz. *quod Partitio*, &c. for before that the Plaintiff may be Non-suit, or he may, upon the Return of the Sheriff, suggest to the Court that the Partition is not equal, and so have a new Partition, and may also Release before the last Judgment.

like Case adjudged, & vide 2 *Rel. Rep.* 125. 2 *Bulf.* 119.

*Cro. Eliz.* 65. If the Writ be brought by one Joint-tenant against several, and there happens to be Error in the Execution of it, and one of the Defendants releases all Errors to the Plaintiff, this shall not bar the others; for each having a distinct Interest shall not be prejudiced by the Release of his Companion.

*Dyer* 265. pl. 5. Dalton's Sheriff 265. A. and B. Tenants in Common of a Manor, A. purchases several Freeholds that lay so mixed with the Demefne Lands of the Manor that they could hardly be distinguished from them; B. brings a Writ of Partition of the Manor only; and it was adjudged that Partition should be made, and a Writ awarded accordingly; upon the Execution of which Writ A. comes to the Sheriff and Inquest, and informs them with the Purchase of the Freeholds, that are not Parcel of the Manor, and bids them take care how they make Partition of all the Lands within such a Compass, lest they offer Violence to their Consciences; but does not shew them the Freeholds distinctly, nor the Limits of the Manor, which obliged the Sheriff to adjourn to a certain Day, on which one of the Inquest made Default; and thereupon the Sheriff returns a Fine of

of 40 s. with an Account of the Difficulties they met with, *Et ulterius propter Brevitatem temporis Breve illud exequi non potuit*, it was held, that *A.* ought to shew the Bounds of the several Freeholds that he purchased, or the Number of the Acres; but if no Light or Evidence is given by either Party to the Inquest, and they make Partition *de tanto quantum resumitur Et dignoscitur per Præsumptiones*, it is good; for they are under an Obligation to execute the Commands of the Court at their Peril.

If after the Awarding of the judicial Writ, and before the Return of it, the Defendant dies, yet the Partition is good, and the Writ shall not abate, because before the Death of the Defendant Judgment was given that Partition should be made; and tho' upon the Return of the judicial Writ there is another Judgment given, yet that is given in Confirmation of the first Judgment; it seems likewise, that upon the Return of the judicial Writ no Exception can be taken to it; therefore it is not material whether the Defendant be dead or alive, since he can have no Advantage by any Plea on the Return of the Writ.

The Process in this Writ is Summons, Attachment, and Distress infirmite. *F. N. B. 62. Eooth 245.*

*A.* and *B.* were Joint-tenants for Years, *B.* suffers *C.* to occupy his Moiety with him, and *A.* brings a Writ of Partition against *B.* and *C.* supposing that *B.* had granted a Moiety of his Part to *C.* *C.* shews that he was but Tenant at Will to *B.* whereupon the Writ abated; whether *A.* might have another Writ of Partition against *B.* by Journeys Accounts, was the Question; and resolved, that he might; for the Possession of *C.* was good Colour for bringing the Writ of Partition, and *A.* could not take Notice what Estate *C.* had. *Go Jac. 218. Beedle versus Clerk.*

By the (a) 8 & 9 W. 3. cap. 31. intituled, an Act for the easier obtaining Partitions of Lands in Coparcenary, Joint-tenancy and Tenancy in common, reciting, That whereas the Proceedings upon Writs of Partition between Coparceners by the Common Law or Custom, Joint-tenants and Tenants in common are found by Experience to be tedious, chargeable, and oftentimes ineffectual, by reason of the Difficulty of discovering the Persons and Estates of the Tenants of the Manors, Messuages, Lands, Tenements, and Hereditaments to be divided, and the defective or dilatory executing and returning of the Process of Summons, Attachment and Distress, and other Impediments in making and establishing of Partitions, by reason of which divers Persons having undivided Parts or Purparts are greatly oppressed and prejudiced, and the Premises are frequently wasted and destroyed, or lie uncultivated and unmanured, so that the Profits of the same are totally or in a great measure lost; for Remedy whereof it is Enacted, 'That after Process of *Pone*, or Attachment returned upon a Writ of Partition, Affidavit being made by any credible Person of due Notice given of the said Writ of Partition to the Tenant or Tenants to the Action, and a Copy thereof left with the Occupier, or Tenant or Tenants, or, if they cannot be found, to the Wife, Son, or Daughter, (being of the Age of twenty-one Years, or upwards,) of the Tenant or Tenants, or to the Tenant in actual Possession by Virtue of any Estate of Freehold or for Term for Years, or uncertain Interest, or at Will, of the Manors, Lands, Tenements, or Hereditaments whereof the Partition is demanded, (unless the said Tenant in actual Possession be Demandant in the Action,) at least forty Days before the Day of Return of the said *Pone* or Attachment, if the Tenant or Tenants to such Writ, or any of them, or the true Tenant to the Messuages, Lands, Tenements, and Hereditaments as aforesaid, shall not in such Case within fifteen Days after Return of such Writ of *Pone* or Attachment cause an Appearance to be entered in such Court where such Writ of *Pone* or Attachment shall be returnable, then in Default of such Appearance, the Demandant having entered his Declaration, the Court may proceed



' proceed to examine the Demandant's Title, and Quantity of his Part and  
 ' Purpart, and accordingly as they shall find his Right, Part and Pur-  
 ' part to be, they shall for so much give Judgment by Default, and  
 ' award a Writ to make Partition, whereby such Proportion, Part and  
 ' Purpart may be set out severally; which Writ being executed, after  
 ' eight Days Notice given to the Occupier, or Tenant or Tenants of the  
 ' Premises, and returned, and thereupon final Judgment entered, the  
 ' same shall be good, and conclude all Persons whatsoever, after Notice  
 ' as aforesaid, whatever Right or Title they have, or may at any time  
 ' claim to have, in any of the Manors, Messuages, Lands, Tenements,  
 ' and Hereditaments mentioned in the said Judgment and Writ of Par-  
 ' tition, altho' all Persons concerned are not named in any of the Pro-  
 ' ceedings, nor the Title of the Tenants truly set forth.

' Provided always, That if such Tenant or Person concerned, or  
 ' either of them, against whom or their Right or Title such Judgment  
 ' by Default is given, shall within the Space of one Year after the first  
 ' Judgment entered, or in Case of Infancy, Coverture, *Non sane Me-*  
 ' *morise*, or Absence out of the Kingdom, within one Year after his, her,  
 ' or their Return, or the Determination of such Inability, apply them-  
 ' selves to the Court by Motion where such Judgment is entered, and  
 ' shew a good and probable Matter in Bar of such Partition, or that the  
 ' Demandant hath not Title to so much as he hath recovered, then in  
 ' such Case the Court may suspend or set aside such Judgment, and  
 ' admit the Tenant and Tenants to appear and plead, and the Cause  
 ' shall proceed according to due Course of Law, as if no such Judgment  
 ' had been given; and if the Court upon hearing thereof shall adjudge  
 ' for the first Demandant, then the said first Judgment shall stand con-  
 ' firmed and be good against all Persons whatsoever, except such other  
 ' Persons as shall be absent or disabled as aforesaid; and the Person or  
 ' Persons so appealing shall be awarded thereupon to pay Costs; or if  
 ' within such Time or Times aforesaid the Tenants or Persons concerned,  
 ' admitting the Demandant's Title, Parts, and Purparts, shall shew to  
 ' the Court any Inequality in the Partition, the Court may award a new  
 ' Partition to be made in Presence of all Parties concerned, (if they  
 ' will appear,) notwithstanding the Return and filing upon Record the  
 ' former, which said second Partition returned and filed shall be good  
 ' and firm for ever against all Persons whatsoever, except as before  
 ' excepted.

' And it is further Enacted, That no Plea in Abatement shall be  
 ' admitted or received in any Suit for Partition, nor shall the same be  
 ' abated by reason of the Death of any Tenant.

' And it is further Enacted, That when the High Sheriff by reason  
 ' of Distance, Infirmary, or any other Hindrance, cannot conveniently  
 ' be present at the Execution of any Judgment in Partition, in such Case  
 ' the Under Sheriff, in Presence of two Justices of the Peace of the  
 ' County where the Lands, Tenements, or Hereditaments to be divided  
 ' do lie, shall and may proceed to Execution of any Writ of Partition  
 ' by Inquisition in due Form of Law, as if the High Sheriff were then  
 ' personally present; and the High Sheriff thereupon shall, and is hereby  
 ' enabled and required to make the same Return as if he were personally  
 ' present at such Execution; and in Case such Partition be made, re-  
 ' turned, and filed, he or they, that were Tenant or Tenants of any of  
 ' the said Messuages, Lands, Tenements, and Hereditaments, or any  
 ' Part or Purpart thereof before they were divided, shall be Tenant or  
 ' Tenants for such Part set out severally to the respective Landlords or  
 ' Owners thereof by and under the same Conditions, Rents, Covenants,  
 ' and Reservations where they are or shall be so divided; and the Land-  
 ' lords and Owners of the several Parts and Purparts so divided and  
 ' allotted, as aforesaid, shall warrant and make good unto their respective

' Tenants



‘ Tenants the said several Parts severally after such Partition, as they  
 ‘ are or were bound to do by any Copy, Leases, or Grants of their  
 ‘ respective Parts before any Partition made ; and in Case any Deman-  
 ‘ dant be Tenant in actual Possession to the Tenant to the Action for  
 ‘ his Part and Proportion, or any Part thereof, in the Messuages, Lands,  
 ‘ Tenements, and Hereditaments to be divided by Virtue of a Writ of  
 ‘ Partition as aforesaid, for any Term of Life, Lives or Years, or un-  
 ‘ certain Interest, the said Tenant shall stand and be possessed of the  
 ‘ said Purparts and Proportions for the like Term, and under the same  
 ‘ Conditions and Covenants, when it is set out severally in Pursuance of  
 ‘ this, or any other Act, Statute, or Law to that Purpose.

‘ And it is further Enacted, That the respective Sheriffs, their Under  
 ‘ Sheriffs and Deputies, and in Case of Sicknes or Disability in the  
 ‘ High Sheriff, all Justices of the Peace, within their respective Divi-  
 ‘ sions, shall give due Attendance to the executing such Writ of Parti-  
 ‘ tion, unless reasonable Cause be shewn to the Court upon Oath, and  
 ‘ there allowed of, or otherwise be liable every of them to pay unto the  
 ‘ Demandant such Costs and Damages as shall be awarded by the Court,  
 ‘ not exceeding five Pounds, for which the Demandant or Plaintiff may  
 ‘ bring his Action in any of his Majesty’s Courts of Record at *Westmin-  
 ‘ ster*, wherein no Effoign, Protection, Privilege, or Wager of Law shall  
 ‘ be allowed, nor any more than one Imparlance ; and in Case the  
 ‘ Demandant doth not agree to pay to the Sheriffs or Under Sheriffs,  
 ‘ Justices, and Jurors such Fees as they shall respectively demand for their  
 ‘ Pains and Attendance in the Execution of the same, and returning  
 ‘ thereof, then the Court shall award what each Person shall receive,  
 ‘ having Respect to the Distance of the Place from their respective Habi-  
 ‘ tations, and the Time they must necessarily spend about the same, for  
 ‘ which they may severally bring their Actions.

By the 7 *Anne*, cap. 18. it is Enacted, ‘ That if Coparceners, or Joint-  
 ‘ tenants or Tenants in common be seised of any Estate of Inheritance 7 *Anne*, cap. 18.  
 ‘ in the Advowson of any Church or Vicarage, or other Ecclesiastical  
 ‘ Promotion, and a Partition is or shall be made between them to pre-  
 ‘ sent by Turns, that thereupon every one shall be taken and adjudged  
 ‘ to be seised of his or her separate Part of the Advowson to present in  
 ‘ his or her Turn ; as if there be two, and they make such Partition, each  
 ‘ shall be said to be seised, the one of the one Moiety to present in the  
 ‘ first Turn, the other of the other Moiety to present in the second Turn ;  
 ‘ in like Manner if there be three, four, or more, every one shall be said  
 ‘ to be seised of his or her Part, and to present in his or her Turn.’

## (K) Joint-tenants and Tenants in common how to sue and be sued; and therein of Summons and Severance.

JOINT-TENANTS being seised *per mie & per tout*, and deriving *Co.Lit. 180. b.*  
 by one and the same Title, must jointly implead and be jointly im-  
 pleaded with others.

So tho’ one Joint-tenant may distrain for Rent, yet he cannot bring *Carth. 328.*  
 an Action of Debt, nor (a) avow for Rent Arrear without making him- *Pullen and*  
 self Bailiff to his Companions, that they may be privy to the Suit, and *Palmer.*  
 be intitled to their Shares upon his Recovery thereof in their Right. *5 Mod 72,*  
 150. S. C.

(1) That

Joint-tenants must join in an Avowry for Damage-Fasant. *Thomps Ent. 264. 5 Mod. 151.*

If

*Co. Lit. 42. a.* If *A.* and *B.* Joint-tenants, and to the Heirs of *B.* join in a Lease for Life, *A.* has a Reversion, and shall join in Action of Waste; but the Writ must be *ad Exhereditationem* of *B.* because he only hath the Inheritance.

*Noy 1. Farmer and Downes, adjudged.* But if two Joint-tenants acknowledge a Statute, and their several Lands are taken in Execution, and after, upon the Invalidity of the Statute, they jointly bring an *Audita Querela*, the Writ shall abate; for they ought to have several Writs; for the Wrong done to one by the Execution of his Land is no Tort to the other.

*1 Show Rep. 342. 1 A'od. 102. Co. Lit. 200.* And altho' regularly Joint-tenants are to join and be joined in Action; yet it is otherwise with Tenants in common; and therefore if in Ejectment the Plaintiff declares on a Lease made by *A.* and *B.* and on the Trial it appears that they are Tenants in common, the Plaintiff cannot recover; but if *A.* and *B.* had been Joint-tenants, a Joint-Lease to the Plaintiff had been good, and he might have declared *quod demiserunt*; and the Reason of the Difference is, that Tenants in common are of several Titles, and therefore the Freehold is several; and if they be disseised, they shall be put to their several Actions; as therefore the Lands of Tenants in common are to be considered as different Estates depending on different Titles, the Plaintiff shall not recover, because that were to allow the Plaintiff to try two several and different Titles in one Issue at the same Time, and therefore the Plaintiff to make out his Title must shew and prove that each demised the Whole to him, or else he doth not prove the Declaration; whereas the Discovery of the Tenancy in common proves the contrary; and as they have different Titles to a Moiety only, so they could not each of them demise the Whole; but Joint-tenants are seised *per mie & per tout*, and they derive by one and the same Title, and therefore each may be said to demise the Whole; and as they must join in an Action for any Violation of their Possession, so for the same (*a*) Reason too their Lessee on their joint Demise.

But note, That to avoid any Difficulty in those Cases, the best Way seems to be for them to join in a Lease to a third Person, and that Lessee to make a Lease to try the Title. *Noy 13.*

*Lit. sect. 314. Co. Lit. 197. a.* But tho' Tenants in common having (*b*) several and distinct Rights cannot join in Action, yet where the Thing is (*c*) intire, as a Horse, Hawk, they must join, these being in their Nature not severable, and therefore from the Necessity of the Case the Law admits them to join.

*Ecceffment. 5 Mod. 11.* (*c*) And therefore Tenants in common shall join in a *Quare Impedit*, because the Presentation to the Advowson is intire. *Co. Lit. 197. b.* — And for this Reason Tenants in common of a Seignory shall join in a Writ of Right of Ward, and Ravishment of Ward for the Body. *Co. Lit. 197. b.* — Also Tenants in common shall join in Detinue of Charters, and if the one be nonsuit, the other shall recover. *Co. Lit. 197. b.* — And shall join in a *Warrantia Charta*, but sever in Voucher. *Co. Lit. 197. b.*

*Co. Lit. 197. b. Moor 202.* So if there be two Tenants in common, and they make a Lease for Life, rendering Rent, this Reservation, tho' made by joint Words, shall follow the Nature of the Reversion, which is several in the Lessors; therefore they shall be put to their several Assises if they be disseised, as if there had been distinct Reservations.

*Lit. sect. 315. Co. Lit. 198. a.* Also Tenants in common shall join in Actions personal, as Trespafs in breaking into their House, breaking their Inclosure or Fences, feeding, waisting, or defouling their Grass, cutting down their Timber, fishing in their Piscary, &c. and shall recover jointly their Damages; because in those Actions tho' their Estates are several, yet the Damages survive to all; and it would be unreasonable to bring several Actions for one single Trespafs.

*Co. Lit. 198. a.* So if there be two Tenants in common of a Manor, and they make a Bailiff thereof, and one of them die, the Survivor shall have an Action

of Account, for the Action given unto them for the Arrearages upon the Account was joint.

So if two Tenants in common sow their Land, and a Stranger eateth the Corn with his Cattle, tho' they have the Corn in common, yet the Action given to them for the Trespass is joint, and shall survive.

Tenants in common may join or sever in (a) Debt or Covenant for Rent; but if they sever, the Demand must be *de una Medietate* of the whole Rent, and not of a certain Sum, which amounts to a Moiety.

*lanc.* (a) But in an Avowry they ought to sever. *Co. Lit.* 193. b.

And as in Trespass Tenants in common shall join, so they shall for a Nuisance done to their Land, for it is Personal, and concerns the Profits of the Land; but for Forging of false Deeds they shall sever, for that concerns the Inheritance of the Land; and if the Nuisance be continued after the Death of one of the Tenants in common, his Devisee shall join in Action with the Survivor, for the Continuance thereof is as the new erecting of such a Nuisance.

A. makes a Lease, in which the Lessee covenants with the Lessor, &c. to Repair; Lessor grants his Reversion by several Moieties to several Persons, and Lessee assigns to J. S. In an Action of Covenant by the Grantees of the Reversion for not Repairing; the Question was, if two Tenants in common of a Reversion could join in bringing an Action of Covenant against the Assignee; and it was held, that they could and ought to join in this Case, being a meer Personal Action, according to *Littleton's* Rule, which was held to be general, without any Relation to any Privy of Contract; and that the Covenant being indivisible, the Wrong and Damages could not be distributed because uncertain.

6. 7. 28 E. 3. 90. *Moor* 40. *Godb.* 90, 283. *Bro. Joinder in Action* 104.

Joint-tenants and Tenants in common are to join in a *Quare Impedit*; the first, because they are jointly seised, and claim by a joint Title; the (b) latter out of Necessity, because the Thing is intire.

*sup.* 7 *Ann. cap.* 18. (b) If two Tenants in common be of an Advowson, and they bring a *Quare Impedit*, and the one doth Release, yet the other shall sue forth and recover the whole Presentment.

If Joint-tenants or Tenants in common refuse to set out their Tithes, the Action must be brought against them both; but if one of them only occupy the Land, the Action is to be brought against him; or if one Joint-tenant or Tenant in common sets out the Tithes, and the other takes them away, the Action must be brought against the Wrongdoer.

If a Lease for Years be made to B. and C. rendring Rent, and C. assigns his Moiety to D. and after the Rent is Arrear, the Lessor may bring an Action of Debt for the Rent against B. and D. for the Reversion remains intire.

If two Joint-tenants bring Trespass, pending the Action one of them dies, the Writ shall abate; *secus* if brought against them, for in the latter Case the Action is both joint and several.

Also where a *Quare Impedit* is brought by two Joint-tenants, and pending the Action one of them dies, the Writ shall not abate; and this out of Necessity, lest the six Months should elapse, and thereby the Action be lost.

If one Joint-tenant refuses to join in Action, he may be summoned and severed; but herein it is to be observed, that if the Person severed dies the Writ abates, because the Survivor then goes for the Whole, which he cannot do on that Writ, where on the Summons and Severance he went only for a Moiety before, for the Writ cannot have a double Effect, to wit, for a Moiety in Case of Summons and Severance, and for

the whole in Case of Survivorship; and the Law is the same if such Joint-tenants proceed without Summons and Severance, for since both by the Writ might by Possibility recover their Moieties, they shall not go on for the Whole in Case of Survivorship, because the Words and Effect of the Writ at the Time of its first Purchasing was that each might recover his Moiety, and therefore a new Writ must be purchased to enable one to proceed for the Whole.

*Co. Lit.* 197. But in Personal and Mixt Actions where there is Summons and Severance, and yet after such Summons and Severance the Plaintiff goes on for the Whole, there if one of them dies, yet the Writ shall not abate, because they go on for the Whole after Summons and Severance; and if they were to have a new Writ, it would only give the Court Authority to go on for the Whole.

*Co. Lit.* 197. So if two Joint-tenants bring a Writ of Ward, and they are summoned and severed, and the severed Person dies, the Writ shall not abate, because after such Severance he went on for the Whole; and so he does in this Case, after the Death of his Companion.

*Co. Lit.* 197. *b.* So in a *Quare Impedit* by two Joint-tenants, and one is summoned and severed, and the severed Person dies, the Writ shall not abate, because the Advowson is an intire Thing; and he proceeded for the Whole after the Severance, and so he may after the Death, &c.

*11 H. 4.* 17. If two Joint-tenants bring an Assise, and the one is severed, if it be found that the other had Goods taken upon the Land, he shall recover sole Damage for them.

*Moor* 466.

*Cro. Eliz.* 554.

*Skin.* 12.

*1 Salk.* 4, 32.

*1 Mod.* 102.

*2 Lew* 113.

*Carth.* 63.

Wherever Tenants in common ought to join in Action, and one alone brings the Action, the Defendant ought to plead the Tenancy in common in Abatement, which is a Defence the Law allows him, that he may not be twice charged; but if he plead in chief, and it be found against him, the Plaintiff shall have Judgment, because he loses the Opportunity of Pleading in Abatement by Pleading to the Right of the Action.

*2 Inst.* 523,  
524.

If Joint-tenancy be pleaded by Fine or Deed in Abatement of the Demandant's Action, he cannot take a general Averment that the Tenant is sole seised, for that were directly to contradict them, and set them aside by a Matter of less Force and Solemnity than they are; but he may confess the Joint-tenancy which the Tenant pleads after the Fine levied, but that the Joint-tenant not named released to the Tenant before the Writ brought, or that both the Conuzees enfeoffed one who enfeoffed the Tenant; but at this Day, if the Tenant had been enfeoffed by Deed, and had pleaded Joint-tenancy to abate the Demandant's Writ, the Demandant might have averred generally, that the Tenant is sole seised, for the Statute of 34 *E. 1. de Conjunctis Feoffatis* extends to Joint-tenancy by Deed tho' not by Fine; but by the Common Law the Demandant was not allowed that Plea, where the Tenant claimed under a Deed, no more than when he claimed under a Fine; but if the Tenant claims by Feoffment *in Pais*, and plead that in Abatement of the Demandant's Action, the Demandant may aver sole Tenancy, because the Feoffment is to be proved *viva voce per Pares*, whose Credit is not more regarded by the Court than the Demandant's.

(L) Of the Remedies Which Joint-tenants and Tenants in common have against each other.

BY the Common Law Joint-tenants and Tenants in common had no Remedy against each other, where one alone received the whole Profits of the Estate, for he could not be charged as Bailiff or Receiver to his Companion, unless he actually made him so; but now by the 4 & 5 Ann. cap. 16. it is provided, that they and their Executors and Administrators may have an Account against the others as Bailiffs, for receiving more than their Proportion, and against their Executors and Administrators.

Co. Lit. 172 a  
186. a. 200 b.  
3 Leon. 228.  
So if two  
had a Ward  
in common,  
and one took  
all the Pro-  
fits. F. N. B.  
118.

But if one Joint-tenant or Tenant in common had ejected or (a) with-held the Possession from his Companion, such Joint-tenant or Tenant in common so ejected might have maintained an *Ejectione firme* against such Ejector, &c.

Co. Lit. 199 b.  
(a) But tho'  
one Tenant  
in common  
may disseise

the other, yet it must be by actual Disseisin, as turning him out, hindering him to enter, &c. but a bare Perception of Profits is not enough. 1 Salk. 392. Farell. 39.

Also one Joint-tenant or Tenant in common may offend against the Statutes against forcible Entries, either by forcibly Ejecting, or forcibly holding out his Companions; for tho' the Entry of such a Tenant be lawful *per mie & per tout*, so that he cannot in any Case be punished in an Action of Trespass at the Common Law; yet the Lawfulness of his Entry no way excuses the Violence, or lessens the Injury done to his Companion, and consequently an Indictment of forcible Entry into a Moiety of a Manor, &c. is good.

Lat. b. 224.  
Palm. 419.

But tho' Joint-tenants and Tenants in common being actually ejected, had these Remedies at Common Law, yet such Remedies were only extended to Things Real; and there was no Remedy where a Horse, Hawk, &c. were seized by one Joint-tenant or Tenant in common, but by re-seizing it again when a proper Opportunity served.

Lit. sect. 323.

If there be two Tenants in common of a Manor to which Waif and Stray belong, a Stray doth happen, they are Tenants in common of the same; and if the one doth take the Stray, the other hath no Remedy by Action but to take him again; but if by Prescription, the one is to have the first Beast happening as a Stray, and the other the second, there an Action lieth, if the one take that which pertains to the other.

Co. Lit. 200 a.

So if there be two Tenants in common of a Park or Dove-house, and one of them destroy all the Deer, or take all the old Doves, and destroy the Flight; or if two have Land and Meer-Stones in common, and one of them carry them away; or if they have a Folding in common, and one disturb the other to erect Hurdles, in all these Cases Trespass *Quare vi & Armis* lies.

Co. Lit.  
200. a. b.

If two several Owners of Houses have a River in common, and one of them corrupt it, the other shall have an Action on the Case.

Co. Lit. 200. b.

If one be willing to repair a House or Mill which he holds in common, or jointly with another, he may have a Writ *de Domo reparanda* against him.

Co. Lit. 200. b.

If Land be given to two for Life, and to the Heirs of one of them, and Tenant for Life do Waste, he that hath the Fee cannot have an Action of Waste on the Statute of *Glocester*, but he may have one on *Westm. 2. cap. 22.* which enacts, that if there be two Tenants in common of a Wood, Turbary, Piscary, &c. and one do Waste, the other shall have a Writ of Waste, and the Waster shall have Election before Judgment,

Co. Lit. 200. b.  
2 Inst. 423.

ment, either to have his Part in certain assigned to him by the Oath of twelve Men, (and then the Place wasted shall be assigned for Part thereof,) or to grant that he will take no more for the future than his Companion shall approve of; and this Act by Construction has been held to extend to Joint-tenants, but not to Parceners, because they might have the Writ *de Partitioe facienda* at Common Law.

*Vid. Tit Tro-  
ver and Con-  
version.*

One Tenant in common cannot bring Trover against his Companion, because they are both equally intitled to the Possession.

## Jointure.

*Co. Lit. 36. b.  
4 Co. 2. b.*

**A** Jointure is a competent Livelihood of Freehold for the Wife of Lands, &c. to take Effect presently in Possession or Profit after the Death of the Husband, for the Life of the Wife at least, if she herself be not the Cause of the Determination or Forfeiture thereof.

Under this Definition we shall consider,

- (A) The Original and first Introduction of this Provision.
- (B) Of its being a Bar of Dower; and therein of the 27 H. 8. and the Rules to be observed in making a good Jointure, and such a one as will be an effectual Bar of Dower: And herein,
  1. That the Estate must take Effect immediately after the Death of the Husband.
  2. That it must be for Term of the Wife's Life or greater Estate.
  3. That it must be made to herself, and not to others, in Trust for her.
  4. That it must be in Satisfaction of her whole Dower.
  5. That it must be expressed to be in Satisfaction of her Dower; and therein how far a collateral Recompence shall be a Bar of Dower or Jointure.
  6. That it must be made during Coverture.
- (C) How far her own or her Husband's Acts may defeat her of this Provision.
- (D) How far a Jointress is intitled to the Aid and Assistance of a Court of Equity.

Of Discontinuances by Women of their Husbands Estates *vide* Tit. Discontinuance.

(A) Of the Original and first Introduction of this Provision.

IT having been determined that at Common Law a Woman could not be endowed of an Use, and most Lands before the 27 H. 8. being put in Use, so that there was no Confidence to be had in the Dower at the Common Law; this obliged the Wife, or her Friends, either before or after the Marriage, to procure the Husband to take the legal Estate from the Feoffees and settle it to the Use of him and his Wife for Life, or in Tail, with what Remainders over he pleased; and this seems to have been the Original of Jointures.

*Vide Tit. Dower and Tit. Curtesy of England.*

But tho' this Method was an effectual Security to the Wife, yet was it of no Service to the Husband, or his Heirs, in barring her of her Dower before the 27 H. 8. for by the Common Law a Woman could not be barred of her Dower by any Assignment or Assurance to her of other Lands whereof she was not dowable, (except in the Case of Dower *ad ostium Ecclesiæ*, or *ex assensu Patris*, which were allowed to be Dowers or Jointures of themselves, and were a good Bar of any other Dower,) were such Assignment or Assurance made by the Husband before Marriage or after, or by the Heir after his Death; and tho' they were expressly said to be in full Bar and Recompence of her Dower, yet might she recover her Dower notwithstanding; for she having a Right to be endowed of the third Part of all her Husband's Lands, vested and fixed in her immediately upon the Marriage and the Husband's Seisin thereof; this Right, like all others, could not be transferred or extinguished but by a Release thereof; and if no such Release were made, it continued still in Being, for want of the proper Means to destroy it; and if it still existed, her Remedy was open to recover and reduce it into Possession; and of this there can be no Doubt as to any Estate or Purchase procured by the Husband to be made to his Wife after Marriage, in Lieu and Satisfaction of Dower, for she is not at this Day bound in such Case; and if it were made before Marriage, it was at Common Law no Bar, for two Reasons; 1. Because at the Time of making thereof she had no Title to Dower, and therefore an Estate made to her then could be no Bar to a Right which accrued to her after. 2. Because immediately upon the Marriage the Right first vested in her, and could not be extinguished or barred but by a Release thereof; so if such Assignment or Assurance were by the Heir *in Pais*, this was no Bar neither; but (a) if it were by Indenture or Fine, then it should seem an Estoppel to her to Demand any other Dower, because her Title to Dower was then compleat and certain; and she has by this Acceptance concluded herself to demand any Thing more.

4 Co. 1. *Ver-non's Case.*  
Lyer 91.  
Co. Lit. 34. b.  
36. b.  
Bro. Tit. Dower 97.  
2 Brownl. 132

(B) Of its becoming a Bar of Dower; and therein of the 27 H. 8. and the Rules to be observed in making a good Jointure, and such a one as will be an effectual Bar of Dower.

Co. Lit. 56. b.  
4 Co. 1.

THE Maxims of the Common Law, that no Right could be barred before it accrued, that a Right or Title to a Freehold could not be barred by Acceptance of a collateral Satisfaction, and the Reasons aforesaid allowing the Wife to claim her Dower, and also the Benefit of such Settlement as was made on her, which being contrary to Justice,

By the 27 H. 8. cap. 1. par. 6. it is Enacted, ' That whereas divers  
' Persons have purchased, or have Estates made and conveyed of and in  
' divers Lands, Tenements, and Hereditaments unto them and their  
' Wives, and to the Heirs of the Husband, or to the Husband and the  
' Wife, and to the Heirs of their two Bodies begotten, or to the Heirs  
' of one of their Bodies begotten, or to the Husband and to the Wife  
' for Term of their Lives, or for Term of the Life of the said Wife, or  
' where any such Estate or Purchase of any Lands, Tenements, or Here-  
' ditaments hath been or hereafter shall be made to any Husband and to  
' his Wife in Manner and Form above expressed, or to any other Person  
' or Persons, and to their Heirs and Assigns, to the Use and Behoof of  
' the said Husband and Wife, or to the Use of the Wife, as is before  
' rehearsed, for the Jointure of the Wife; that then in every such Case  
' every Woman married having such Jointure made, or hereafter to be  
' made, shall not claim nor have Title to have any Dower of the Residue  
' of the (a) Lands, Tenements, or Hereditaments, that at any Time were  
' her said Husband's, by whom she hath any such Jointure, nor shall  
' demand nor claim her Dower of and against them that have the Lands  
' and Inheritances of her said Husband; but if she have no such Jointure,  
' then she shall be admitted and enabled to pursue, have, and demand  
' her Dower by Writ of Dower, after the due Course and Order of the  
' Common Law of this Realm; this Act or any Law or Provision made  
' to the contrary thereof notwithstanding.

(a) A Jointure made of Copyhold Lands is no Bar of Dower within this Statute.

Cro. Car. 44.  
4 Mod. 85.

Par. 7. *Provided*, ' That if any such Woman be lawfully expelled or  
' evicted from her said Jointure, or from any Part thereof, without any  
' Fraud or Covin, by lawful Entry, Action, or by Discontinuance of her  
' Husband, then every such Woman shall be endowed of as much of the  
' Residue of her Husband's Tenements or Hereditaments whereof she  
' was before dowable, as the same Lands and Tenements so evicted and  
' expelled shall amount or extend unto.

Par. 9. *Provided also*, ' That if any Wife have, or hereafter shall have,  
' any Manors, Lands, Tenements, or Hereditaments unto her given or  
' assured after Marriage for Term of her Life or otherwise, in Jointure,  
' except the same Assurance be to her made by Act of Parliament, and  
' the said Wife after that fortune to overlive the same her Husband in  
' whose Time the said Jointure was made or assured unto her, that then  
' the same Wife so overliving shall and may at her Liberty after the  
' Death of her said Husband refuse to have and take the Lands and  
' Tenements so to her given, appointed, or assured during the Coverture,  
' for Term of her Life or otherwise, in Jointure, except the same Assurance be to her made by Act of Parliament as is aforesaid, and thereupon to have, ask, demand, and take her Dower by Writ of Dower or otherwise, according to the Common Law, of and in all such Lands,

' Tene-



‘ Tenements, and Hereditaments, as her Husband was and stood seised  
‘ of any Estate of Inheritance at any Time during the Coverture; any  
‘ Thing, &c.

To make a good Jointure within this Statute, the six following Things  
are to be regarded.

## 1. That the Estate must take Effect immediately from the Death of the Husband.

Therefore if an Estate be made to the Husband for Life, the Remain- 4 Co. 3.  
der to J. S. for Life, Remainder to the Wife for her Jointure, this is no Hutton 51.  
good Jointure, for it is not within the Words or Intent of the Statute;  
for the Statute designed nothing as a Satisfaction for Dower, but that  
which came in the same Place, and is of the same Use to the Wife, and  
tho’ J. S. dies during the Life of the Husband, yet this is not good; for  
every Interest not equivalent to Dower being not within the Statute, is a  
void Limitation to deprive the Wife of her Dower.

So if an Estate be made to the Use of A. for Life, the Remainder to 4 Co. 2.  
the Wife for Life, this is not good, tho’ A. dies, living the Husband. Hob. 151.

So if an Estate be made to the Husband for Life, Remainder to J. S. Hutt 51.  
for Years, the Remainder to the Wife for her Jointure, this is not good, Winch 33.  
tho’ the Years are expired in the Life-time of the Husband.

But if an Estate be made to the Husband for Life, the Remainder to 4 Co. 3.  
J. S. for the Life of the Husband, to support contingent Remainders,  
Remainder to the Wife for Life, this is a good Jointure, tho’ not within  
the exprefs Words of the Statute, for it is within the Equity and Design  
of it.

If a Man makes a Feoffment to the Use of himself for Life; Remain- Winch 33.  
der to the Son and his Wife, and the Heirs of the Body of the Son, this  
is no good Jointure, tho’ the Wife hath an immediate Freehold; for to  
be within the Cases of the Statute whereby Dower is barred, the Wife  
must have (a) a sole Property after the Death of her Husband.

(a) That a  
Jointure  
within this Act by the first Limitation must take Effect for Life in Possession or Profit presently after  
the Death of the Husband, laid down in Co. Lit. 36. b. 4 Co. 2. a Cro Jac. 489. Hutt. 51. Winch 33.

A Feoffment in Fee to the Use of the Feoffee for Life, the Remainder 1 Sid. 3, 4.  
to the Use of his second Son for Life, Remainder to the Use of such Per Bridgman.  
Wife as the Son shall take, Remainder to the Heirs of the Son; the Fa-  
ther dies, the Son marries, and dies; the Wife is not by this Settlement  
barred of her Dower; for this at the Time of the Creation was no certain  
Provision for the Wife’s Life, for the Son might have married and died  
in the Life of the Father.

A Jointure limited to take Effect immediately on the Death of the 4 Co. Lit 153.  
Husband shall take Effect as well on a civil as a natural Death; therefore Moor 851.  
if the Husband enters into Religion, is banished, or abjures the Realm, 5 B. If. 188.  
the Wife shall have her Jointure. 1 Rel. Rep.  
420.  
2 Vern. 104.

## 2. That it must be for Term of the Wife’s Life or greater Estate.

Therefore if an Estate be made to the Wife for the Life or Lives of 4 Co. Lit 36. b.  
many others, this is no good Jointure; for if she survives such Lives, 4 Co. 2. b.  
as she may, then it would be no competent Provision during her Life,  
as every Jointure within the Statute ought to be.

So if a Term for 100 Years be limited to the Wife, if she so long live, 4 Co. Lit. 36. a.  
or absolutely, this is no good Jointure; for the Statute provides, that  
when

when the Wife hath an Estate for Life by Settlement, she shall be barred of her Dower at Common Law, if she hath any greater Estate she hath an Estate for her own Life included in it; but if she hath any less Estate, it is out of the Statute.

4 Co. 3. a.

If an Estate be limited to the Wife upon Condition, her Acceptance of such a conditional Jointure makes it good; for this Estate supports the Wife well enough, and it is in her Power to continue it during her Life; therefore an Estate limited to the Wife (a) *durante Viduitate* is a good Jointure; for it cannot determine but by her Act.

(b) So, says my Lord Coke, if li-

imited to her upon Condition that she shall perform the Will of her Husband, &c. this is a good Jointure within the Words and Intention of the Act, for that her Estate cannot determine without her Default. 4 Co. 2. b. 3. a. But for this *vide Moor* 31. pl. 103. 1 Leon. 311. N. Bendl. pl. 247.

### 3. That it must be made to herself, and not to others in Trust for her.

Co. Lit. 36. b.

This Rule, my Lord Coke says, is so necessary to be observed, that tho' the Wife should assent to a Jointure made in Trust for her, yet it would not be good; for the Statute only bars the Dower when by it the Possession (which was formerly a Use) is executed in her.

But as the Intention of the Statute was to secure the Wife a competent Provision, and also to exclude her from claiming Dower, and likewise her Settlement, it seems that a Provision or Settlement on the Wife, tho' by Way of Trust, if in other Respects it answers the Intention of the Statute, will be enforced in a Court of Equity.

### 4. That it must be in Satisfaction of her whole Dower.

Co. Lit. 36. b.

The Reason hereof is, that if it be in Satisfaction of Part only, it is uncertain for what Part it is in Satisfaction of her Dower, and therefore void in the whole.

4 Co. 5.

If an Estate be made to the Wife in Satisfaction of Part of her Dower before Marriage, and after Marriage other Lands are conveyed, wherein it is said to be in full Satisfaction of all her Dower, if she waves the Lands conveyed to her after Marriage, she shall have Dower of all the Lands of her Husband, notwithstanding the Settlement is in Satisfaction of Part.

### 5. That it must be expressed to be in Satisfaction of her Dower; and therein how far a collateral Recompence shall be a Bar of Dower or Jointure.

Co. Lit. 36. b.

My Lord Coke says, that it must be expressed or averred to be in Satisfaction of her Dower; but *quære*; for this does not seem requisite, either within the Words or Intention of the Statute.

Owen 33. and there said, that it had been so likewise ruled between the Queen and Dame Beaumont.

Therefore where an Assurance was made to a Woman to the Intent it should be for her Jointure, but it was not so expressed in the Deed, the Opinion of the Court was, that it might be averred that it was for a Jointure, and that such Averment was not traversable.

Co. Lit. 36. 4 Co. 4.

But a Devise of an Estate to a Wife for Life cannot be averred to be in Satisfaction of Dower or Jointure, unless it be expressed to be so in the Will; for there can be no Averment contrary to the Will, and consequently

quently there can be no Averment contrary to the Consideration implied in every Devise, which is the Kindness of the Testator.

So where one devised Lands to his Wife during her Widowhood, and died, and she married again and brought Dower, and this Devise being pleaded in Bar, it was held no Bar: *1<sup>st</sup>*, Because a Will imports a Consideration in itself, and cannot be averred to be in Bar of Dower, unless it be so expressed. *2<sup>dly</sup>*, Dower cannot be of less Estate than for Life of the Wife. And a *third* Reason may be, that her Right to Dower cannot be barred by a collateral Recompence, since such collateral Recompence is no proper Conveyance of such Right.

A Man devised his Lands to his Wife till his Daughter *M.* should arrive to the Age of nineteen Years, and after to *M.* in Tail, Remainder over in Fee; and devises further, that *M.* should pay after her Age of nineteen Years to his Wife *12 l. per Annum* in Recompence of her Dower, and if she failed in Payment, that then his Wife should have the Land for her Life; the Wife before her Daughter came to nineteen brought her Writ of Dower, and recovered a third Part; and after the Daughter came to nineteen, and for Non-payment of the *12 l.* the Mother entered; and the Question was, if her Entry were lawful; and argued that it was, and that by bringing of her Writ of Dower she had not waved the Benefit to have the Lands by the Devise, because then she had no Title to it, but her Title accrued after, for Non-payment of the *12 l.* But it was adjudged, that she having recovered a third Part in Dower, she should not have the Rent by the Will; for it is against the Intention of the Will that she should have both, and the Acceptance of one is a Waiver of the other.

One seised in Fee of Lands held in Socage, and of other Lands in Tail held *in Capite*, devises by Will in Writing the third Part of all his Lands to his Wife in Recompence of her Dower, and dies; she enters into the third Part of the Fee-simple Lands without bringing her Writ of Dower, and therefore she was barred to have any more by *27 H. 8.* of Jointures; which shews that she took this by the Devise, as a Jointure within that Statute, and that taking by the Devise she could have no more than the Devisor had Power to dispose of, which was only his Fee-simple Lands; and she by entering into a third Part thereof shews her Intention to have it as a Jointure, (for otherwise she could not enter till Assignment by the Heir or Sheriff;) but in this Case she being barred only by reason of the Statute, as the Book says, it appears that before that Statute she would not have been barred of her Dower by such Devise.

A Man marries an Orphan of *London*, who had a great Portion in the Chamber of *London*, the Husband dies before taking of it out, but makes his Will, and devises this Money to his Wife, provided that she should not claim her Dower; and yet after his Death she brought her Writ of Dower, and thereupon a Bill was brought in Chancery to have her release her Dower or renounce the Devise, and for an Injunction in the mean time, but could not prevail, the Money belonging to her in her own Right by the Custom, for want of the Husband's altering the Property thereof; and tho' he had, yet it was admitted it would have been no Bar of Dower, being totally collateral thereto; tho' it should seem she would in such Case have forfeited the Money by suing for Dower.

On this Distinction it hath been often ruled in Chancery, that if Lands, Money, Goods, &c. are devised to a Woman, without saying in Lieu or Satisfaction of Dower, &c. yet the Wife shall have both; because a Devise is to be considered as a Bounty, and implies a Consideration in itself; but if it be said in Lieu or Recompence of Dower, there the Wife cannot have both, but may (*a*) wave which she pleases.

in D. with a Portion for a Daughter by a first *Venter*, and then marries, and settles Part of those Lands as a Jointure on a second Wife, who has no Notice of the Charge, and *A.* believing that the Portion would take Place of the Jointure, by Will gives other Lands to the Wife in Lieu thereof, and the Wife by Combination with the Heir refuses to accept of the Devise; the Daughter shall hold the other Lands which descended to the Heir till satisfied her Portion.

2 Vern. 365.  
Lawrence and  
Lawrence.  
Abr. Ej.  
218-9.  
S. C. & wife  
1 Vern. 463.

J. S. devised Legacies to his Wife out of his personal Estate, and devised to her Part of his real Estate during her Widowhood, and devised the Residue of his Estate to Trustees for twenty-one Years, for Payment of Debts and Legacies, and the Remainder of the whole Estate he devised to the Plaintiff, (who was his Godson, and of his Name, but a remote Relation,) for Life, and to his first and other Sons in Tail; and my Lord Chancellor *Somers* decreed, that tho' it was not declared in the Will to be in Lieu and Satisfaction of Dower, yet as it may be plainly collected to be so intended, (he having made a Disposition of his whole Estate,) and as a collateral Satisfaction, may be a good Bar to Dower in Equity, tho' not at Law, that she must either take her Dower and wave the Devise, or accept the Devise and wave the Dower; but this Decree was reversed by *Wright* Lord Keeper, and the Decree of Reversal affirmed in Parliament.

Mitch. 6 Geo 2.  
Jordan ver.  
Savage.

J. S. seised of Copyhold Lands belonging to the Manor of *Whitchurch*, in which Manor there is the following Custom, viz. that the first Wife of every Tenant should have her Free Bench in all the Lands whereof her Husband was ever seised during the Coverture, the second Wife a Moiety, and the third a third Part so long as she kept her Husband above Ground; J. S. in Consideration of a Marriage and Marriage Portion covenants with Trustees, that within two Months after the Marriage he would settle all his Lands to the following Uses, viz. as to Part of the Lands, to the Uses of himself and his Wife for their Lives, Remainder to the first Son, &c. in Tail Male, and as to the other Moiety, to the Use of himself for Life, Remainder to his first Son, &c. with a Proviso that the Lands so settled on the Wife should be in Lieu of her customary Estate; and one of the Points in this Case was, whether this Jointure not being made expressly in Lieu of her Dower, but only said so in the Proviso, and she being an Infant at the Time of making the Articles, and not a Party to them, she should be excluded from claiming her Free Bench; and it was held, that she should be obliged to abide by her Jointure, and the Case of *Vizet* and *Longdon* was cited, where a Sum of Money was settled upon a Woman before Marriage for her Provision and Maintenance; and the Master of the *Rolls* was of Opinion she should have both that and her Dower; but the Chancellor reversed the Decree, and confined her to her Settlement.

#### 6. That it must be made during the Coverture.

Co Lit 36.  
4 Co. 3.

This the very Words of the Act of Parliament require, and therefore if a Jointure be made to a Woman during Coverture in Satisfaction of Dower, she may wave it after her Husband's Death; but if she enters and agrees thereto, she is concluded; for tho' a Woman is not bound by any Act when she is not at her own Disposol, yet if she (a) agrees to it when she is at Liberty, it is her own Act, and she cannot avoid it.

(a) What  
shall be said  
an Agree-  
ment or Refusal,

3 Co. 26. a. 3 Leon. 272. 1 And. 352. Poph. 88. Goulf. 4, 84, 85.

Co. Lit. 36. b.  
1 Bulf. 163.

If a Jointure be made to the Wife before Coverture, and the Husband and Wife alien by Fine, the Wife shall not afterwards be endowed of any Lands of her Husband's; for since she quitted her Dower when she was at her own Disposol, she can claim nothing but the Jointure, and that she has passed away by the Fine levied; but if the Jointure was made during the Coverture, and then she relinquished it by Fine, yet she shall have her Dower of the other Lands; for the Acceptance of a Jointure during the Coverture is no Bar of her Dower, and the passing of it by Fine cannot be construed as Acceptance of Property in them,

since that is capable of another Construction, viz. to bar her of her Dower in those Lands.

The Husband after Marriage settled Lands to the Use of himself and Wife in (a) Tail, for her Jointure, and during the Coverture Part of the Lands were evicted, and the Husband died, and the Wife entered into the Residue; and upon a Reference out of the Court of Wards to the two Chief Justices, it was resolved, that she should have a Recompence for the Part evicted.

*Moor* 717.  
*Pl.* 1002.  
(a) But whether the Part settled in Recompence should be in Tail, or for

Life only, *quære*; & vide 4 Co. 3. b.

A Seignory was granted to the Husband and Wife, and their Heirs, the Tenant attorns, the Husband dies, and the Seignory survives to the Wife, and she brought her Writ of Dower, in Bar of which the Heir pleads Acceptance of Homage from the Tenant; and this was held a good Bar; for tho' she might have disagreed to such Estate made during the Coverture, yet by the Acceptance of Homage she hath concluded herself; and this Case differs from the Assignment by the Heir in *Pais* and her Acceptance; because if he gives her a wrong Estate, and she accepts thereof, this is no Bar of her rightful Estate; but here she having two Titles, either as a Purchaser to have the Whole, or as a Wife to have the third Part, her Acceptance of the one is a Waiver of the other, because she cannot have both out of the same Land.

3 Leon. 272.  
3 Co. 27.

If Lands are given to the Husband and Wife, and the Heirs of the Husband, who dies, the Wife may disagree to this Estate made during the Coverture, and then it will be an Estate to the Husband and his Heirs *ab initio*, and so she shall have her Dower thereof; but if an Estate be made to the Husband and Wife for the Life of the Husband, Remainder to the right Heirs of the Husband, it should seem she cannot in this Case disagree, because the Estate upon the Husband's Death is determined and gone; tho' by this Contrivance all Women may be defeated of their Dower as to Estates purchased after the Marriage.

*Perk* 352.3.  
3 Co. 27.

If an Estate be made to the Wife for her Jointure during the Coverture, the Remainder to *J. S.* in Fee, and the Wife waves this Jointure, *J. S.* shall have the Remainder; for here was a particular Estate at the Time of creating the Remainder, so that it had the Circumstances of a Remainder, being the Residue of a particular Estate then in Being, and since the particular Estate was defeasible by an Act that could not hurt the Remainder, the Remainder upon such Destruction of the particular Estate comes in Being.

*Co. Lit.* 29. b.

A Man covenants to stand seised to the Use of himself in Tail, the Remainder to his Wife for Life, the Remainder to *B.* in Tail, and then he makes a Feoffment in Fee to the Use of himself and his Wife for their Lives, as a Jointure, the Remainder to *C.* and dies without Issue, the Wife is remitted; for where a later and defeasible, and a former and indefeasible Title concur in the same Person, there must be a Remitter.

*Co. Lit.* 348. a.

But in this Case the Wife hath two Titles, both wavable by her, the first indefeasible by any third Person, the latter defeasible by a third Person; for upon her claiming by the second Title she waves the first, and consequently the Remainder in *B.* commences, and he shall have his Action, and therefore she must be in her former Title, to save the Contention and Trouble of the Action.

*Co. Lit.* 348. a.

But if an Estate be made to the Husband in Tail, the Remainder to the Wife for Life, the Remainder to the right Heirs of the Husband, the Husband afterwards makes a Feoffment in Fee to the Use of the Husband and Wife for their Lives, the Remainder to the right Heirs of the Husband; the Husband dies without Issue; the Wife may claim by which she pleases, and is not remitted *volens volens*, because here are not two Titles, the one indefeasible, and the other defeasible by a third Person, but both equally firm; for the right Heir of the Husband upon the

*Co. Lit.* 357.  
*Dyer* 351.

Waiver

Waver of the first Estate by the Wife can claim nothing in the Land contrary to the Feoffment of his Ancestor, and therefore that Estate which the Wife claims is indefeasible, and no Stranger is prejudiced by being put to his Action.

2 *Rol. Abr.*  
422.

But if she makes no Election, she shall be supposed to be in of her elder Estate, because every one is presumed to chuse what is most for his Benefit.

*Cro. Jac.* 490.

If the Wife has an old Right before the Coverture, and afterwards takes a Jointure of the same Lands, she shall be remitted.

*Hob* 72.

An Estate settled to the Husband for Life, Remainder to the Wife for a Jointure, except such of the Lands as the Husband should devise, this Exception is repugnant to the Grant, because the Settlement might be avoided by the Husband devising the Whole.

### (C) How far her own or her Husband's Acts may defeat her of this Provision.

*Co. Lit.* 36.  
*Dyer* 358.

(a) So a Recovery as well as a Fine by a Feme Covert is sufficient

IT has been already observed, that if a Man make a Jointure on his Wife either before or after Marriage, and they both join in a (a) Fine, that she is so far bound thereby, that if the Jointure was made before Marriage she is barred to claim Dower in any other Lands of the Husband's; but if the Jointure was made during Coverture, she may claim Dower in the other Lands.

to bar her, because the *Præcipe* in the Recovery answers the Writ of Covenant in the Fine to bring her into Court, where the Examination of the Judges destroys the Presumption of Law, that this is done by the Coercion of the Husband, for then it is to be presumed they would have refused her.  
10 *Co.* 43. 2 *Rol. Abr.* 395.

2 *Inst.* 673.  
*Hob.* 225.

But if a Wife joins with her Husband in a Bargain and Sale of the Lands by Deed indented and inrolled, yet it shall not bind her; for a Wife cannot be examined by any Court without Writ, and there is no Writ allowed in this Case.

2 *Chan. Ca.*  
162.

But if a Feme Covert joins with her Husband in levying a Fine to raise a Sum of Money by way of Mortgage, this shall bind her; yet in this Case she doth not absolutely depart with her Estate for Life, but there results a Trust to the Wife to (b) redeem, and to reinstate herself in her Jointure.

(b) And the Money shall be paid out

of the personal Estate of the Husband 1 *Vern.* 41, 213. 2 *Vern.* 436. — So if a Jointure be made of Lands which are in Mortgage, the Wife may redeem, and her Executor shall hold over till repaid with Interest. 1 *Chan. Ca.* 271. 2 *Vent.* 343. S. P. decreed.

1 *Chan. Ca.*  
119, 120

If Tenant in Tail of a Trust makes a Mortgage, or acknowledges a Judgment or Statute, and then levies a Fine, and settles a Jointure, the Jointress shall hold it subject to the Mortgage or Judgment, in the same Manner as if the Mortgagor or Conusor had been Tenant in Tail of the legal Estate, and after the Mortgage or Judgment had levied a Fine, and made a Jointure, because the subsequent Declaration of the Use of the Fine is meerly the Act of the Tenant in Tail, and he cannot by any Act of his own make a subsequent Conveyance take Place of a precedent, and the rather, because the Feme claims under that Fee which Tenant in Tail got by the Recovery or Fine, and that Fee was subject to all the Charges he had lain upon it.

(D) how far a Jointress is intitled to the Aid and Assistance of a Court of Equity.

**I**F a Man before Marriage articles to settle a Jointure on his intended Wife, and the Marriage is consummated, and the Husband dies before any Settlement made, an Execution of the Articles will be decreed in (a) Equity.

(a) That a Jointress in

Equity is considered as a Purchaser for valuable Consideration, who may set aside a prior voluntary Conveyance as fraudulent against her. 1 *Chan. Ca.* 100 — But where by a Marriage Agreement the Son's intended Wife was to have more than would have been left for the Father, (tho' indebted,) his Wife and two Daughters unpreferred, the Court of Chancery would not decree it principally, by reason of the Extremity of it, but left the Party to her Remedy by Law. 2 *Chan. Ca.* 17.

So where A. gave a voluntary Bond after Marriage to make a Jointure to his Wife, and he made a Jointure accordingly, and then the Wife delivered up the Bond, and the Jointure being evicted, the Court held that it should be made good out of the personal Estate, especially as there were no Creditors affected by it; for the Delivery of the Bond by a Feme Covert could no way bind her. 1 *Vern.* 427. *Beard and Nutbals.*

So if a Jointress brings her Bill to have an Account of the real and personal Estate of her late Husband, and to have Satisfaction thereout, for a Defect of Value of her Jointure Lands, which he had covenanted to be and to (b) continue of such Value, and the Defendant insists that this is a Covenant which (c) founds only in Damages, and properly determinable at Law, tho' it be admitted that a Court of Equity cannot regularly assess Damages, yet in this Case a Master in Chancery may properly inquire into the Value of the Defect of the Lands, and report it to the Court, which may decree such Defect to be made good, or send it to be tried at Law upon a *Quantum Damnisfact*.

(b) If a Man covenants to settle Lands of such a Value as a Jointure, and this Covenant is omitted in the Settlement,

yet it subsists in Equity; but the Value of the Land is not to be estimated according to the present Value, but as they were at the Time of the Jointure settled, unless the Covenant be so 1 *Vern.* 217. *Speake versus Speake.* (c) An Action on the Case brought at Law for not making a Jointure. 2 *Rel. Rep.* 488.

If there be a Jointress, and a Covenant that her Jointure shall be of such a yearly Value, and it falls short, tho' her Estate be not without Impeachment of Waste, yet she may commit Waste so far as to make up the Defect of the Jointure, and Equity will not (d) prohibit.

*Abr. Eq.*

221-2. *Carew and Carew.*

(d) But on a Motion to

stay a Jointress Tenant in Tail after Possibility, &c. the Court held, that she being a Jointress within the 11 H. 7. ought to be restrained, being Part of the Inheritance which by the Statute she is restrained from aliening, and therefore granted an Injunction against wilful Waste. *Abr. Eq.* 221. *Cook and Winford*

J. S. made a Settlement on his eldest Son for Life, with Remainder to his first and other Sons in Tail, Remainder over, with Power to his Son to appoint any of the Lands not exceeding 100 l. per Annum to any Wife he should afterwards marry, for a Jointure, (the Father being under an Apprehension that he was then married to a Woman which the Father disliked, and had no Intention his Son should provide for;) the Father died, and the Son married that very Woman, (tho' there was strong presumptive Proof that he was married to her before,) and after Marriage appointed certain Lands to Trustees in Trust for her, for a Jointure, and covenants that if they were not of 100 l. per Annum Value, that upon Request made to him any Time during his Life, he would make them up so much out of other Lands in his Power; he lived several Years, and no Complaint was made that the Lands were not of that

*Abr. Eq.* 222. *Hill* 1701. *Fothergill and Fothergill.*

Value, nor Request to make it up, and died; upon Issue on a Bill brought by the Widow to have the Jointure made up 100*l.* my Lord Keeper said, that a Provision for a Wife or Children was not to be considered as a voluntary Covenant, and therefore decreed the Deficiency to be made up, notwithstanding the Circumstances of the Case, and her Neglect in not requesting it during Coverture; for the Laches of a Feme Covert cannot be imputed to her.

2 Vern. 701.  
1 Vern. 479.  
S. P. tho'  
the Jointure  
was made  
after Mar-  
riage.

If a Bill is brought by an Heir at Law, or any other Person, against a Jointress, whereby the Party would avoid the Jointure, under Pretence that his Ancestor was only Tenant for Life, &c. and he seeks for a Discovery of Deeds and Writings, whereby he would avoid the Title of the Jointress, he shall never have such a Discovery, unless he by his Bill submits to confirm her Title, and then he shall.

So if a Jointress prays a Discovery against an Heir at Law of Deeds and Writings, if the Heir submits by Answer to confirm the Jointress's Title, she shall have no such Discovery.

## Juries.

Fortesc. de  
Laud. Leg.  
Ang. cap. 25.  
Co. Lit. 155.  
Co. Preface  
to 3d and 5th  
Report.

**T**HE Trial *per Pais*, or by a Jury of one's Country, is justly esteemed one of the chiefest Excellencies of our Constitution; for what greater Security can any Person have in his Life, Liberty, or Estate, than to be sure of not being deposed of, or injured in any of these, without the Sense and Verdict of twelve honest and impartial Men of his Neighbourhood? And hence we find the Common Law herein confirmed by *Magna Charta*, cap. 29. *Nullus Liber Homo capiatur, vel imprisonetur, aut disseisietur de libero Tenemento suo, vel Libertatibus, vel Liberis Consuetudinibus suis, aut utlagetur, aut exuletur; aut aliquo modo destruat, nec super eum ibimus, nec super eum mittimus; nisi per legale iudicium Parium suorum, vel per Legem terre.*

Spelm. Gloss.  
verbo Jurata.  
Glan. lib. 2.  
cap. 7.

Likewise the Antiquity of this Trial, and its being peculiar to us, have been taken Notice of, as Matters which reflect Honour on our Constitution; for tho' there were antiently several other Methods of Trial, such as by Battle, Ordeal, &c. yet have they, from the Inconveniencies attending them, been laid aside, and this alone cultivated and improved, as the best Method of investigating Truth.

We shall consider this Head under the following Divisions.

- (A) Of the several Kinds of Juries and particular Inquests; and wherein of the Number such Juries must consist of.
- (B) Of the Jury Process, and Manner of convening the Jury: And herein,



1. Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.
2. Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.
3. By whom such Processes are to be executed, and the Jury convened.
4. In what Time such Processes are returnable.
5. Where the Jury must appear.
6. What Number are to be returned.
7. Of awarding Process by *Proviso*.
8. Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.
9. Of the Trials going off *pro Defectu Juratorum*; and therein of drawing a Juror.

(C) In what Cases and in what Manner a Tales is grantable.

(D) In what Cases and in what Manner special Juries are appointed.

(E) Who are to be returned; and therein of the Qualifications and several Causes for which they may be challenged: And herein,

1. Of Challenges to the Array or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Favour.
2. Where Insufficiency and not being *Liber Homo* is a good Cause of Challenge to the Polls.
3. Where the Want of Freehold, or a competent Estate, is a good Cause of Challenge.
4. Where the Jury's not being convened from a right Place is a good Cause of Challenge.
5. Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.
6. Where the Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.
7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.
8. Of Trials *per Medietatem Lingue*, where an Alien is Party.
9. Of peremptory Challenges.
10. Of Challenges by the Crown.
11. At what Time a Challenge is to be taken.
12. How such a Challenge is to be tried.

(F) How Jurors are to be impanelled and sworn.

(G) How to be kept and discharged.

(H) In what Cases and in what Manner to have a View.

(I) What.

- (I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors are amendable, and aided after Verdict.
- (K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.
- (L) When and by whom to be paid.
- (M) For what Misdemeanors punishable: And herein,
1. Where punishable by Attaint.
  2. How otherwise punishable.
  3. Where Abuses by others in Relation to them are punishable; and therein of the Offence of Embracery.

(A) Of the several Kinds of Juries and particular Inquests; and therein of the Number such Jury must consist of.

*Cro. Eliz.* 654. J URIES are distinguished into Grand and Petit Juries; the Grand Jury may (a) consist of thirteen, or any greater Number; for these being the Grand Inquisitors of the County, every Indictment and Presentment by them must be found by twelve at least; but it is not necessary that all above that Number should concur in such Presentment or Indictment.

(a) That in *Middlesex* three Grand Juries are returned every Term to serve in B. R. every Jury consisting of sixteen, seventeen, or more, to inquire of Offences criminal committed in the several Parts of the County of *Middlesex* thro' the whole County; the Reason hereof is, that in *Middlesex* there are three Hundreds, and for every several Hundred there is a particular Jury returned to serve for that Hundred only. 2 *Lil. Reg.* 124. — That in some Counties which consist of Guildable, and such Franchise where antiently several Justices of Gaol-Delivery sat, as in *Suffolk*, there are two Grand Juries, one for the Guildable, another for the Franchise, because there are two several Commissions of Gaol-Delivery. 2 *Hal. Hist. P. C.* 154.

2 *Hal. Hist. P. C.* 154. Upon the Summons of any Session of the Peace, and in Cases of Commissions of Oyer and Terminer and Gaol-Delivery, there goes out a Precept either in the Name of the King, or of two or more Justices, directed to the Sheriff, upon which he is to return twenty-four, or more, out of the whole County, namely, a considerable Number out of every Hundred, out of which the Grand Inquest at the Sessions of the Peace, Oyer and Terminer, or Gaol-Delivery are taken, and sworn *ad Inquirendum pro Domino Rege & Corpore Comitatus*.

*Cro. Eliz.* 654. Those returned to serve on the Grand Jury must be (b) *Probi & Legales Homines*, and ought to be of the same County where the Crime was committed; and therefore it is a good Exception at Common Law to one returned on a Grand Jury, that he is an Alien or Villein, or that he is (c) outlawed for a Crime, or that he was not returned by the proper (b) Where Indictments found in inferior Courts have been quashed for Want of the Words *Prohorum & Legalem Hominum* in the Caption. *Cro. Eliz.* 751. *Cro. Jac.* 635. *Palm.* 282. 2 *Rel. Rep.* 400 2 *Rel. Abr.* 82. *Poph.* 202. 1 *Keb.* 629. 2 *Keb.* 471. 3 *Mod.* 122. 1 *Lev.* 208. — But this Exception has been often overruled, because *Prima Facie* all Men shall be intended honest and lawful. 1 *Keb.* 50. 2 *Keb.* 135, 284. *Cro. Jac.* 41. 1 *Sid.* 106, 367. (c) Tho' in a personal Action. 2 *Hal. Hist. P. C.* 155. But for this vide 3 *Inst.* 32. 21 *H.* 6. 30. pl. 17. *Fitz. Tit. Process* 208. *Cro. Car.* 154, 147. 1 *Jones* 198. 12 *Co.* 99.

Officer, or that he was returned at the Instance of the Prosecutor ; but these Exceptions must be taken before the Indictment found.

It is laid down by my Lord Chief Justice *Hale*, that at Common Law every Person returned on the Grand Jury ought to be a Freeholder at least, and that the Statute of 2 *H. 5. cap. 3.* that requires Jurors that pass upon the Trial of a Man's Life to have 40 s. *per Annum* Freehold, hath been the Measure by which the Freehold of Grand Jurymen hath been measured in Precepts of Summons of Sessions.

Also by several (a) Acts of Parliament it is provided, that those who serve on the Grand Jury be such as are duly qualified, the principal ones of which are the 11 *H. 4. cap. 9.* and 3 *H. 8. cap. 12.* the first whereof is as followeth: ' Because that now of late Enquests were taken at *Westminster* of Persons named to the Justices, without due Return of the Sheriff, of which Persons some were outlawed before the said Justices of Record, and some fled to Sanctuary for Treason, and some for Felony, there to have Refuge, by whom as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conspiracy, Abetment, and false Imagination of other Persons, for their special Advantage and singular Lucre, against the Course of the Common Law used and accustomed before this Time; our said Lord the King, for the greater Ease and Quietness of his People, wills and granteth, that the same Indictment so made, with all the Dependence thereof, be revoked, annulled, void, and holden for none for ever, and that from henceforth no Indictment be made by any such Persons, but by Inquests of the King's lawful liege People, in the Manner it was used in the Time of his Noble Progenitors, returned by the Sheriffs or Bailiffs of Franchises, without any Denomination to the Sheriffs or Bailiffs of Franchises before made by any Person of the Names which by him should be impanelled, except it be by the Officers of the said Sheriffs or Bailiffs of Franchises sworn and known to make the same, and other Officers to whom it pertaineth to make the same, according to the Law of *England*; and if any Indictment be made hereafter in any Point to the contrary, that the same Indictment be also void, revoked, and for ever holden for none.'

next Neighbours, most sufficient, and least suspicious; and the like is enacted by 42 *E. 3. cap. 11.* And to the same Purpose are the 23 *E. 3. cap. 6.* and 34 *E. 3. cap. 4.*

In the Construction of this Statute the following Points have been resolved;

That if a Person not returned on a Grand Jury procure his Name to be read among those that are returned, whereupon he is sworn, &c. he may be indicted for a Contempt of this Statute.

That Indictments before (b) Justices of the Peace are clearly within this Statute.

(b) But it seems doubtful whether a Coroner's Inquest be within it.

That a Person, arraigned on an Indictment taken contrary to the Statute, may plead such Matter in Avoidance of the Indictment, and also plead over to the Felony.

That he, who is outlawed on an Indictment without any Trial, may clearly shew in Avoidance of such Outlawry, that the Indictment was taken contrary to the Statute; but the Court needs not admit of the Plea of the Outlawry of an Indictor in Avoidance of any such Indictment, unless he who pleads it have the Record ready, unless it be an Outlawry of the same Court wherein the Indictment is depending; in which Case it is said, that any one as *Amicus Curie* may inform the Court of it; also it seems the better Opinion, that no Exception against an Indictor is allowable, unless the Party takes it before Trial.

2 *Hal. Hist.*  
P. C. 155.  
But for this  
side 2 *Haw.*  
P. C. 216.

(a) *Viz. Westminster* 2 *cap.* 25. that old Men above the Age of seventy shall not be put on Juries.— By *Westm. 2. cap. 38.* shall not have less than 20 s. yearly.— By 31 *E. 1.* commonly called the Statute *de his qui ponendi sunt in Assis*, shall have Tenements to the Value of 40 s. yearly.— By 28 *E. 1.* commonly called the Statute of *Articuli super Chartas*, none are to be put on Inquests and Juries but such as be

42 *E. 3. cap. 11.*  
12 *Co. 99.*  
3 *Inst. 33.*  
12 *Co. 98.*  
3 *Inst. 33.*  
*Cro. Car. 134.*  
1 *Jones 198.*

3 *Inst. 34.*  
*Cro. Car. 134.*  
1 *Jones 198.*

3 *Inst. 34.*  
*Cro. Car. 147.*

11 H. 4. 41. That if any one of the Grand Jury, who find an Indictment, be within  
 pl. 8. any of the Exceptions in the Statute, he vitiates the Whole, tho' never  
 S. P. C. 88. so many unexceptionable Persons joined with him in finding it.

3 Inst. 33. That if a Prisoner indicted of Felony offer to take any such Exception,  
 Cro. Car. 134, he shall, upon his Prayer, have Counsel assigned him for his Assistance.  
 147.

1 Jones 198.

By the 3 H. 8. cap. 12. it is Enacted, ' That all Panels to be returned,  
 ' which be not at the Suit of any Party that shall be made, and put in by  
 ' every Sheriff, and their Ministers, before any Justice of Gaol-Delivery,  
 ' or Justices of Peace, whereof one to be of the *Quorum*, in their open  
 ' Sessions, to inquire for the King, shall be reformed by putting to and  
 ' taking out of the Names of the Persons which so be impanelled by  
 ' every Sheriff, and their Ministers, by the Discretion of the same Justices  
 ' before whom such Panels shall be returned, and that the same Justice  
 ' and Justices shall command every Sheriff, and their Ministers in his  
 ' Absence, to put other Persons in the same Panel by their Discretions,  
 ' and that the same Panels so reformed by the said Justices be good and  
 ' lawful; and that if any Sheriff, or any other Minister, at any Time do  
 ' not return the same Panels so reformed, that then every such Sheriff  
 ' and Minister so offending shall forfeit for every such Offence twenty  
 ' Pounds, &c.'

2 Hal. Hist.  
 P. C. 156,  
 265.

This Act extends not only to Panels of Grand Inquests returned, but  
 also to Panels of the Petty Jury, commonly called the Petty Jury of  
 Life and Death, which may be reformed by the Justices according to  
 this Act, and the Sheriff is bound to return the Panel so reformed.

3 Inst. 33.  
 2 Hawk. P. C.  
 219.

It hath been holden, that this Statute doth not take away the Force  
 of 11 H. 4. as to any Point wherein both may consist together; and  
 therefore if any Indictor be outlawed, or returned at the Nomination  
 of any Person, contrary to 11 H. 4. except of the Justices authorised as  
 abovementioned to reform the Panel, the Indictment may be avoided in  
 the same Manner as before.

*Trials per*  
*Pais* 80.  
 F. N. B. 107.  
 Finch of Law  
 400, 484.—  
 A Writ of In-

The Grand Jury, as has been already observed, must consist of twelve  
 at (a) least, the Petty Jury of twelve, and can be neither more nor less;  
 but it is said, that particular (b) Inquests may consist of a more or less  
 Number than twelve.

quary of Waste by thirteen was holden good. Cro. Car. 414. (a) That to make a Jury in a Writ of  
 Right, which is called the Grand Assise, there must be sixteen, viz. four Knights, and twelve others.  
*Trials per Pais* 82. Or it may consist of a greater Number. 2 Rol. Abr. 674.— The Jury in Attaint,  
 called the Grand Jury, must be twenty-four; but if the Issue be upon a Matter out of the Point of  
 the Attaint, as upon a Plea of Non-tenure, the Trial shall be by twelve. *Trials per Pais* 82. (b) That  
 a Juror can be excepted against on an Inquest of Office. 6 Mod. 43.— That a Jury cannot be attainted  
 on an Inquest of Office. Carth. 362.

1 Vent. 113.

But on a Writ of Error a Judgment out of an inferior Court was  
 reversed, because being by Default, the Inquiry of Damages was only  
 by two Jurors; and tho' a Custom was alledged to warrant it, yet it  
 was resolved, that there could not be less than twelve, tho' the Writ of  
 Inquiry saith only *per Sacramentum Proborum & Legalium Hominum*, and  
 not *duodecim* as in a *Venire*.

Cro. Car. 259.  
 1 Sid. 233.  
 3 Keb. 326.

Also it hath been frequently held, that a Custom in an inferior Court  
 to try by six Jurors is void; and that tho' such Custom is used in *Wales*,  
 yet that that is by Force of the Statute 34 H. 8. which appoints that  
 such Trials may be by six only where the Custom hath been so.

## (B) Of the Jury Process, and Manner of convening the Jury: And herein,

### 1. Of the Necessity of such Process, and where a Panel may be returned by a bare Award without any Precept.

IT seems agreed, that a Person not duly summoned and returned is March 81. not obliged to serve on a Jury; also it hath been held, that if a Stranger cause himself to be sworn in the Name of one who was of the Jury, it is such a Misdemeanor for which he may be indicted, and for which also an Action on the Case lies at the Suit of the Party injured.

But Justices of Gaol-Delivery may have a Panel returned by the Sheriff without any Precept or Writ; and the Reason given for it is, 2 Inst. 568. 3 Inst. 168. 2 Hawk. P.C. 405. that before their Coming they make a general Precept to the Sheriff in Parchment, under their Seals, to bring before them at the Day of their Sessions twenty-four out of every Hundred, &c. to do those Things which shall be enjoined them on the Part of the King, &c. and therefore it is said, that they need not make any other Precept for the Return of a Jury for the Trial of any Issue joined before them, but that their bare Award that the Jury shall come is sufficient, because there are enow for that Purpose supposed to be present in Court, whom the Sheriff may return immediately, whenever the Court shall demand their Service.

Also it is said, that a Jury may be so returned before Justices of Peace 2 Inst. 568. 1 Sid. 364. at their Sessions, because the Precept for the Summons of the Sessions hath a Clause to the same Effect, for the Summons of twenty-four out of every Hundred: But it is (a) doubted whether this Matter does not (a) 2 Hawk. P.C. 406. rather depend on Practice, and the constant Course of Precedents, than any Argument from the Reason of the Thing; and even in the Case of Justices of Gaol-Delivery, the Law is otherwise, if they have a special Commission.

Also the Precept to the Sheriff from Justices of Oyer and Terminer, 2 Hal. Hist. P.C. 260 1. 2 Hawk. P.C. 406. in order for the holding of their Sessions, hath in Effect the very same Clause for the bringing of twenty-four before them out of each Hundred at the Day of their Sessions, &c. and yet it seems agreed, that they cannot have a Jury returned for the Trial of an Issue joined before them by Force of a bare Award, but ought to make a particular Precept to the Sheriff for that Purpose under their Seals.

By the Course of the King's Bench no Jury can be returned into it Dyer 118. 2 Hal. Hist. 260. 2 Hawk. P.C. 406. from a foreign County, without Process under the Seal of the Chief Justice; but *Quære* if it may not be returned for a Trial in the County where it sits by a bare *Præceptum est*?

### 2. Of the several Kinds of Jury Process, and Manner of compelling a Jury to appear.

The first Process for convening the Jury is the *Venire Facias*, which Trials per Pais 64. must be awarded on the Roll, and thereupon in the *Common Pleas* there issues the *Habeas Corpora* and *Disfringas Juratores*; but in the *King's Bench* and *Exchequer* after the *Venire* they proceed on the *Disfringas*; for the *Venire* being in the Nature of a Summons, if the Jury did not appear thereon in those Courts in which the King has a more immediate Concern, they proceed on the strongest Process, *viz.* the *Disfringas*.

If all the Jury did not attend on the *Habeas Corpora* or *Disfringas*, which was to bring them into Court, there was an *undecim, decem*, or o. 70

*o To Tales*, according as the Number was deficient, to force others to the King's Court to try the Issue, this was without (a) a new Summons or *Venire*, because it was supposed that the first *Habeas Corpora* and *Disfringas* had given Notice to the Vicinity that they ought to appear; and therefore the Supplement of a Jury were forced in without a particular Summons to them.

of the Jury appear, then a *Disfringas Juratores* shall issue, and no *Tales*. 2 *Hal. Hist. P. C.* 265.

2 *Hawk. P. C.* 298 9. There must be an Award on the Roll to warrant the Issuing the *Venire* or *Disfringas*, and such Process must be continued from Time to Time against the Jurors, returnable on the same Days to which the Suit is continued on the Roll against the Parties.

6 *Mod.* 281. And therefore where a *Venire Facias* was made returnable on the 23d  
1 *Salk.* 51. of *January*, and the *Disfringas* tested on the 24th, this was held a Discontinuance, and being in a criminal Case, not aided by any of the Statutes of *Jeofails*.

*Cro. Eliz.* 622. So where the *Venire* omits Part of the Issue or Issues to be tried, or  
1 *Rel. Rep.* 22. where a *Venire* omits any of the Parties, these are Discontinuances.  
3 *Bull.* 311.  
*Winch* 73.

1 *Sid.* 66. So where a Juror is named in the *Habeas Corpora* by a Name different  
1 *Keb.* 182, from that in the Panel returned on the *Venire*, or where a Juror returned  
191, 198, 215. on such a Panel is wholly omitted in the *Habeas Corpora*; but in these  
6 *Mod.* 285. Cases if the Juror so misnamed or omitted be not sworn at the Trial  
5 *Co.* 36. b. of the Cause, it is questionable whether there be any Discontinuance  
*Cro. Eliz.* 586. at all.  
*Vide postea*  
Letter (1).

1 *Jones* 425. Where there are several Defendants who plead several Pleas, the  
*Trials per* Plaintiff may chuse either to have one *Venire Facias* for all, or several  
*Pais* 57. for (b) every one of the Defendants; so where several Persons are  
(b) It is said, arraigned upon the same Indictment or Appeal, and severally plead Not  
that where guilty, it is in the Election of the Prosecutor either to take out joint  
there are *Venire's* against them all, or several against each of them; but in an  
three Defen- Appeal if one plead Not guilty, and the other plead a Release made at  
dants, the Plaintiff  
may join A. it seems that there must be several *Venire's*.  
two of them

in one *Venire*, and take out another against the third. *Cro. Eliz.* 541. But for this *vide* 2 *Rel. Abr.* 596,  
620, 667. *Hob.* 36. *Cro. Eliz.* 866. *Cro. Fac.* 550.

2 *Hawk. P. C.* 298. But where a joint *Venire* is first awarded for the Trial of all the Defendants together, and afterwards several *Venire's* for the Trial of each of them, this is a Discontinuance.

2 *Hawk. P. C.* 407. And where the same Jury is returned on joint Process against several  
and several Autho- Defendants, if a Juror be challenged by any one of them, and thereupon  
rities there drawn, he is by necessary Consequence drawn as to all, because there  
cited. being but one Panel, the same Person cannot at the same Time be taken  
from it, and continue in it; and to prevent this Inconvenience, where  
one Jury is jointly returned before Justices of Gaol-Delivery, they may  
sever the Panel; but after an Appellant has taken out a joint *Venire*  
against all the Appellees, he cannot afterwards take out several ones,  
tho' the first be never returned, because it would cause a Discontinuance.

2 *Hawk. P. C.* 146. and several Autho- Jurors being duly served with Process are compellable to appear; and  
rities there therefore where more than one appear, but not enough to take the  
cited. Inquest, but some of the others come within View, or into the Town  
*Trials per* where the Court is holden, but refuse to come into Court; in these  
*Pais* 200. Cases the Court may order those who appear to inquire of the yearly  
Value of such Defaulters Lands; which being done, the Court may  
either summon them to appear, on Pain of the Sum found, or some  
lesser Sum, or may fine them in like Sum without more ado; but such

Juror shall only lose his Issues, and not the yearly Value of his Lands, unless the Party pray it; but one who makes Default after Appearance is liable to such Forfeiture without any Prayer; yet the Court in Discretion will sometimes only impose a small Fine; also a Juror, who comes not to Town where the Court is holden, shall only lose his Issues, or be amerced, but not fined; and it is said, that a Juror is not amerceable at all at the Return of the first *Venue*, except before Justices of *Oyer and Terminer*.

Also by the 27 *Eliz. cap. 6. sect. 2.* it is Enacted, ‘ That upon every first Writ of *Habeas Corpora* or *Disfringas* with a *Nisi Prius* delivered of Record by the Sheriff, or other Minister or Ministers to whom the making of the Return shall appertain, shall return in Issues, upon every Person impanelled and returned upon any such Writ, at least ten Shillings; and at the second Writ of *Habeas Corpora* or *Disfringas* with a *Nisi Prius* upon every Person impanelled and returned upon any Writ twenty Shillings at the least; and at the third Writ of *Habeas Corpora* or *Disfringas* with a *Nisi Prius*, that shall be further awarded, upon every Person impanelled and returned upon such Writ thirty Shillings; and upon every Writ that shall be further awarded to try any Issues, to double the Issues last afore specified, until a full Jury be sworn, or the Process otherwise ceased or determined, upon Pain to forfeit for every Return of Issues contrary to the Form aforesaid five Pounds.’

And now by the 3 *Georg. 2. cap. 25. sect. 13.* it is Enacted, ‘ That every Person or Persons whose Name or Names shall be drawn, (as by the Act is directed,) and who shall not appear after being openly called three Times, upon Oath made by some credible Person, that such Person so making Default had been lawfully summoned, shall forfeit and pay for every Default in not appearing upon Call as aforesaid, (unless some reasonable Cause of his Absence be proved by Oath or Affidavit, to the Satisfaction of the Judge who sits to try the said Cause,) such Fine or Fines not exceeding the Sum of five Pounds, and not less than forty Shillings, as the said Judge shall think reasonable to inflict or assess for such Default.’

### 3. By whom such Processes are to be executed, and the Jury convened.

The Sheriff is the proper Officer by whom the Jury Process is to be executed, unless he be partial, that is, such a one, as from his Consanguinity or Affinity, his being under the Power of either Party, &c. cannot be presumed to be an indifferent Person, as every Officer who hath any way to do with the Administration of Justice ought to be; and in every such Case the Process shall be directed to the Coroners, if they are impartial, or to those of them who are so, in Cases some of them lie under the afore-mentioned Prejudices; and in Case all the Coroners are partial, or not indifferent, then the *Venue* shall be directed to two *Elizors* named by the Court, and against whom, for that Reason, no Challenge can be taken.

When Process is once awarded to the Coroners, &c. for the Sheriff’s actual Partiality, the Entry is *Viccomes se non intromittat*, and in such Case Process shall not afterwards be awarded to any new Sheriff, but where it was awarded to the Coroners for that the Sheriff is Tenant, &c. it may be awarded to a new Sheriff.

So if a *Venue Facias* is awarded to the Coroner for Partiality in the Sheriff, and afterwards a *Tales* is awarded, which is returned by the Sheriff, this has been held Error.

*Co. Lit. 158. a.*  
*Ero. Challenge*  
155. *vide in-*  
*fra Lett. (E).*

*Co. Lit. 158.*  
*2 R. L. Abr.*  
670.

*Cro. Eliz. 574.*  
*Morgan ver.*  
*Wye; & vide*  
*Cro. Eliz. 586.*

*Trials per  
Pais 46.*

But if the *Venire* be awarded to the Coroners for Default in the Sheriff, and they do nothing upon the Writ, upon a Default discovered in the Coroner *de Puisne Temps* the Party may shew this to the Court, and have a *Venire* awarded to the Sheriff, if there be an indifferent one made in the mean time, or else to Elizors; & *sic e converso*.

*Cro. Eliz. 855.*

And therefore in Error of a Judgment in *Chester*, the Parties being at Issue, a *Venire* was awarded to the Sheriff, and at the Day of the Return it was entered, *quod Vicecomes non misit Breve*, and then the Plaintiff prayed a *Venire Facias* to the Coroners for Confinage betwixt him and the Sheriff, which was awarded accordingly; and at the Day of Trial the Defendant made Default, and there being Judgment thereon, it was assigned for Error, that after the Plaintiff had admitted the Sheriff to execute the Writ, he could not pray a *Venire Facias* to the Coroners without some Cause *de Puisne Temps*; *sed non allocatur*, because there was nothing done upon the first Writ, and the Defendant having made Default, it was not material.

*Co Lit. 157. b.  
158. a.  
Cro. Jac. 547.  
Trials per  
Pais 41.  
Jerk. 115*

Upon the Surmise of the Plaintiff that the Sheriff is his Cousin, and upon Prayer that the *Venire* be directed to the Coroners for Avoidance of his own Delay, that might happen by the Challenge of the Array, the Defendant shall be examined whether it be true or not; and if he confesses it, then the *Venire* shall be awarded to the Coroners; for then it appears to the Court by the Defendant's Confession, that the Sheriff is not indifferent; but if the Defendant denies it, then the Process shall be awarded to the Sheriff, because the Sheriff's Authority and Profit shall not be taken away without Cause apparent to the Court; but if the Defendant will alledge any such Matter, and pray a *Venire Facias* to the Coroners, there the Plaintiff shall not be examined; neither shall such Allegations be allowed, because Delays are for the Defendant's Advantage, and the Defendant may challenge the Jury for this Cause, and so is at no Prejudice.

*Carth. 214.  
The King ver.  
Warrington,  
one of the  
Sheriffs of  
Chester.  
4 Mod. 65.*

If there be two Sheriffs of a County, and one of them is partial, the *Venire* may be directed to the other, and not to the Coroners; for the Coroner is not the proper Person to execute the Process of the Court, but in such Cases where the proper Officer is wanting; which cannot be said where there is one impartial Sheriff.

*S. C. Skin. 104.* S. P. adjudged between *Rich*, Sheriff of *London*, and *Sir Thomas Player*.

*Trials per  
Pais 41.  
2 Lil. Reg.  
124. cont.*

So if the Under Sheriff be a Party, yet the *Venire* may be directed to the High Sheriff, with this *Proviso*, *quod Sub-Vic. tunc in nullo se intro-mittat cum Executione istius Brevis*.

*Fitz. Tit.  
Challenge 121.  
Dyer 177. b.  
pl. 34.*

After a Challenge to the Array, and allowed for the Partiality of the Sheriff, the Coroner may return the very same Jury.

If the Sheriff return on the *Venire Facias*, *quod Breve istud sic executum & indorsatum per A. B. nuper Vicecomitem Prædecessorem suum cum Panello, ubi in facto Panellum illud factum & arraiatum fuit per ipsum nunc Vicecomitem*, the Party may challenge the Array afterwards for Consanguinity or Affinity of the Sheriff; and this shall be tried by two Triers, notwithstanding this false Return.

*110b 70.*

Upon a Surmise the *Venire Facias* was awarded to the Coroners, and the *Venire* was returned by two Coroners only, and the *Disfringas* by three Coroners; and there being at the Time of the Award and Return of the *Venire Facias* and *Disfringas* four Coroners, it was agreed that this was at Common Law plain Error; for that Coroners as Ministers must all join, but as Judges they may divide; but that it was aided by the Statute of *Jeofails*, which cures the imperfect and insufficient Returns of Process by Sheriffs or other Officers.

*Raynt. 484.  
Dominus Rex  
ver Higgins.*

If upon a Suggestion on the Roll the *Venire* is directed to the Coroners, who are two in Number, and both the Coroners are mentioned on the

Record



Record to have returned the Panel, and in Reality one only returned it; yet this cannot be excepted against, because an Objection contrary to what appears on the Face of the Record.

Error of a Judgment in *Northampton*, because in *Northampton* the Court being held before the Mayor and two Bailiffs, the *Venire fac.* upon the Issue was awarded to the two Bailiffs to Return a Jury before the Mayor and Bailiffs *secundum consuetudinem*, which being returned, and Judgment given, the Error assigned was, because the Bailiffs being Judges of the Court, could not also be Officers, to whom Process should be directed, there being no Custom that can maintain any to be both Officer and Judge; but all the Court (*absente Hide*) conceived it might be good by Custom, and that it is not any Error; for the Judges be not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Course in many of the ancient Corporations where the Bailiffs are Judges, or the Mayor and they be Judges, yet in respect of executing Process they be the Officers also, and one may be Judge and Officer *diversis respectibus*; as in *Redcliffe* the Sheriff is Judge and Officer; whereupon the Judgment was affirmed.

*Cro. Car.* 133.  
*Crane ver.*  
*Holland*

If the Array of a Panel is returned by a Bailiff of a Franchise, and the Sheriff return it as of himself, this shall be quashed; but if the Sheriff Return a Jury within a Liberty, this is good, and the Lord of the Franchise is driven to his Remedy against him.

*Co. Lit.* 156. a.

If the Sheriff returns a Panel of Jurors, struck by two Strangers, that favour neither of the Parties, this is a good Array, and shall not be quashed; and therefore it is common for the Officers of the Court, by the Direction of the Judges, to give a Panel to the Sheriff, which he returns; but the Court seems not to have Power to compel the Sheriff to make this Return, but they can fine him, if a sufficient Jury do not appear according to the Precept of the Writ.

*Co. Lit.* 157. a.  
*1 Keb.* 557.  
687.

By the 3 *Georg.* 2. cap. 25. for the better Regulation of Juries, it is enacted, ' That the Person or Persons required by a Statute made in the 7th and 8th Years of the Reign of his late Majesty King *William*, intituled, *An Act for the Ease of Jurors, and better Regulating of Jurors*; and by a Clause in another Act made in the 3d and 4th Years of the Reign of the late Queen *Anne*, intituled, *An Act for making perpetual an Act for the more easy Recovery of small Tithes*; and also an Act for the more easy obtaining Partition of Lands in Coparcenary, Joint-tenancy and Tenancy in common; and also for making more effectual and amending several Acts relating to the Return of Jurors, to give in, or who are, by Virtue of this Act, to make up true Lists in Writing of the Names of Persons qualified to serve on Juries, in order to assist them to compleat such Lists, pursuant to the Intent of the said Act, shall (upon Request by him or them made to any Parish Officer or Officers, who shall have in his or their Custody any of the Rates for the Poor, or Land-Tax, in such Parish or Place) have free Liberty to inspect such Rates, and take from thence the Name or Names of such Freeholders, Copyholders, or other Persons qualified to serve on Juries, dwelling within their respective Parishes or Precincts, for which such List is to be given in and returned pursuant to the said Acts, and shall yearly, and every Year, twenty Days at least before the Feast of St. *Michael* the Archangel, upon two or more *Sundays*, fix upon the Door of the Church, Chapel, and every other publick Place of Religious Worship, within their respective Precincts, a true and exact List of all such Persons intended to be returned to the Quarter-Sessions of the Peace, as qualified to serve on Juries, pursuant to the Directions of the said Act, and leave at the same Time a Duplicate of such List with a Church-warden, Chapel-warden, or Overseer of the Poor of the said Parish or Place, to be perused by the Parishioners without Fee or Reward, to the End that Notice may be given of Persons so qualified who are omitted, or

Made perpetual by  
6 *Georg.* 2.  
cap. 37.

of

‘ of Persons inserted by Mistake, who ought to be omitted out of such  
 ‘ Lists; and if any Person or Persons not being qualified to serve on  
 ‘ Juries, shall find his or their Name or Names mentioned in such List,  
 ‘ and the Person or Persons required to make such List shall refuse to  
 ‘ omit him or them, or think it doubtful whether he or they ought to  
 ‘ be omitted, it shall and may be lawful to and for the Justices of the  
 ‘ Peace for the County, Riding, or Division, at their respective General  
 ‘ Quarter-Sessions, to which the said Lists shall be so returned, upon  
 ‘ Satisfaction from the Oath of the Party complaining, or other Proof,  
 ‘ that he is not qualified to serve on Juries, to order his or their Name  
 ‘ or Names to be struck out or omitted in such List, when the same shall  
 ‘ be entered in the Book, to be kept by the Clerk of the Peace for that  
 ‘ Purpose, pursuant to the said Act.

*Seçt. 2.* it is further enacted, ‘ That if any Person or Persons required  
 ‘ by the said Acts to return or give in, or by Virtue of this Act to make  
 ‘ up any such List, or concerned therein, shall wilfully omit out of any  
 ‘ such List any Person or Persons, whose Name or Names ought to be  
 ‘ inserted, or shall wilfully insert any Person or Persons who ought to  
 ‘ be omitted, or shall take any Money, or other Reward, for omitting  
 ‘ or inserting any Person whatsoever, he or they so offending shall, for  
 ‘ every Person so omitted or inserted in such List, contrary to the Mean-  
 ‘ ing of this Act, forfeit the Sum of Twenty Shillings for every such  
 ‘ Offence, upon Conviction before one or more Justice or Justices of  
 ‘ Peace of the County, Riding, or Division, where such Offender shall  
 ‘ dwell, upon the Confession of the Offender, or Proof by one or more cre-  
 ‘ dible Witness or Witnesses upon Oath; one Half thereof to be paid to the  
 ‘ Informer, and the other Half to the Poor of such Parish or Place for  
 ‘ which the said List is returned; and in case such Penalty shall not be  
 ‘ paid within five Days after such Conviction, the same shall be levied  
 ‘ by Distress and Sale of the Offender’s Goods, by Warrant or Warrants  
 ‘ from one or more Justice or Justices of the Peace, returning the Over-  
 ‘ plus, if any there be; and the said Justice or Justices, before whom  
 ‘ such Person shall be convicted of such Offence, shall, in Writing under  
 ‘ their Hands, certify the same to the Justices at their next General  
 ‘ Quarter-Sessions which shall be held for the County, in which the  
 ‘ Person or Persons so omitted or inserted shall dwell; which Justices  
 ‘ shall direct the Clerk of the Peace for the Time being, to insert or  
 ‘ strike out the Name or Names of such Person or Persons, as shall by  
 ‘ such Certificate appear to have been omitted or inserted in such Lists,  
 ‘ contrary to the Meaning of this Act; and Duplicates of the said Lists,  
 ‘ when delivered in at the Quarter-Sessions of the Peace, and entered in  
 ‘ such Book, to be kept by the Clerk of the Peace for that Purpose,  
 ‘ shall, during the Continuance of such Quarter-Sessions, or within ten  
 ‘ Days after, be delivered or transmitted by the Clerk of the Peace to  
 ‘ the Sheriff of each respective County, or his Under-Sheriff, in order  
 ‘ for his returning of Juries out of the said Lists; and such Sheriff, or  
 ‘ Under-Sheriff, shall immediately take care that the Names of the Per-  
 ‘ sons contained in such Duplicates shall be faithfully entered Alphabeti-  
 ‘ cally, with their Additions and Places of Abode, in some Book or  
 ‘ Books to be kept by him or them for that Purpose; and that every  
 ‘ Clerk of the Peace, neglecting his Duty therein, shall forfeit the Sum  
 ‘ of 20 *l.* to such Person or Persons as shall inform or prosecute for the  
 ‘ same, until the Party be thereof convicted upon an Indictment before  
 ‘ the Justices of the Peace at any General Quarter-Sessions of the Peace  
 ‘ to be holden for the same County, Riding, Division or Precinct.

And *Seçt. 3.* it is further enacted, ‘ That in case any Sheriff, Under-  
 ‘ Sheriff, Bailiff, or other Officer, to whom the Return of Juries shall  
 ‘ belong, shall summon and return any Person or Persons to serve on  
 ‘ any Jury in any Cause to be tried before the Justices of Assize or Nisi

‘ *Prins,*

‘ *Prius*, or Judges of the Great Sessions, or the Judge or Judges of the Sessions for the Counties Palatine, whose Name is not inserted in the Duplicates so delivered or transmitted to him or them by such Clerk of the Peace, if any such Duplicate shall be delivered or transmitted; or if any Clerk of Assise, Judge’s Associate, or other Officer, shall record the Appearance of any Person so summoned and returned as aforesaid, who did not really and truly appear then; and in such Case any Judge, or Justice of Assise or *Nisi Prius*, or Judge or Judges of the said Great Sessions, or the Judge or Judges of the Sessions for the said Counties Palatine, shall and may, upon Examination in a Summary Way, set such Fine or Fines upon such Sheriff, or Under-Sheriff, Clerk of the Assise, Judge’s Associate, or other Officer, for every such Person so summoned or returned as aforesaid; and for every Person whose Appearance shall be so falsely recorded, as the said Judge, or Justice of Assise or *Nisi Prius*, or of the said Great Sessions, or the Judge or Judges of the Sessions for the said Counties Palatine shall think meet, not exceeding 10*l.* and not less than 40*s.*

*Sett.* 4. ‘ And for preventing Abuses by *Sheriffs, Under-Sheriffs, Bailiffs, or other Officers concerned in the Summoning or Returning of Jurors*, it is further enacted, That no Persons shall be returned as Jurors to serve on Trials at any Assises or *Nisi Prius*, or at any the said Great Sessions, or at the Sessions for the said Counties Palatine, who have served within the Space of one Year before in the County of *Rutland*, or for four Years in the County of *York*, or of two Years before in any other County, not being a County of a City or Town; and if any such Sheriff shall wilfully transgress therein, any Judge, or Justice of Assise or *Nisi Prius*, or of the said Great Sessions, or the Judge or Judges of the Sessions for the said Counties Palatine, may, and is hereby required, on Examination and Proof of such Offence in a summary Way, to set a Fine or Fines upon every such Offender, as he shall think meet, not exceeding 5*l.* for any one Offence.

Note; by the 4 *Georg.* 2. cap. 7. this Clause is repealed as to the County of *Middlesex*, and no Person to serve who has served within the two Terms before.

*Sett.* 5. ‘ It is further enacted, That the Sheriff, Under-Sheriff, or other Officer, to whom the Return of Juries shall belong, shall from Time to Time enter, or Register, in a Book to be kept for that Purpose, the Names of such Persons as shall be summoned, and shall serve as Jurors on Trials at any Assises or *Nisi Prius*, or in the said Courts of Great Sessions, or Sessions for the said Counties Palatine, together with their Additions and Places of Abode Alphabetically, and also the Times of their Services; and every Person so summoned and attending, or serving as aforesaid, shall (upon Application by him made to such Sheriff, Under-Sheriff, or other Officer,) have a Certificate, testifying such his Attendance or Service done, which Certificate the said Sheriff, Under-Sheriff, or other Officer, is hereby directed and required to give without Fee or Reward; and the said Book shall be transmitted by such Sheriff, Under-Sheriff, or other Officer, to his or their Successor or Successors from Time to Time.

*Sett.* 6. ‘ It is further enacted, That no Sheriff, Under-Sheriff, Bailiff, or other Officer, or Person whatsoever, shall directly or indirectly take or receive any Money, or other Reward, to excuse any Person from serving or being summoned to serve on Juries, or under that Colour or Pretence; and that no Bailiff, or other Officer, appointed by any Sheriff, or Under-Sheriff, to summon Juries, shall summon any Person to serve thereon, other than such whose Name is specified in a Mandate signed by such Sheriff, or Under-Sheriff, and directed to such Bailiff, or other Officer; and if any Sheriff, Under-Sheriff, Bailiff, or other Officer, shall wilfully transgress in any of the Cases aforesaid, any Judge, or Justice of Assise *Nisi Prius*, or Great Sessions aforesaid, or the Judge or Judges of the Sessions for the said Counties Palatine, may, and is hereby required, on Examination and Proof of such Offence

‘ in a summary Way, to set a Fine or Fines upon any Person or Persons  
 ‘ so offending, as he shall think meet, not exceeding 10*l.* according to  
 ‘ the Nature of the Offence.

*Sect. 6.* ‘ And whereas by the said Act of 7 & 8 W. 3. and by the  
 ‘ 3 & 4 Ann. all Constables, Tythingmen and Headboroughs, are obliged to  
 ‘ give in true Lists at the respective Quarter-Sessions of the Peace holden  
 ‘ for each County, Riding, or Division, of the Names and Places of all Per-  
 ‘ sons within their respective Precincts or Places, qualified to serve on Juries,  
 ‘ to the Justices of the Peace in open Court, which hath by Experience been  
 ‘ found inconvenient and expensive to several Constables, Tythingmen and  
 ‘ Headboroughs, such Quarter-Sessions being often held at a great Distance  
 ‘ from their Abode; for Remedy whereof it is enacted, That it shall be  
 ‘ lawful and sufficient for all or any Constables, Tythingmen or Head-  
 ‘ boroughs, after they shall have made and completed such Lists of  
 ‘ Persons qualified to serve on Juries, for their respective Parishes or  
 ‘ Precincts, according to the Manner directed by the before-mentioned  
 ‘ Acts, and this present Act, and to subscribe the same in the Presence of  
 ‘ one or more Justice or Justices of the Peace for each respective  
 ‘ County or Place, and also at the same Time to attest the Truth of  
 ‘ such Lists, upon Oath, to the best of their Knowledge or Belief, which  
 ‘ Oath such Justice or Justices respectively are hereby empowered and  
 ‘ required to administer; and the said Lists shall (being first signed by  
 ‘ the said Justices respectively, before whom the same shall be attested  
 ‘ on Oath, and subscribed as aforesaid) be delivered by the said Con-  
 ‘ stables, Tythingmen or Headboroughs, to the Chief or High Constables  
 ‘ of the Hundreds or Divisions whereunto the same shall respectively  
 ‘ belong, who are hereby directed and required to deliver in such Lists  
 ‘ to the Justices of the Peace for the County, Riding, or Division, at  
 ‘ their respective General Quarter-Sessions in open Court, attesting at  
 ‘ the same Time, upon Oath, their Receipt of such Lists from the  
 ‘ Constables, Tythingmen or Headboroughs, respectively, and that no  
 ‘ Alteration hath been therein made since their Receipt thereof; and  
 ‘ the said Lists so delivered in and attested, shall be deemed as effectual  
 ‘ as if they had been delivered in by the Constables, Tythingmen or  
 ‘ Headboroughs, for their respective Parishes or Precincts.

#### 4. In what Time such Processes are returnable.

2 *Roll. Abr.*  
 626.

9 *Co.* 118. *b.*

2 *Inst.* 568.

2 *Hawk. P.C.*

406.

(a) Whether

such Indict-

ment were originally taken in the King's Bench, or taken before Justices of Peace of the same

County, and removed into the King's Bench by *Certiorari*. 2 *Hal. Hist. P. C.* 260.

2 *Hawk. P.C.*

406. and

several Au-

thorities

there cited.

(b) That as

to the Commission of *Oyer* and *Terminer*, tho' there goes out a general Precept in the Names of three

or more of the Commissioners, and under their Seals, fifteen Days before the Sessions, directed to

the Sheriff to return Twenty-four Jurors to try the Issue between the King and the Prisoners to be

arraigned; yet this is but preparatory, and to have a Jury in Readiness; for after the Prisoners

arraigned, and pleaded to the Country, a Precept ought to issue to the Sheriff in Nature of a *Venue*

*fac.* which may bear Teste the same Day that the Prisoners plead, commanding the Sheriff to Re-

turn Twenty-four, &c. to try the Issue upon such a Day, 2 *Hal. Hist. P. C.* 261. — Or they may

make

Process against Jurors may be returnable immediately into the King's Bench for the Trial of an Indictment found in the (a) County where it fits, whether for a Crime in such County, or for a Treason beyond Sea; but for the Trial of an Indictment removed by *Certiorari* from a different County, there must be fifteen Days between the Teste and Return of every Process.

ment were originally taken in the King's Bench, or taken before Justices of Peace of the same County, and removed into the King's Bench by *Certiorari*. 2 *Hal. Hist. P. C.* 260.

Justices in *Eyre*, or of Gaol-Delivery, may order a Jury to be returned immediately for the Trial of a Prisoner; also it hath been adjudged, that Justices of (a) *Oyer* and *Terminer*, or of the Peace, might for

4

for

to the Commission of *Oyer* and *Terminer*, tho' there goes out a general Precept in the Names of three or more of the Commissioners, and under their Seals, fifteen Days before the Sessions, directed to the Sheriff to return Twenty-four Jurors to try the Issue between the King and the Prisoners to be arraigned; yet this is but preparatory, and to have a Jury in Readiness; for after the Prisoners arraigned, and pleaded to the Country, a Precept ought to issue to the Sheriff in Nature of a *Venue fac.* which may bear Teste the same Day that the Prisoners plead, commanding the Sheriff to Return Twenty-four, &c. to try the Issue upon such a Day, 2 *Hal. Hist. P. C.* 261. — Or they may make

for the Trial of an Issue joined before them award a *Venire* returnable the same Day on which the Party is arraigned; but it is said, that there are strong Authorities to the contrary, unless the Prisoner consent, or the Crime amount to Felony.

*viz. Ad horam primam post Meridiem, &c.* for Justices of Oyer and Terminer may take their Indictment and arraign the Prisoner, and try him the same Day. *Ibid.* — And it is there also said, that Justices of the Peace, as to the Point of their Precepts of *Venire fac.* agree with Justices of Oyer and Terminer; for they are, as to this Purpose, Commissioners of Oyer and Terminer, and may indict, arraign, and try the same Day, in Cases of Felony. 2 *Hal. Hist. P. C.* 261-2.

A *Venire* before Justices of Oyer and Terminer, returnable at a Day certain, is erroneous, unless the Sessions appear to be adjourned to the same Day, because otherwise it shall not be intended that their Commission continued so long; but such *Venire* may be returnable at the next Assizes, and then tried by Virtue of 1 *E. 6. cap. 7.*

Here it may be proper to take Notice, that the Statutes of 4 & 5 *H. 8 M. cap. 24.* and 7 & 8 *H. 8 M. cap. 32.* require that Jurors shall be summoned six Days before they appear, which seems to make it necessary that whenever a *Venire fac.* or particular Precept is required, there should be six Days between its Teste and Return; and to this Purpose it is enacted by the 7 & 8 *H. 3. cap. 32.* ' That every Summons of any Person qualified, &c. shall be made by the Sheriff, his Officer, or lawful Deputy, six Days before, at the least, shewing to every Person so summoned the Warrant under the Seal of the Office, wherein they are nominated and appointed to serve; and in case any Juror, so to be summoned, be absent from the usual Place of his Habitation at the Time of such Summons, in such Case Notice of such Summons shall be given, by leaving a Note in Writing, under the Hand of such Officer, containing the Contents thereof, at the Dwelling-house of such Juror, with some Person there inhabiting in the same.

' Provided that those Acts shall not extend to give or require any longer Time for the summoning of any Juries, that are to try any Issues joined in any of the said Courts, that are triable by Jurors of the City of London or County of Middlesex, than was by Law required before the Making of the said Act, nor shall extend or be construed to give any longer Time, or other Day, for the Return of any Writ, Precept or Process of *Venire facias*, *Habeas Corpora* or *Disfringas*, for the summoning, attaching or distraining of any Jury to appear, than was by Law required before the Making of the said Act; but that where there shall not be six Days between the Awarding of such Writ, Precept or Process, and Return thereof, every Juror may be summoned, attached or distrained to appear at the Day and Time therein mentioned or appointed, as he might have been before the Making of the said Act.

### 5. Where the Jury must appear.

At Common Law, the Jurors and Parties were to appear at the Court (a) where the Suit or Prosecution was depending, which occasioned a great Expence, and a great Conflux of People to the Superior Courts; to Remedy which Inconveniency, it was ordained by *Westm. 2. cap. 30.* that all Pleas in either Bench, which require only an easy Examination, shall be determined in the Country, before the Justices of Assize, by Virtue of the Writ prescribed by that Statute, commonly called the Writ of *Nisi Prius*.

Justices of Oyer, &c. needs not express before what Justices it shall be returnable, for it cannot but be intended that it ought to be returned before the Court that awards it. 29 *E. 3. 30. b.* *Dyer* 315. pl. 99. 2 *Keb.* 855.

make the Precept returnable the same Day that the Prisoner pleads,

2 *Hal. Hist. P. C.* 261.  
2 *Hawck. P. C.* 406.

2 *Inst.* 421-2.  
&c  
4 *Inst.* 159.  
*Cro. Car.* 349.  
(a) The Award of a *Venire* returnable at a certain Day before

The

2 Inst. 423.  
Trials per  
Pais 63-4.

The Manner of contriving it was to direct the *Venire* to return the Jury at some Day the next Term, unless the Justices *prius tali Die & Loco venerint*; and thus the *Nisi Prius* was at first on the *Venire*; and continued in that Manner from *Ed. 1.* to *Ed. 3.* for tho' there were no Issues returned on the *Venire* to make them appear at *Nisi Prius*; yet it was so much a greater Difficulty on them to appear afterwards at *Westminster*; which if they did not, the *Disfringas* issued, that it had its Effect to bring them in their proper Counties; the Writ was contrived to command them to come into Court, because it would have been improper for the Court to have commanded them to come into any other Place; so that their Appearance before the Justices of Assise is an Excuse for their Non-Appearance in Bank; but if they did not appear at the Assise, nor at *Westminster*, then issued a *Habeas Corpus* and *Disfringas* to bring them up.

Trials per  
Pais 65.

The antient Practicè of the Defendant's being essoinable on the *Venire* was a great Mischief in this Process, because if he did not appear, the Jury were afterwards obliged to appear in Bank; and there was another Mischief in this Process as it then stood, that the Parties not seeing the Panel beforehand, they could not be prepared to make their Challenge; and the first of these Mischiefs was pretty well remedied by laying the Costs on the Defendant when the Plaintiff prevailed; but the second Mischief had no Remedy till 22 E. 3. cap. 11. whereby it is ordained, that no Inquests but Assises and Delivery of Gaols be taken by Writ of *Nisi Prius*, or other Manner, at the Suit of Great or Small, before that the Names of all of them that shall pass in the Inquest be returned into the Court; and this set the Process on the same Foot it now stands.

Trials per  
Pais 63.

From henceforward they could not place the *Nisi Prius* in the *Venire*, as was directed by the Statute of *Westminster 2.* because it is directed that no Inquest be taken at *Nisi Prius* until the Inquest be returned in Court, and therefore the Clause of *Nisi Prius* was taken out of the *Venire* and placed to the *Habeas Corpus* and *Disfringas*, which was so awarded on the Roll in the *Jurat*; this had many good Effects; 1st, For that the Plaintiff and Defendant knew the Names of the Jury, in order to their Challenges. 2dly, The *Venire* being returned, the Defendant had no Essoin on the *Habeas Corpus* and *Disfringas*, but was obliged to appear, or else by *Westminster 2. cap. 27.* the Inquest was taken by Default as if he had appeared. Another Advantage was, that the Jury on the *Nisi Prius* were fined if they did not appear; and therefore the Clause in the *Disfringas* is, *quod Habeas Corpora eorum coram nobis apud Westm' Die Lunæ prox' post vel coram Justiciariis nostris ad Assisas in Com' tuo tenend' assign', si prius Die, &c.* and since they could fine them on this Process according to their Offence, they granted *Nisi Prius* in the ensuing *Disfringas*, and did not compel them to try it at Bar, which was more convenient than the antient Way, where the appearing Juror was obliged by his Companions Default to come up to *Westminster*; but now every one has Issues returned on him for his own Default.

6 Mod. 9.

The Day at *Nisi Prius* and in Bank are in Consideration of Law the same, because the Writ of *Nisi Prius*, which gives Authority to the Judge to try the Cause in the Country, is instead of the Court, and therefore the *Postea* certified by him on the Day of Bank is the same as if the Jury had come up to the Court, and the Trial had been had in open Court; and this, as has been said, is for the Ease of the Subject, that the Jury and Witnesses may not come out of the proper County.

Cro. Car. 348.  
2 Inst. 424.  
4 Co. 43.  
4 Inst. 160.  
Raym. 567.  
6 Mod. 246.

It seems agreed, that an Issue joined in the King's Bench upon an Indictment or Appeal, whether for Treason or Felony, or a Crime of an inferior Nature, committed in a different County from that wherein the Court sits, may be tried in the proper County by Writ of *Nisi Prius*, by Virtue of the said Statute of *Westm. 2. cap. 30.*

Yet inasmuch as the King is not expressly named in this Statute, and it is a general Rule that he shall not be bound by a Statute which doth not expressly name him, it seems to have been generally holden, that wherever the King is a Party it is irregular to grant a Trial by *Nisi Prius* without his special Warrant, or the (a) Assent of his Attorney; but it seems the Court may grant it in an (b) Appeal in the same Manner as in any other Action.

great Examination, the Court refused to grant a Trial by *Nisi Prius* at the Motion of the Attorney General, till the King by his Letters had signified his Pleasure that it should be so tried. *Cro. Car.* 348. (b) But not where the Jury is to be from two Counties. *Dyer* 46. pl. 6.

(a) In an Indictment of Barretry, which seems to require

## 6. What Number are to be returned.

Altho' by the Words of the Writ of *Venire Facias* the Sheriff is only to return twelve, yet by antient Course he was obliged to return twenty-four; and this, says my Lord Coke, is for Expedition of Justice; for if twelve should only be returned, no Man should have a full Jury appear or be sworn in respect of Challenges without a *Tales*, which would be a great Delay of Trials.

But tho' the Sheriff return a lesser Number, as where the Sheriff returned only twenty-three, and a sufficient Number appear, and try the Issue, this will be aided by the Statutes of *Jeofail* as a Misreturn.

The Precept that issues before a Sessions of Gaol-Delivery, Oyer and Terminer, and of the Peace, is to return twenty-four, and commonly the Sheriff returns upon that Precept forty-eight.

But the Award or Precept to try the Prisoner after he hath pleaded, is only *Venire Facias* twelve, and (c) twenty-four are returned by the Sheriff on that Panel.

als on the Crown Side for Criminals the Sheriff may be commanded to return any Number the Court pleased, and accordingly in Sir H. Vane's Trial the Sheriff returned sixty

5 Co. 36.  
*Cro. Eliz.* 587.  
*Cro. Car.* 225.

2 Hal. Hist.  
P. C. 265.

2 Hal. Hist.  
P. C. 265.  
(c) But it has been held, that in Tri-

At Common Law in Civil Causes, it seems the Sheriff might have returned above twenty-four if he pleased; and therefore by the Statute of (d) *Westminster* 2. cap. 38. it is recited, That whereas the Sheriffs were used to summon an unreasonable Multitude of Jurors, to the Grievance of the People, it is ordained, that from thenceforth in one Assise no more shall be returned than twenty-four.

*Godb.* 370.  
1 Keb 310.  
(d) This Statute extends not to Jurors returned for Trial of criminal Per-  
sons. *Kel.* 16.

And now by the 3 *Georg.* 2. cap. 25. sect. 8. it is Enacted, ' That every Sheriff or other Officer, to whom the Return of the *Venire Facias Juratores*, or other Process, for the Trial of Causes before Justices of Assise or *Nisi Prius*, in any County in (e) England, doth or shall belong, shall upon his Return of every such Writ of *Venire Facias*, (unless in Causes intended to be tried at Bar, or in Cases where a special Jury shall be struck by Order or Rule of Court,) annex a Panel to the said Writ, containing the Christian and Surnames, Additions, and Places of Abode of a competent Number of Jurors named in such Lists as qualified to serve on Juries, the Names of the Persons to be inserted in the Panel annexed to every *Venire Facias* for the Trial of all Issues at the same Assises in each respective County, which Number of Jurors shall be not less than forty-eight in any County, nor more than seventy-two, without Direction of the Judges appointed to go the Circuit and sit as Judges of Assise or *Nisi Prius* in such County, or one of them, who are respectively hereby impowered and required, if he or they see Cause, by Order under his or their respective Hand or Hands, to direct a

By the 9th Sect. of this Statute the Number in Wales for the Grand Sessions not to be less than ten, nor more than fifteen out of every Hundred, and to be summoned eight Days before.—By the 10th Sect. the Number in the Coun-

ties Palatine the same as in other Parts of England, and to be summoned fourteen Days before.



‘ greater or lesser Number ; and then such Number, as shall be so directed, shall be the Number to serve on such Jury, and that the Writs of *Habeas Corpora Juratorum* or *Disfringas*, subsequent to such Writ of *Venire Facias*, need not have inserted in the Bodies of such respective Writs the Names of all the Persons contained in such Panel ; but it shall be sufficient to insert in the mandatory Part of such Writs respectively, *Corpora separatum Personarum in Panello huic Brevis annexo nominatorum*, or Words of the like Import, and to annex to such Writs respectively Panels containing the same Names as were returned in the Panel to such *Venire Facias*, with their Additions and Places of Abode, that the Parties concerned in any such Trials may have timely Notice of the Jurors who are to serve at the next Assises, in order to make their Challenges to them, if there be Cause ; and that for the making the Returns and Panels aforesaid, and annexing the same to the respective Writs, no other Fee or Fees shall be taken than what are now allowed by Law to be taken for the Return of the like Writs and Panels annexed to the same, and that the Persons named in such Panels shall be summoned to serve on Juries at the then next Assises or Sessions of *Nisi Prius* for the respective Counties to be named in such Writs, and no other.’

### 7. Of awarding Process by Proviso.

*Trials per Pais* 60, 61.

If the Plaintiff after Issue joined neglects to try his Cause the first Assises in the Country, or the first Term in *Middlesex* or *London*, the Defendant is at Liberty to bring down the Cause by *Proviso*, so called by the Clause in the *Venire Facias*, which says, *Proviso semper quod si duo Brevia inde tibi pervenerint unum eorundem tantum retorn’ & exequaris* ; for both Plaintiff and Defendant having put themselves upon their Country, the Plaintiff’s Laches shall not prevent the Defendant’s Discharging himself from the Action, and therefore the Process is as well open for him as for the Plaintiff.

*Dyer* 215.  
pl. 51, 284.  
pl. 34.  
*Cro. Car.* 484.  
2 *Rot. Abr.*  
665-6.  
*Keilw.* 176.  
pl. 11.  
2 *Fon.* 34.

This Process by *Proviso*, (*i. e.* with a Clause that if two Writs come to the Sheriff, he shall execute one of them only,) may be taken out not only when the Plaintiff neglects to take out the *Venire* the same Term, but also upon his Neglect to get it returned ; and in like Manner if the Plaintiff make the like Default in suing out an *Habeas Corpora*, or other subsequent Process, the Defendant may sue out the like Process by *Proviso*.

*Dyer* 193.  
pl. 28, 284.  
pl. 34.  
2 *Lev.* 5, 6.  
2 *Sand.* 336.  
6 *Mod.* 246.

But where the Defendant hath sued out any Process by *Proviso*, there are Authorities that the Plaintiff is to sue out the proper subsequent Process upon it in the same Manner as if he had sued out the first, and that it is irregular for a Defendant to take out any such subsequent Process till the Plaintiff has made a Default in respect of the same kind of Process, except only in such Actions wherein the Defendant is an Actor as well as the Plaintiff, as in *Replevin*, or *Error*, or *Quare Impedit* against a Patron only, or *Prohibition*, &c. in which Actions the Defendant may either take out Process by *Proviso*, without any Default in the Plaintiff, or may, if he think fit, take it out in the same Manner as the Plaintiff, without any Clause of *Proviso*.

2 *Leon.* 110.  
1 *Keil.* 195.  
6 *Mod.* 246.  
cont.  
1 *Sid.* 316.

It seems agreed, that neither in Actions wherein the King is sole Party, nor in Indictments, there can be any Process taken out by *Proviso*, because no Laches is imputable to the King ; also it hath been questioned whether there can be any such Process in Informations *Qui tam*, because the King is in some sort a Party.

*Keilw.* 176.  
pl. 70

But it seems agreed, that it may be so awarded in any Appeal, whether Capital or not Capital, in the same Manner as in other Actions, after the



the Appellant hath made Default in Relation to the very same kind of Process.

By the 7 & 8 W. 3. cap. 32. which gives a *Venire Facias de Novo* where the Cause is not tried the first Assises, it is Enacted, ' That if any Defendant or Tenant in any Action depending in any of the Courts of Westminster shall be minded to bring to Trial any Issue joined against him, when by the Course in any of the said Courts he may lawfully do the same by Proviso, such Defendant or Tenant shall or may, of the issuable Term next preceding such intended Trial to be had at the next Assizes, sue out a new *Venire Facias* to the Sheriff by Proviso, and prosecute the same by Writ of *Habeas Corpora* or *Disstringas*, with a *Nisi Prius*, as tho' there had not been any former *Venire Facias* sued out or returned in that Cause ; and so *toties quoties* as the Matter shall require.'

### 3. Of the Necessity of returning a Panel into Court, and where a Prisoner may demand a Copy of it.

By the 42 E. 3. cap. 11. it is recited, That divers Mischiefs had happened, because that the Panels of Inquests, which had been taken before Justices by Writ of *Scire Facias*, and other Writs, had not been returned before the Sessions of the Justices at the *Nisi Prius*, and otherwise, so that the Parties could not have Knowledge of the Names of the Persons which should pass in the Inquest ; whereby divers of the People had been disherited and oppressed ; and thereupon it is ordained, that no Inquest but (a) Assises and Deliverances of Gaols be taken by Writ of *Nisi Prius*, nor in any other Manner, at the Suit of the Great or Small, before the Names of all of them that shall pass in the Inquest be returned in the Court.

(a) The Statute of 6 H. 6. cap. 2. provides also for Assises.  
3 Inst. 175.

This Statute extends as well to Writs of *Nisi Prius* in Criminal Cases as in Civil, and to Jurors returned upon a *Tales* as well as to those returned upon a principal Panel.

But it seems that in Trials before the Justices of Gaol-Delivery the Prisoner has not Right to a Copy of the Panel before the Time of his Trial, except only in Cases within the Purview of 7 & 8 W. 3. cap. 3. which Enacts, ' That every Person indicted and tried for High Treason, or Misprision thereof, (except it be for counterfeiting the Coin, &c.) shall have a Copy of the Panel of the Jurors who are to try him duly returned by the Sheriff, and delivered unto him two Days at least before he shall be tried.'

It hath been adjudged to be sufficient, within the Intent of this Act, to deliver to the Prisoner a Copy of a Panel arrayed by the Sheriff before it is returned into Court, if the very same Panel be afterwards returned.

2 Hawk. P.C. 410.

2 Hawk. P.C. 410.

### 9. Of the Trials going off pro Defectu Juratorum ; and therein of drawing a Juroz.

If a *Venire* is awarded, and the Parties do not go to Trial the next Assises, but it lies for several Terms, the Continuance may be made by a *Vic non misit Breve* ; but if a *Nisi Prius* be awarded, and some of the Jury appear, and the Panel be not full, so that the Trial is not carried on, they enter those of the Jury that appeared, and *alii non venerunt, ideo respectuentur* to the next Term *pro Defectu Jurat*, and at the Day in the next Term they award an *Alias Disstringas* to the next Assises, with a *Nisi Prius* until the next Term.

Vide the Statute 7 & 8 W. 3. cap. 32. which gives a *Venire Facias de Novo*, in Case the Cause be not tried the first Assises.

It is held by the Opinions of some, that in a Criminal Case not Capital, after a Jury sworn and impanelled, and all the Evidence given, the King's Counsel

1 Vent. 28. Raym. 84.

Counsel may, without the Party's Consent, withdraw a Juror, and have the Cause tried over again.

*Carth.* 465.

But herein the better Opinion seems to be ; 1<sup>st</sup>, 'That in Capital Cases a Juror cannot be withdrawn, tho' all Parties consent to it. 2<sup>dly</sup>, 'That in Criminal Cases not Capital a Juror may be withdrawn, if both Parties consent ; but not otherwise. 3<sup>dly</sup>, 'That in all (a) Civil Causes a Juror cannot be withdrawn, but by Consent of all Parties.

(a) Where the Jurors lying all

Night could not agree, a Juror by Consent was drawn. *Cro. Car.* 484.

*Ca. Law and Eq.* 390.  
*Huet and Bainard.*

It hath been held, that a Juror withdrawn from the Panel by Consent of both Parties, to the Intent the Trial might for that Time go off *pro Defectu Juratorum*, it being necessary for the Jury to have a View, may be of the Jury, when the Cause comes to be tried at a subsequent Time, and that this being neither a principal Cause of Challenge, nor to the Favour, cannot be Error.

### (C) In What Cases and in What Manner a Tales is grantable.

(b) It hath been held since this Statute, that a Tales de Circumstantibus was al-

lowable upon special Juries, by *Raymond C. J.* in the Case of *The King versus Franklin*, *Trin.* 5 *Georg.* 2.

10 *Co.* 104.  
*Dyer* 359. pl. 2.  
2 *Roll. Abr.* 671.

*Plow.* 100.  
2 *Hal. Hist.* P. C. 266.

(c) For this Purpose, with the Statutes

35 *H. 8.* cap. 6.

made perpetual by 2 & 3 *E. 6.* cap. 32. 4 & 5 *Pb. & Mar.* cap. 7. 5 *Eliz.* cap. 25. 14 *Eliz.* cap. 9. 7 & 8 *W. 3.* cap. 32.

If all the Jury did not attend on the *Habeas Corpus* or *Disfringas*, whether by reason of the Death of some of the Persons returned, or for any other Cause ; or if so many be challenged and drawn, that there do not remain a sufficient Number to make a Jury ; or if after the Jury is charged one or more of them die, there are at Common Law the Writs of *Undecim*, *Decem*, or *Octo Tales*, according as the Number was deficient, to force others into Court to try the Issue, or by (c) Statute the Plaintiff may pray a *Tales de Circumstantibus* to prevent the Delay of the *Decem Tales*.

*Cro. Car.* 484.

10 *Co.* 104.

2 *Roll. Abr.*

671. and in

*Dyer* 359. pl. 2.

it is said, that if a full Jury do not appear, and the Plaintiff pray a *Disfringas* without praying any

*Tales*, the Court ought to grant it at the Prayer of the Defendant.

A *Tales* may be granted as well on the Application of the Defendant as Plaintiff ; but it seems that a Defendant cannot regularly pray it till there has been a Default in the Plaintiff.

1 *Bulf.* 121.

*Dyer* 215.

pl. 41.

In Capital Cases the *Tales* may be granted for a larger Number than the first Process ; as for sixty, or forty, or any other even Number, in order to prevent Delays from peremptory Challenges ; and in this Respect a *Tales* in Capital Cases is different from what it is in any other Case ; it being an allowed Rule, that in all (d) other Cases the *Tales* must be for a less Number than the first Process.

(d) But a

*Tales de Cir-*

*cumstantibus*

may be of any uncertain Number. 10 *Co.* 105 a

Every subsequent *Tales* in Capital, as well as in all other Cases, must be for a less Number than the former, except the former were quashed, in which Case the next may be for the same Number. 10 Co. 105. a.  
Keilw. 176.

The Quashing the Array of the principal Panel doth not quash that of the *Tales*, but the Inquest shall be taken by those returned on the *Tales*, if there be a sufficient Number, otherwise more shall be added to them by a new *Tales*; but if all the Persons returned on a *Habeas Corpora* be challenged and drawn, there shall not be a *Tales* awarded, but a new *Venire*; for the Word *Tales* plainly refers to some others, to whom the Persons returned are to be like; also if the first *Habeas Corpora* be quashed, the second with a *Tales* cannot but be quashed with it, and the Party must go on as if the *Venire* had only been returned, and nothing done upon it; for where a Process is quashed, all that follows and depends upon it falls with it. 10 Co. 104.  
Dyer 245.  
pl. 64.

It seems, that a *Tales* is not grantable on the Return of a *Venire*, but only on the Return of a *Habeas Corpora* or *Disfringas*, because it appears not before such Return, but that a full Jury may appear. Cro. Eliz. 502.  
2 Rol. Abr.  
671.

A *Disfringas* or *Habeas Corpora*, with a Command to add so many more to those summoned on the *Venire*, is the first Process against the *Tales*. 1 Rol. Abr.  
798.

If a Juror be withdrawn after a Trial commenced, whereon a *Tales de circumstantibus* was awarded, and afterwards a new *Habeas Corpora* be taken out with a *Tales*, it shall appoint the *Tales* to be added to the Jurors first returned, and also to those returned on the *Tales de circumstantibus*. Cro. Jac. 677.

The Statutes, which authorize Justices of *Nisi Prius* to award a *Tales de circumstantibus*, extend as well to all Capital Cases as to others; but it seems that such a *Tales* cannot be prayed for the King upon an Indictment, or Criminal Information, without a Warrant from the Attorney General, or an express Assignment from the Court, before which the Inquest is taken. 1 Lev. 223.  
Raym. 367.  
1 Keb. 490.  
6 Mod. 246.

It seems not to be clear, that a *Tales* is grantable by Justices of Oyer, &c. or of (a) Gaol-Delivery; but if a Trial be put off before Justices of Gaol-Delivery for want of a full Jury, they may, without Doubt, order a larger Panel, whereon the former Jurors should be returned in the same Order as before, and called to be sworn as they stand, without any more Regard to those who were sworn before, than to the others; and the like Method is to be observed as to a Jury returned with a *Tales*. Keilw. 176.  
p. 10.  
Plow. 100.  
Yelv. 23.  
Fenk. 340.  
(a) That before Justices of Gaol-Delivery this Learning of

*Tales* is not of much Use, because there is no particular Precept to the Sheriff to return either Jury or *Tales*, but the general Precept before the Sessions, and the Award or Command of the Court upon the Plea of the Prisoner. 2 Hal. Hist. P. C. 266.

On a Writ of Error of a Judgment given in the Court of Bristol, it was solemnly adjudged, that a Custom in an inferior Court to try by a *Tales de circumstantibus* was void, as it breaks down that important Rule, that Trials must be *per Pares*, and admits an unlimited extravagant Latitude of gleaning together any Set of Men for Jurors, however profligate and unfit for the Office, and intirely deprives the Parties of their Challenges. Mich. 6 Geo. 2. in B. R.  
Bell ver.  
Knight, vide  
2 Rol. Abr.  
672.  
Styl. 16.

### (D) In What Cases and in What Manner Special Juries are appointed.

<sup>2</sup> *Lil. Regist.*  
123 that the  
Court may  
order a Jury  
of Merchants  
if they think  
it conveni-  
ent. <sup>2</sup> *Lil.*  
*Regist.* 122.

**S**PECIAL Juries are appointed on Motion and Application to the Court for that Purpose, on which, if the Court think it reasonable, the Sheriff is to attend the Secondary or Master with his Book of Freeholders, who, in the Presence of the Attornies on both Sides, names Forty-eight Freeholders, and then each Party strikes out twelve, by one at a Time, the Plaintiff or his Attorney beginning first, and the remaining Twenty-four are returned by the Secondary, as the Jury, to try the Cause.

<sup>2</sup> *Lil. Regist.*  
127.  
<sup>3</sup> *Salk.* 405.

If the Rule was entered into by Consent, it is said to be a Contempt in the Attorney not to be present; but to remedy any Inconveniency, from hence, a Rule was made, that when a Master is to strike a Jury; *viz.* Forty-eight out of the Freeholders Book, he shall give Notice to the Attornies of both Sides to be present; and if the one comes, and the other does not, he that appears shall, according to the ancient Course, strike out twelve, and the Master shall strike out other twelve for him that is absent.

<sup>1</sup> *Salk.* 405.

And it is said, that if by Rule of Court the Master is ordered to strike a Jury, in case it be not expressed in such Rule that the Master shall strike Forty-eight, and each of the Parties shall strike out twelve, the Master is to strike Twenty-four, and the Parties have no Liberty to strike out any.

<sup>1</sup> *Mod. Cr.*  
*Law and Eq.*  
248.

It is said, that a Special Jury may be granted to try a Cause at Bar without the Consent of the Parties, but never at *Nisi Prius*, unless for good Cause shewn, such as Partiality of the Sheriff, &c.

<sup>2</sup> *Jon.* 222.

Alto it is said to be contrary to the Course of the Court of *B. R.* in Capital Cases, to order the Clerk of the Crown to strike a Special Jury, as is done by the Secondary in Civil Causes upon Trials at Bar.

By the 3 *Georg. 2. cap. 25. Sect. 15.* reciting, that whereas some Doubt had been conceived touching the Power of his Majesty's Courts of Law at *Westminster*, to appoint Juries to be struck before the Clerk of the Crown, Master of the Office, Prothonotaries, or other proper Officer of such respective Courts, for the Trial of Issues depending in the said Courts, without the Consent of the Prosecutor or Parties concerned in the Prosecution or Suit then depending, unless such Issues are to be tried at the Bar of the same Courts, it is enacted, ' That it shall and may be ' lawful to and for his Majesty's Courts of King's Bench, Common ' Pleas and Exchequer at *Westminster*, respectively, upon Motion made ' on Behalf of his Majesty, or on the Motion of any Prosecutor or De- ' fendant in any Indictment or Information for any Misdemeanor or In- ' formation in Nature of a *Quo Warranto*, depending or to be brought or ' prosecuted in the said Court of Exchequer, or on the Motion of any ' Plaintiff or Plaintiffs, Defendant or Defendants, in any Action, Cause ' or Suit whatsoever depending, or to be brought and carried on in the ' said Courts of King's Bench, &c. or in any of them; and the said ' Courts are hereby respectively authorized and required, upon Motion ' aforesaid, in any of the Cases before-mentioned, to order and appoint ' a Jury to be struck before the proper Officer of each respective ' Court, for the Trial of any Issue joined in any of the said Cases, and ' triable by a Jury of twelve Men, in such Manner as Special Juries have ' been, and are usually struck in such Courts respectively, upon Trials at ' Bar had in the said Courts, which said Jury, so struck as aforesaid, ' shall be the Jury returned for the Trial of the said Issue.

And *Sec.* 16. it is further enacted by the said Statute, ' That the Person or Party, who shall apply for such Jury to be struck as aforesaid, shall bear and pay the Fees for the Striking such Jury, and shall not have any Allowance for the same upon Taxation of Costs.

*Sec.* 17. *Provided*, ' That where any Special Jury shall be ordered, by Rule of any of the said Courts, to be struck by the proper Officer of such Court, in the Manner aforesaid, in any Cause arising in any City or County of a City or Town, the Sheriff or Sheriffs, or Under-Sheriff of such City, or County of a City or Town, shall be ordered by such Rule to bring, or cause to be brought before the said Officer, the Books or Lists of Persons qualified to serve on Juries within the same; out of which Juries ought to be returned by such Sheriff or Sheriffs, in like Manner as the Freeholders Book hath been usually ordered to be brought, in order to the Striking of Juries for Trials at the Bar in Causes arising in Counties at large; and in every such Case the Jury shall be taken and struck out of such Books or Lists respectively.

A Rule was made for a Special Jury, which was entered into by Consent; and afterwards when the Parties attended the Master, the Defendant struck out some Hundredors, and at the Trial challenged the Array for want of Hundredors, which the Judge of Assize allowed a good Challenge; and this was held such a Breach and Contempt of the Rule, for which an Attachment was granted.

But where in the Trial of a *Quo Warranto*, the Defendant challenged the Array of a Special Jury, that had been struck at his Request, for Partiality in the Sheriff; and an Attachment being moved for, and the Case next above relied on, it was denied, and said *per Curiam*, that the Attachment in the Case *supra* was granted by Reason of the Abuse of the Rule; but here the only Foundation is the Jury's being so struck at his Request, which is not alone sufficient; for he had a Right to challenge the Array on the Process's being directed to a wrong Officer; and the Rule might have been fulfilled another way, *viz.* as the Sheriff was partial, a proper Entry might have been made, and Process directed to the Coroner.

*1 Mod. Co. Law and Eq. 245 The King ver. Burridge.*

*The King ver. Johnson. Ali b. 8 Geo. 2. in B. R.*

## (E) Who are to be returned; and therein of the Qualifications and several Causes for which they may be challenged: And herein,

1. Of Challenges to the Array, or to the Polls; and herein where the Insufficiency or Partiality of the Sheriff or Returning Officer is a principal Cause of Challenge, or to the Fault.

A Challenge (a) to Jurors is twofold, either to the Array, or to the Polls, *i. e.* to the particular Jurors, to the Array of the principal Panel, and to the Array of the *Tales*; and herein my Lord Coke observes, that the Jurors Names are ranked in the Panel one under another, which Order or Ranking the Jury is called the Array; as in common Speech we say *Battail Array* for the Order of the Battle; so as to challenge the Array of the Panel, is at once to challenge or except against all the Persons so arrayed or impanelled, in respect of the Partiality or Default of the Sheriff, Coroner, or other Officer who made the Return.

*Co. Lit. 156 a. (a) For the several Significations of the Word Challenge vide Co. Lit. 155 b.*

This

- Co. Lit.* 156. This kind of Challenge is twofold, either a principal Cause of Challenge, or to the Favour, like that to the Polls or particular Jurors; for they thought there could be no better Rule to ascertain what should be a proper Challenge to their Officer, than what was a proper Challenge to each Juror's Partiality; for they did not suppose that they had a Jury *per quos rei veritas melius sciri poterit*, unless they were settled by a Person absolutely indifferent.
- Co. Lit.* 156. A Principal is grounded on such a manifest Presumption of Partiality, that if it be found true it unquestionably sets aside the Array or the Juror, but a Challenge to the Favour leaves it to the Discretion of the Triers.
- Co. Lit.* 156. There are many principal Causes of Challenge to the Array; as if the Officer return any Juror at the Party's Denomination, or that he may be more favourable to one Party than the other; or if the Array be returned by a Bailiff of a Franchise, and the Sheriff return it as of himself; in which Case the Party should lose his Challenges in a Default in the Bailiff, because the Return on Record is in the Sheriff's Name; but if the Sheriff return one within a Liberty, this is good, and the Lord of the Franchise is put to his Action against him.
- Co. Lit.* 156. If the Sheriff be liable to the Distress of either of the Parties mediately or immediately, or if he be his Servant or Officer in Fee, or of Robes, or his (a) Counsellor or Attorney, or have Part of the Land depending on the same Title; or if he has been Godfather to a Child of either of the Parties, or either of them to his; or if either of them have an Action of Debt against him; or if an Action of Battery, or such like, which imply Malice, are depending between them, these are principal Challenges to the Array.
- (a) But by *Finch of Law* 402. these are Challenges to the Favour only.
- Co. Lit.* 156. But if either of the Parties be subject to the Distress of the Sheriff, &c. or if the Sheriff, &c. have an Action of Debt against either of the Parties, these are Causes of Challenge to the Favour only; for the Sheriff, &c. thereby is not under the Party's Influence, but the Party under his.
- Co. Lit.* 156. *1 Leon.* 88. Consanguinity, how remote soever between the Sheriff or Juror, and either of the Parties, or Affinity by Marriage of either Party himself with the Cousin of the Sheriff or the Juror, or *e converso*, are principal Causes of Challenge to the Array, or to the Polls; but if the Marriage be between the Son of the one and Daughter of the other, it is a Cause of Challenge to the Favour only; and he, that challenges the Array or a Juror for a Cousinage, must shew how the Party is Cousin; but if it be found that he is Cousin it is (b) sufficient, whether it be found in the Manner alledged or not; and here my Lord Coke notes, that a Bastard can have no Kindred.
- (b) That being Cousin, tho' in 8th or 9th Degree, is sufficient, *Dyer* 319. a. pl. 13. — The Array of a Panel, because the Sheriff was Cousin to the Plaintiff; and upon a Traverse it was found that they were Cousins, but not in such Manner as the Defendant had alledged; and *per Cur.* the Array was quashed, for the Manner is not material, but whether Cousin or not. *Owen* 44.
- Dyer* 367. pl. 40. That the Sheriff and one of the Parties are Fellow-Servants, not a principal Cause of Challenge, but only to the Favour.
- 1 Rol. Rep.* 328. *Hutt.* 25. *Cro. Jac.* 21. *Moor* 894. *Eyre* ver. *Banister.* It has been doubted, whether the (c) Lessor in Ejectment, being of kin to the Sheriff in such a Manner as to make it a principal Cause of Challenge, in case he had been Plaintiff or Defendant; it has been held by some to be a principal Cause of Challenge, for that this is but a fictitious Action, the Lessor being only concerned in Interest, and the Plaintiff a fictitious Person; and that the Courts take Notice of the Lessor as the (c) It is said, that where the Defendant justifies as Servant to J. S. and that the Land is the Freehold of J. S. it is a principal Challenge, that a Juror is within the Distress of J. S. for that the Title is to be tried. *Hutt.* 25. — But in this Case of an Ejectment it has been held, in the House of Lords, in the Case of *Helborn* ver. *Bannington* 1719. that the Lessor of Plaintiff, being a Peer, and no Knight returned, was no Cause of Challenge, because he did not appear to be Party to the Record. — And the S. P. was resolved *Mich. 9 Georg. 2.* between *Grimston*, Lessee of Lord Gower, and *Gardner*; *Et vide Skin.* 229. S. P.

108. Plaintiff, by ordering him in certain Cases to pay Costs, &c. but the better Opinion is, that it is no principal Cause of Challenge; that he not being Party to the Record, the Judges *ex officio* are not obliged to take Notice of him, and that to do it in this Case would tend to Delay, which the Courts always avoid.

The Array of a Panel was challenged *ore tenus*, because it was returned by the Sheriff two Days after he had received a Writ of Discharge; and it was said *per Cur.* that it could not be challenged for that Cause, because it would be a direct Averment against the Record, for it is returned by him as Sheriff, and the Return accepted; but by the Advice of the Court the Party made his Challenge to the Array, because it was favourably made and returned in Favour of the Party, &c. and Issue being joined thereupon, and all this Matter given in Evidence, the Court directed the Triers, that it was not duly made and returned, for it was without Warrant; whereupon the Array was quashed.

*Cro. Eliz.* 369.  
*Hore ver.*  
*Broom.*

But where a Challenge to the Array was taken, because the Sheriff who made the Return had continued in his Office for more than three Months, and not taken the Oaths, and subscribed the Declaration required by the Act 25 Car. 2. made for preventing the Dangers by Popish Recusants; and so his Office, by that Act, was void to all Intents and Purposes before he made his Return of the Jury; but the Challenge was disallowed by the Court, for he must be taken here as Sheriff *de facto*; and if such a Challenge should be allowed, no Trial could be had, but should be put off, unless the Party were ready to shew that the Sheriff had taken the Test.

2 Vent 58.  
in the Case  
of the Sheriff  
of Bucks.

The Plaintiff for his Expedition surmised that he was Servant to the Sheriff of the County where the Action was brought and triable, and prayed a *Venire fac.* to the Coroners, and the Defendant *non dedit*; whereupon Process was awarded to the Coroners; and after Trial, and Verdict for the Plaintiff, it was moved that this Process was misawarded, and a Mis-trial, for Process ought not to be awarded to the Coroners but where the Challenge is Principal; and here to say that he was Servant to the Sheriff, is no principal Challenge, but only to the Favour, wherefore, &c. but the Court held, for as much as if the Sheriff had returned this Panel, it had been a good Cause to quash the Array for Favour, (a) that the Plaintiff to avoid that Delay might well shew it, and have Process to the Coroners; and the rather, this being a (b) judicial and not an original Writ; and the Clerks said there were many Precedents accordingly.

*Cro. Eliz.* 581.  
*Cham ver.*  
*Matthew.*

(a) But *Cro.*  
*Jac.* 547. S.P.  
seems to have  
been adjudged  
*contra.*  
(b) *Vid. Plow.*  
74.

If the Challenge to the Array be found against the Party, he shall have his Challenge to the Polls; but neither Party shall take a Challenge to the Polls, which they might have had to the Array.

*Co. Lit.* 156 b.  
157 b.

## 2. Where Insufficiency and not being Liber Homo is a good Cause of Challenge to the Polls.

A Challenge to the Polls is, as has been observed, a Challenge to the particular Jurors, who, it seems, of old could not be challenged; for these by the feudal Law, as the *Pares Curtis*, were the Judges; and therein the Rule was *Partes qui Ordinariam Jurisdictionem habent recusari non possunt*; but tho' those Suitors, as Judges of the Court, could not be challenged, yet the *Pares*, when brought up by Writ, were subject to be challenged; and the Reason is, that there are several Qualifications required by the Writ, *viz.* that they be *Liberos & Legales Homines de vicineto* (of the Place laid in the Declaration) *quorum quilibet habeat decem Libras terrarum, tenementorum vel redditum per annum ad minus, per quos rei veritas*

*Fortes. de*  
*Land. Leg.*  
*Ang. cap.* 25.  
2 *Inst.* 27.



*tas melius sciri Poterit, & qui nec* (of the Plaintiff nor Defendant; *aliqua affinitate attingunt, ad faciend' quand' Jurat' Patrie inter partes Prædictæ.* These Qualifications were inserted, because this Manner of Trial was different from below; for there the Trial being by all the *Pares*, if there was a Majority amounting to twelve, the Cause was decided by such a Number as were necessary; but here, because they brought up but twelve, and they were all to be of one Mind, in order to make the Verdict, therefore it was necessary there should be several Qualifications mentioned in such Persons who are to give in the Verdict in that Cause; and if any of the Qualifications were wanting in any one, it was a sufficient Reason to reject such Person.

Co. Lit. 156. b.  
157. b. 172. b.  
7 Co. 18. in  
Calvin's Case.  
2 Rol. Abr.  
656.

The first Qualification is, that they should be *Liberi & Legales Homines*; hence it has been always clearly held, that Aliens, Minors or Villeins, cannot be Jurors.

Co. Lit. 6. b.  
155. b. 158. a.  
Cro. Car. 134.  
2 Bulf. 158.  
2 Rol. Abr.  
949.  
2 Lev. 263.  
Raym. 380.  
1 Hal. Hist.  
P. C. 303.  
2 Hawk. P. C.  
417. S.

Also Infamy is a good Cause of Challenge to a Juror; as that he is outlawed, or that he hath been adjudged to any Corporal Punishment whereby he becomes infamous, or that he hath been convicted of Treason or Felony, or Perjury or Conspiracy, or of Forgery on 5 *Eliz.* or attainted in an Attaint for giving a false Verdict; and it hath been holden, that such Exceptions are not solved by a Pardon; and it was anciently holden, that Excommunication was also a good Challenge, yet it seems that none of the above cited Challenges are principal ones, but only to the Favour, unless the Record of the Outlawry, Judgment or Conviction be produced, if it be a Record of another Court, or the Term, &c. be shewn, if it be a Record of the same Court.

Raym. 417.  
Attorn. Gen.  
ver. Blood &  
al'.  
1 Keb. 563.  
S. C.  
(a) Liberos for  
Liberos in the  
Venire a-  
mended after  
Verdict. Cro.  
Eliz. 618.

The *Venire facias* was *Probus & Legales Homines*; and it was objected, that it ought to have been (*a*) *Liberos & Legales Homines*, there being a Difference between *Probus*, *Liber* & *Legalis*; for that *Legalis* is he who is not outlawed, and against whom no Exception can be taken in this Behalf; that *Probus* is not taken Notice of in Law; and *Liber Homo* is not only one that hath Freehold Land, but that hath Freedom of Mind, and stands indifferent, no more inclining to the one than to the other; but it was adjudged that *Probus & Liberos* are of one Sense, and that the Statute of *Westminster* 2. which gives the *Venire*, does not tie the Writ to the very Words.

### 3. Where the Want of a Freehold, or competent Estate, is a good Cause of Challenge.

Raym. 485.  
1 Vent. 366.

It seems to be admitted by the Statute of 21 *E. 1. de his qui Ponendi sunt in Assisis*, and also by the Register, that at Common Law there was no Necessity that Jurors should have any Freehold as to Inquests before Justices in *Eyre*, or in Cities or Burghs; for it seems, that in Corporations the Freedom, and not the Freehold, made them *Liberos Homines*.

Keilw. 46.  
Cro. Eliz. 413.  
2 Hawk. P. C.  
415.  
2 Hal. Hist.  
P. C. 272.

Also it seems agreed, that the Common Law doth not require that a Juror should in any Case have a Freehold of any certain Value; and upon this Ground it hath been adjudged, that a Freehold worth but 20 s. or 5 s. or even 1 d. is still a sufficient Qualification for a Juror in such Cases as are not within the Statutes, which require a Freehold of a greater Value.

2 Hawk. P. C.  
415. and the  
Authorities  
there cited.  
State Trials,  
Vol 6. 58.  
Francis's  
Case, fol. 245.  
Ibid. Laver's  
Case.

Also by some Opinions it is holden, that the Common Law did not require that a Juror should in any Case have a Freehold; but this is not only contrary to what seems implied by the Books, which in saying that the Common Law did not require a Freehold of any certain Value, plainly suppose that it required some Freehold, but hath been also contradicted by many express Authorities; agreeably to which it seems to be settled at this Day, that the Want of a Freehold is a good Challenge

of



of a Juror in all Cases not otherwise provided for by Statute, and consequently in a Trial for High Treason in *London* as well as in any other County.

But it seems agreed, that wherever the Letter of the Common or Statute Law require that a Juror should have a Freehold, the Meaning is fully satisfied by his having the Use of a Freehold, and that it is not material whether he have it in his own or his Wife's Right, or whether it be absolute or upon Condition, or an Estate of Inheritance, or only for Term of one's own or another's Life, so that it be in the same County wherein the Suit is brought, and actually continue in the Juror till the Time when he is sworn.

But this Matter, as to the Freehold and Value of Jurors, has been regulated and settled by divers Statutes; to which Purpose, by the Statutes of *Westm. 2. cap. 38.* and *21 E. 1. de his qui Ponendi sunt in Assis*, it is enacted, ' That none shall be (a) put in Assises or Juries, except in Cities, Burghs, or Trading Towns, who have not Tenements to the yearly Value of 40 s.

that a Juror can neither be challenged by the Parties for being returned contrary to these Acts, nor alledge such Matter himself for his Discharge, but must take his Remedy by Action against the Sheriff, or by Writ of Privilege, for his Discharge *2 Inst. 448.*

By the *2 H. 5. cap. 3.* it is enacted, ' That no Person shall be admitted ' to pass in any Inquest upon Trial of the Death of a Man, nor in any ' Inquest betwixt Party or Party, in Plea Real or Plea Personal, whereof ' the Debt or the Damage declared amount to forty Marks, if the same ' Person have not Lands or Tenements of the yearly Value of 40 s. ' above all Charges of the same, so that it be challenged by the ' Party, &c.

It hath been (b) held, that this Statute extends as well to collateral Issues as to the general one, but (c) that it doth not extend to an Indictment or Information for a Crime not Capital.

It has been held, that a Peoffee to the Use of another, or one who has only a dry Remainder, are not qualified to be Jurors within the Meaning of those Statutes, because whatsoever the Value of the Lands may be, they have no Income from them.

By the *23 H. 8. cap. 13.* ' Every Natural-born Subject, who doth enjoy and use the Liberties and Privileges of any City, Borough or Town ' Corporate, where he dwells and makes his Abode, being worth in ' moveable Goods and Substance to the clear Value of 40 l. shall be admitted in Trial of Felonies in every Sessions and Gaol-Delivery to be ' holden in and for the Liberty of such City, &c. albeit he have no ' Freehold; but this Act shall not extend to any Knight or Esquire in ' such City, &c.

Special Provision is made by *11 H. 7. cap. 21.* and *4 H. 8. cap. 3.* for Jurors in *London* in Real and Personal Actions above the Value of forty Marks.

have 20 s. Freehold, and 1 l. 6 s. 8 d. Copyhold. — By the *27 Eliz. cap. 6.* the 40 s. by *2 H. 5. cap. 3.* was extended to 4 l.

By the *4 & 5 H. & M. cap. 24.* it is enacted, ' That all Jurors (other ' than Strangers upon Trials *per Medietatem Linguae*) who are to be returned for Trials of Issues joined in any of the Courts of King's Bench, ' Common Pleas or Exchequer, or before Justices of Assise or *Nisi Prius*, ' Oyer and Terminer, Gaol-Delivery, or General Quarter-Sessions of ' the Peace in any County of this Realm of *England*, shall every of ' them have in their own Name, or in Trust for them, within the same ' County, ten Pounds by the Year, at least, above Reprises, of Freehold or Copyhold Lands or Tenements, or of Lands or Tenements ' of

*Keilw. 46.*  
*p. 2. 92. pl. 5.*  
*Tyer 9. pl. 26.*  
*Co. Lit. 156. b.*  
*157. a. 272.*  
*Plow. 85. a.*  
*2 Rol. Abr.*  
*648.*

(a) In the Construction hereof it has been held,

(b) *Keilw. 92.*  
(c) *Cro. Eliz.*  
*415.*

*2 Rol. Abr.*  
*647.*  
*Keilw. 92.*  
*3 Mod. 149.*

By the *1 R. 3. cap. 4.* a Juror in the Torn was to

(a) But by the Common Law a Freehold in Ancient Demesne was not sufficient.  
*Co. Lit.* 156 b.

of (a) Ancient Demesne, or in Rents, or in all or any of the said Lands, Tenements or Rents in Fee-simple, Fee-tail, or for the Life of themselves, or some other Person; and that in every County in *Wales*, every such Juror shall have in the same County six Pounds by the Year, at least, in Manner aforesaid, above Reprises.

Provided that it shall be lawful to return any Person on a *Tales* in *England* who shall have 5 *l.* by the Year, or in *Wales* who shall have 3 *l.* by the Year, in Manner aforesaid.

*1 Vent.* 366.  
*Skin.* 91.

In this Statute, as also in the Statutes 27 *Eliz.* cap. 6. and 16 & 17 *Car.* 2. cap. 3. sect. 2. there is a Saving to all Cities, Boroughs and Towns Corporate, of their Ancient Usages; from whence it hath been settled, that Trials in those Places continue as before, or as prescribed by the 23 *H.* 8. cap. 13. which requires Jurors to be worth 40 *l.* in Goods, &c. lest there should be a Failure of Justice, it being generally impracticable to get a sufficient Number of such Freeholders as the Statutes require in Towns; but it hath been agreed, that for Trials in *London* for (b) High Treason, every Juror ought to have such Freehold or Copyhold as is required by 4 & 5 *W. & M.*

(b) *Stat. Tri.*  
*Vol. 6. fol* 58.  
*Franchia's*  
*Trial.*

By the 3 *Geo.* 2. cap. 25. sect. 18. it is enacted, ' That any Person or Persons having an Estate in Possession in Land, in their own Right, of the yearly Value of 20 *l.* or upwards, over and above the reserved Rent payable thereout, such Lands being held by Lease or Leases for the absolute Term of 500 Years, or more, or for 99 Years, or any other Term, determinable on one or more Life or Lives; the Names of every such Person or Persons shall and may, and are hereby directed and required to be inserted in the respective Lists, in order to their being inserted in the Freeholders Book; and the Persons appointed to make such Lists, are hereby directed to insert them accordingly; and such Leaseholder, or Leaseholders, shall and may be summoned or impanelled to serve on Juries, in like Manner as Freeholders may be summoned and impanelled, by Virtue of this or any other Act or Acts of Parliament for that Purpose, and be subject to the like Penalties for Non-appearance; any Law, &c.

And *Secl.* 19. it is further enacted, ' That the Sheriffs of the City of *London* for the Time being, shall not impanel or return any Person or Persons to try any Issue joined in any of his Majesty's Courts of King's Bench, Common Pleas and Exchequer, or to be or serve on any Jury at the Sessions of *Oyer and Terminer*, Gaol-Delivery, or Sessions of the Peace, to be had or held for the said City of *London*, who shall not be a Householder within the said City, and have Lands, Tenements, or Personal Estate, to the Value of 100 *l.* and the same Matter and Cause alledged by way of Challenge, and so found, shall be taken and admitted as a principal Challenge; and the Person or Persons so challenged shall and may be examined, on Oath, of the Truth of the said Matter.

And *Secl.* 20. it is further enacted, ' That the Sheriffs, or other Officers, to whom the Returning of Juries doth or shall belong, for any County, City, or Place respectively, shall not impanel or return any Person or Persons to serve on any Jury, for the Trial of any Capital Offence, who at the Time of such Return would not be qualified in such respective County, City, or Place, to serve as Jurors in Civil Causes for that Purpose; and the same Matter and Cause, alledged by way of Challenge, and so found, shall be admitted and taken as a principal Challenge; and the Person or Persons so challenged shall and may be examined, on Oath, of the Truth of the said Matter.

By the 4 *Geor.* 2. cap. 7. reciting, ' That whereas by the very frequent Occasions there are for Juries in the County of *Middlesex*, and by the

small Number of Freeholders that are in the said County the Sheriffs of the said County may be under Difficulties in procuring Juries ; for Remedy whereof it is Enacted, ‘ That all Leaseholders upon Leases, where the improved Rents or Value shall amount to fifty Pounds or upwards per Annum, over and above all Ground-Rents, or other Reservations, payable by Virtue of the said Leases, shall be liable and obliged to serve upon Juries, when they shall be legally summoned for that Purpose ; any Thing in this or any former Act to the contrary, &c.’

#### 4. Where the Jury's not being convened from a right Place is a good Cause of Challenge.

The Jury is regularly to come from that County in which the Matter is alledged to arise, and antiently from the Vicinity or very Hundred, pursuant to that Maxim, *Vicini Vicinorum Facta præsumuntur scire*, Persons living in the Neighbourhood being esteemed the most proper Judges of the Facts done within its Limits, as being most likely to be proved by Witnesses, and charged upon Persons with whose Integrity and Reputation they are best acquainted.

But if a Declaration contain Matters lying in two Counties that join, the Jury may come out of both Counties, because the Sheriffs may be supposed to meet on the Bounds of each County, and impanel the *Pares* there ; but if the Counties cannot join, and consequently the Sheriffs cannot meet each other in order to impanel, as if the Issue were, whether a Road from London to York, and from York to London, &c. this may be tried in either County.

So it is said, that if a Man forge a Deed in one County, and publish it in another, the Trial shall be by a Jury of both Counties ; for that the Writing, as well as the Publication of that Writing, is material.

A Party Jury of the Counties of Bedford and Hereford came to the Bar, and first was sworn one of one County, and another of the other County, and so on in Order, till one of the County of Bedford was challenged, and then the Court proceeded to the next of that County till one was sworn, and so of the other County, until six of each County were sworn ; for if there should be six sworn of one County first, and six of the other afterwards, it were disorderly and (a) erroneous.

be tried by two Counties, and one full Inquest appear of one County, but the Inquest remain for Default of Jurors of the other County, a *Tales* shall be awarded to the County where the Default is, not to the other. *Trials per Pais* 69.

If the Jury did not come from the Hundred, it was a good Cause of Challenge to the Array, and it seems that originally they were (b) all obliged to be of the Hundred ; this was changed by Statute, and they were settled first at (c) six, afterwards at (d) two, from the Difficulty of getting Hundredors, and the Partiality they found amongst them, Neighbours having generally a particular Attachment to one Party more than the other.

there ought at Common Law to be four Hundredors returned, the Statutes requiring six, and two Hundredors, not extending to Treason or Felony. — But my Lord Hale says, that he never knew any Challenge for Default of Hundredors upon a Trial of an Indictment for Felony or Treason. 2 Hal. Hist. P. C. 272. (c) By 35 H. 8. cap. 6. (d) By 27 Eliz. cap. 6.

And as the Jury was to come from the Hundred, it was necessary to lay the *Venue* from some known Place where the Fact is supposed to be done ; as in a Vill, Castle, Manor, Forest ; because if it was not a known Place, there could be no proper Direction to the Sheriff who were the *Pares* that were to try the Fact there: It has been held, that a Street

*Vide 2 Hawk. P. C. 182-3. 405. Vide Tit. Affi- ons Local and Transitory, 5 Mod. 405.*

*2 Rol. Abr. 601, 603.*

*5 Mod. 223.*

*Hob. 330. 2 Brownl. 272.*

(a) If the Issue be to that upon Indictments of Treason or Felonies, the Prisoner pleading Not guilty,

For this *vide 2 Hawk. P. C. 182.*

or Lane is no proper Place for a *Venue*, because it is not supposed to be sufficiently known to the Sheriff in what Hundred it is; but a Street in a Parish is a proper *Venue*, because it is sufficiently known in what Hundred the Parish is.

*Co. Lit.* 157. *a.* If the Lord of the Hundred be a Party, then it is sufficient they should come from the next Hundred.

2 *Roll. Abr.* 596. So if an Action be brought on the Statute of *Winton*, there, from the apparent Partiality, the Jury must come from the next Hundred where the Robbery was committed; for the proper *Pares* for the Trial of every

(*a*) It is said, Fact are the nearest (*a*) impartial Men to the Place where the Fact was done. that no Inhabitant of a

County ought to be a Juror for the Trial of an Issue, whether the County be bound to repair a Bridge or not. 6 *Mod.* 307.

*Co. Lit.* 158. *a.* He that takes such a Challenge must shew in what Hundred the *Vifne* lies, and he must take it before so many are sworn as will serve for the Hundred, and he that is challenged for the Hundred shall not be drawn absolutely, but shall remain *propter Hundredum*.

*Co. Lit.* 157. *a.* If a Person dwell in the Hundred, whether he have any Freehold there or not, or if he had a Freehold there when he was returned, and fell it before he appear, he is a good Hundredor; but if he fell as his Freehold, he may be challenged absolutely.

*Co. Lit.* 157. *a.* If divers Hundreds are in a Leet, or if the Cause of Action arose in divers Hundreds, the Hundredors may come from any of them.

And now by the 4 & 5 *Annæ*, cap. 16. no Hundredors are required, except in Prosecutions criminal, and on penal Statutes, because in other Cases the *Venire* shall be *de Corpore Comitatus*.

### 5. Where Partiality in the Juror is a good Cause of Challenge; and therein where it shall be said a principal Cause of Challenge, or to the Favour.

*Co. Lit.* 158. *a.* Jurors ought to be *omni Exceptione Majores*, and by the Words of the Writ such *per quos Rei Veritas melius sciri poterit*, & *qui nec* the Plaintiff, *nec* the Defendant, *aliqua Affinitate attingunt*; which Words contain all Causes of Objection from Impartiality or Incapacity, Consanguinity and Affinity; therefore if the Juror be under the Power of either Party, as if Counsel, Servant of the Robes, or Tenant, they are expressly within the Intent of the Writ; so if he has declared his Opinion touching the Matter, or has been chosen Arbitrator by one Side, or is a Parishioner of the Parish whereof the other Party is Parson, and the Right of the Church comes in Question, or has done any Act by which it appears that he cannot be impartial, as if he has eat or drank at the Expence of either Party, or taken Money to give his Verdict, these are principal Causes of Challenge.

*Co. Lit.* 158. *a.* But tho' a Juror is not under the Distress of either Side, or has not given apparent Marks of Partiality, yet there may be sufficient Reason to suspect he may be more favourable to one Side than the other; and this is a Challenge to the Favour; as if the Juror's Son has married the Plaintiff's Daughter; because this is not contained within the Words of the Writ, and therefore no principal Cause of Challenge, but only to the Favour, because such Juror is not within the Power of the Party; and in these Inducements to Suspicion of Favour the Question is, whether the Jurymen is indifferent as he stands unsworn; for a Jurymen ought to be perfectly impartial to either Side; for otherwise his Affection will give Weight to the Evidence of one Party, and an honest but weak Man may be so much biased, as to think he goes by his Evidence, when his

Affections

Affections add Weight to the Evidence ; now since the Writ expects those by whom the Truth may be best known, it excludes all those who are apparently partial without any Trial, because they are not under the Qualifications in the Writ, since the Truth cannot be known by them, but where the Partiality is not apparent, but only suspicious, then the Juror is to be tried whether favourable or not, that is, whether he comes within the Description of the Writ ; and if the Triers think he does, then he is to be set aside.

If an Action be brought (a) by a Corporation, and the Juror be of Kin Co. Lit. 157. b. to any Member, it is a principal Challenge. (a) Chal-

allowed where the Issue concerns a City or Corporation, and they are to make the Panel, or where any of their Body be to go on the Jury, or any of Kin unto them, tho' the Body Corporate be not directly Party to the Suit. *Hob. 87. 1 Sand. 344.* — So where a Dean and Chapter bringing an Affise, a Juror was challenged because he was Brother to one of the Prebendaries. *Hob. 87.* enges are

If a Juror be challenged for being of Kin to one Party, it is no Coun- Co. Lit. 157. ter-Plea that he is of Kin also to the other ; for the *Venire* commands the Sheriff to return those who are of Kin to neither.

An Arbitrator chosen by both Parties, whether he have treated of the Co. Lit. 158. Matter or not, or chosen by one Party, if he has never treated thereof, 9 Co. 71. a. or a Commissioner chosen by one Party for Examination of Witneses, and appointed under the Great Seal, cannot be challenged principally ; but for such Cause one may be challenged for Favour.

If a Juror be Cousin to him in Reversion, it is only a Challenge to Co. Lit. 158. the Favour, because he in Reversion is not Party to the Record ; but it would be a principal Challenge if he be Party by Voucher, Aid, or Receipt.

It is a principal Cause of Challenge, that the Juror is a Witnefs named Co. Lit. 157. in the Deed, or hath formerly given a Verdict on the same Cause, whe- Cr. Eliz. 33. ther between the same Parties, or others ; but this is only a Challenge to pl. 13 the Favour if the Record be of another Court, and not shewn forth ; but if it be of the same Court, it is sufficient to shew the Day and the Term.

By the 25 E. 3. cap. 3. it is Enacted, That no Indictor shall be put on 1 Sid. 244. Inquests upon Deliverance of the Indictes of Felony or Trespass, if he 2 Hawk. P. C. be challenged for the same Cause by him who is so indicted ; and this 418. hath been adjudged a good Exception not only on the Trial of the same Indictment, but also on the Trial of another Indictment or Action, wherein the Matter found in such former Indictment is either directly in Issue, or happens to be material.

It is a good Cause of Challenge, that a Juror hath a Claim to the For- 2 Hawk. P. C. feiture to be caused by the Conviction, or that he hath declared his Opi- 418. nion beforehand ; yet this hath been adjudged to be no Cause of Chal- lence where it has appeared to proceed not from any Ill Will, but from a Knowledge of the Cause.

But it is no good Cause of Challenge, that the Juror has found others 2 Hawk. P. C. guilty on the same Indictment ; for the Indictment in Judgment of Law 418. is several against each Defendant, and every one must be convicted by particular Evidence against himself.

It hath been ruled to be a good Challenge on the Part of the King, 2 Hawk. P. C. that the Juror hath given his Dogs the Names of the King's Witneses. 418.

Tho' the King may take either a principal Challenge, or to the Favour, 2 Hawk. P. C. yet it is said that the Subject cannot take a Challenge to the Favour 418. against the King, because every one is bound by his Allegiance to favour the King : It is said to be a principal Challenge against the King, that the Jury is of his Livery, or his immediate Tenant.

In an Information of Forgery the Defendant challenged one of the 1 Vent 305. Jury, for that the Prosecutor had been lately entertained at his House ; which seems and this was admitted to the Favour, tho' against the King. cent. to Cr. Eliz. 665.

- Allen* 29. A Juror was challenged because he was Tenant of a Manor to which there was a Court-Leet, of which the Plaintiff was Steward; and it was held that this was no principal Challenge, but only to the Favour.
- 1 *Salk.* 152. Upon a Trial at Bar the Question was, whether the Fair called *Waybill* Fair should be kept at *Waybill*, or at *Anderry*, and one of the Jury was challenged because he lived at *Waybill*; and the Objection was, that the Fair occasioned Manure to improve the Ground; on the other Side it was considered, that the Fair occasioned Trampling of the Grass; and this being a Challenge to the Favour, two of the Jurors were sworn to be Triers; and their Oath was, *You shall well and truly try whether A. (the Jurymen challenged,) stand indifferent between the Parties to this Issue.*
- Dyer* 45. a. Either Party labouring a Juror to appear, is no Cause of Challenge at  
*pl.* 27. all, but a lawful Act.

## 6. Where the Degree and Quality of the Juror is a good Cause of Challenge; and herein who are exempt from serving on Juries.

- Vide Tit. Privilege.* It seems to be agreed, that all Persons, whose Attendance is required in the superior Courts of Justice, such as Serjeants at Law, Counsellors, Attornies, and other Officers of the Courts, are so far privileged as not to be summoned on Juries; also Peers of the Realm are excluded, as not being within the Qualifications mentioned in the Writ, viz. *Ad faciendum quand' Jurat' Patrie*; for they are not *Pares Patrie*, but *Pares* of an higher Rank; and therefore it is clearly (a) agreed, that if a Peer be returned on a Jury, and bring a Writ of Privilege, he shall be discharged; also it seems to be the (b) better Opinion, that even without such a Writ he may challenge himself, or be challenged by either Party.
- (a) *Dyer* 314.  
*Moor* 167.  
 (b) 2 *Roll. Abr.* 646.  
*Co. Lit.* 157.  
 9 *Co.* 49.  
 6 *Co.* 53.  
 1 *Jones* 153.
- Pafcb.* 17.  
*Car.* 2. Sir *Edw. Bainton's* Case. But Members of the House of Commons seem not to have any Privilege to be exempt from serving on Juries; yet in the Case of Sir *Edward Bainton*, who being returned on a Jury in *R. R.* the Court would not force him to be sworn against his Will, he being a Parliament-Man, and the Parliament then sitting.
- 4 *Inst.* 269. Tenants in Antient Demesne are not to be impanelled to appear at  
 — And it is said, that *Westminster*, or elsewhere in any other Court, upon any Inquest or Trial of any Cause.
- they may have a Writ *De non ponendis in Assisis & Juratis* against the Sheriff, or any one who hath Return of Writs; and if notwithstanding such Writ the Sheriff will return them, they may have an Attachment. 1 *Co.* 105. — A Juror surmised at the Bar, that he was a Tenant in Antient Demesne, and had his Charter in his Hand, and prayed to be exempted from the Jury, and discharged; but the Court did not regard it, but caused him to be sworn; and it was held, that his proper Remedy was against the Sheriff, and that if he had made Default and lost Issues, he might shew his Charter in the Exchequer upon the Amereement estreated, and there he should be discharged. 1 *Leon.* 207. — By the Common Law a Freehold in Antient Demesne was not a sufficient Qualification for a Juror. 9 *H.* 7. 1. *pl.* 2. *Ero. Challenge* 157. *Co. Lit.* 156. b. But it is made so by 4 & 5 *W.* 3.

1 *Sid.* 127,  
 243  
*Raym.* 115.  
*Hard.* 389,  
 &c.

It seems agreed, that the King by his Grant or Charter may exempt one, two, or more from serving on Juries; but he cannot exempt a whole County or Hundred, because in such Case there would be a Failure of Justice; also it seems that such Exemption does not extend to Jurors returned into the King's Bench, unless there be express Words including that Court; also by the better Opinion, the Sheriff cannot return such Privilege of Exemption, but each particular Juror must come in and demand it.

2 *Inst.* 446.  
*N. E.* 105

By the Statute of *Westminster* 2. cap. 38. it is expressly provided, That neither Old Men above the Age of seventy Years, nor Persons perpetually sick, nor those who are infirm at the Time of their Summons, nor those who

who do not reside in the County, shall be put in Juries, or in the lesser Assizes: In the Construction of which it hath been held, that tho' such Persons may sue out a Writ of Privilege for their Discharge, grounded on this Statute, yet if they be actually returned, and appear, they can neither be challenged by the Party, nor excuse themselves from not serving, if there be not a sufficient Number without them.

Clerks or Persons in (a) Holy Orders, Coroners, Ministers of the Forest, Officers of the Army, and other Officers and Ministers belonging to the King, are exempt from serving on Juries.

*Dalt. Sher.*  
121.  
*Trials per*  
*Pais* 86.

(a) Where before the Return the Party became a Minister of the Church, and at the Day of the Return he appeared, and prayed to be discharged, according to the Privilege of those of the Ministry: but the Court would not allow of his Prayer, because that at the Time of the Panel made he was a Layman. 4 *Leon.* 190. *Beecher's Case.*

By the 6 *H. 3. cap. 4.* ' Every Person using and exercising the Art of an Apothecary in the City of *London*, or within seven Miles thereof, being free of the Society of Apothecaries in the said City, and who shall have been duly examined and approved, &c. for so long Time as he shall exercise the said Mystery, and no longer, shall be exempted from serving on any Jury or Inquest; and other Persons exercising the said Art of an Apothecary in any other Parts of this Kingdom, who have served as Apprentices seven Years, according to the Statute 5 *Eliz.* shall likewise be exempted from serving on Juries for so long Time as they shall use and exercise the said Art, unless such Person voluntarily consent to serve.'

By the 7 & 8 *H. 3. cap. 21.* all registered Seamen are exempted from serving on Juries.

By the 7 & 8 *H. 3. cap. 34.* it is Enacted, that no Quaker, or reputed Quaker, shall serve on Juries.

## 7. Where from the Quality of either Party it is a good Cause of Challenge, that a Knight is not returned.

Here we must observe, that if a Peer be impleaded by a Commoner, yet such Case shall not be tried by Peers, but by a Jury of the Country; for tho' the Peers are the proper *Pares* to a Lord of Parliament in (b) Capital Matters, where the Life and Nobility of a Peer is concerned, yet in Matter of Property the Trial of Facts is not by them, but by the Inhabitants of those Counties where the Facts arise, since such Peers living thro' the whole Kingdom, could not be generally cognisant of Facts arising in several Counties, as the Inhabitants themselves where they are done; but this Want of having Noblemen for their Jury was compensated as much as possible, by returning Persons of the best Quality.

(b) In which Case a Peer cannot challenge any of his Peers, because the whole Peers sit upon him, who are his proper Judges.  
*Moor* 621.  
*Co Lit.* 156.  
*Co Lit.* 156. a.  
6 *Co.* 53.  
(c) That a Bishop being indicted for a Trespass, a Knight ought to be returned.

And therefore if a Peer of the Realm or Lord of Parliament be Demandant or Plaintiff, Tenant or Defendant, there must be a Knight returned of his Jury, be he Lord (c) Spiritual or Temporal, or else the Array may be quashed; but (d) if he be returned, altho' he appear not, yet the Jury may be taken of the Residue; and if others be joined with the Lord of Parliament, yet if there be no Knight returned, the Array shall be quashed against all.

1 *Leon.* 5. (d) That if a Knight be but returned on a Jury when a Nobleman is concerned, it is not material whether he appear and give his Verdict or no. 1 *Mod.* 226.

But tho' a Peer may be concerned in the Event of a Cause, as if he have the Reversion upon an Estate for Life, and an Action is brought against the Tenant for Life, yet it is no Cause of Challenge if a Knight be not returned.

<sup>1</sup> *Rol. Abr.* 37. Upon an Issue between a Peer of the Realm and another, if the *Venire* between the Earl of Worcester and Fraile. *Facias* be *quod summoheat* 12 *Liberos & Legales Homines*, and does not say *tam Milites quam alios*, as the Register is, (a) tho' the Peer of the Realm may assign it for Error, yet the other cannot, because it does not concern him. (a) Yet this being the Error of the Court, it is said it may be assigned by either. <sup>2</sup> *Sand.* 258. — And it is said, that the other Party may take Advantage of a Knight's not being returned, as well as the Peer. <sup>2</sup> *Show.* 423.

<sup>1</sup> *Mod.* 226. If there be no other Knights in the County, a Serjeant at Law that is  
<sup>2</sup> *Mod.* 182. a Knight may be returned, and his Privilege shall not excuse him.  
Countess of Northumberland's Case.

*Skin.* 229. A Challenge to the Array *quia nullo Milite in eodem Panello existente*  
Countess of Conway's Case. *returnat*, is not good; but it must be averred, that such a one and such  
<sup>2</sup> *Show.* 422-3. a one returned upon the Panel are not Knights, and then it may be tried.

*Mich.* 9 *Georg.* It hath been settled, that the Lessor of the Plaintiff being a Noble-  
<sup>2</sup> in *B. R.* man, it was no Cause of Challenge to the Array, that a Knight was  
in the Case not returned, tho' there be an Averment that the Ejectment is brought  
of *Grinson* and *Gardner*; to try the Peer's Title; because the Lessor does not appear as a Party  
& vide *supra* to the Record.  
of Chal-  
lenges to the Array.

*Co. Lit.* 156. a. Also in an Attaint there ought to be a Knight returned of the Jury,  
<sup>1</sup> *Leon.* 305. and in a Writ of Right four Knights were to be returned.  
*Dalf.* 68.  
*Fenk.* 11, 89.

### 8. Of Trials per Medietatem Linguae, where an Alien is Party.

By the 28 *E. 3. cap. 13. sect. 2.* it is Enacted, ' That in all manner  
' of Inquests and Proofs which be to be taken or made against Aliens  
' and Denizens, be they Merchants or others, as well before the Mayor  
' of the Staple as before any other Justices or Ministers, altho' the King  
' be Party, the one Half of the Inquest or Proof shall be Denizens, and  
' the other Half Aliens, if so many Aliens and Foreigners be in the  
' Town or Place where such Inquest or Proof is to be taken, that be not  
' Parties, nor with the Parties in Contracts, Pleas, or other Quarrels,  
' whereof such Inquests or Proofs ought to be taken; and if there be not  
' so many Aliens, then shall be put in such Inquests or Proofs as many  
' Aliens as shall be found in the same Towns or Places, which be not  
' thereto Parties, nor with the Parties as aforesaid, and the Remnant  
' of Denizens which be good Men, and not suspicious to the one Party  
' nor to the other.'

<sup>2</sup> *Hawk P.C.* In the Construction of this Statute it hath been agreed, that the Sta-  
419. tutes which require that the Jurors shall have Tenements to a certain  
(b) And Value, do not (b) extend to Aliens returned by Virtue of this Statute,  
therefore it hath been adjudged, but only to Denizens, who are to have Lands or Tenements to the same  
adjudged, Value as in other Cases.  
*quorum qui-*  
*libet habeat quatuor Libratas terre, &c.* shall be applied to the *English* only. *Cro. Eliz.* 272, 841.

<sup>2</sup> *Hawk P.C.* Also it is settled, that those on the Grand Jury, or who find an In-  
419. dictment against an Alien, need not be Aliens.

<sup>2</sup> *Hawk P.C.* Neither is it necessary that the Petit Jury in an Action or Appeal by  
419. an Alien against an Alien, should be Half Aliens, and Half *English*; for  
the Words are, *All Inquests, &c. between Aliens and Denizens.*



If an Alien neglect to pray the Benefit of the Statute (a) before the Return of a common *Venire*, he can neither except to such *Venire*, nor pray a subsequent Process *de Medietate Lingue*. Dyer 28. pl. 180. 145. pl. 60. 304. pl. 51. 357. pl. 45.

2 *Rel. Abr.* 643. *Cro. Eliz.* 869. (a) If upon an Indictment of Felony against an Alien he plead Not guilty, and a common Jury be returned, if he doth not surmise his being an Alien, before any of the Jury sworn, he hath lost that Advantage; but if he alledge that he is an Alien, he may challenge the Array for that Cause, and thereupon a new Precept or *Venire* shall issue, or an Award be made of a Jury *de Medietate Lingue*; but it is more proper for him to surmise it upon his Plea pleaded, and thereupon to pray it. 2 *Hal. Hist. P. C.* 272.

The Return of a *Venire de Medietate Lingue* ought to (b) shew which of the Jurors are Denizens, and which Aliens, and a full Number of each must appear to be sworn; if there be not enow to make up a full Number of six Denizens and six Aliens, the Justices of *Nisi Prius* (c) may, by Construction of the Statutes which give a *Tales de Circumstantibus*, award such a *Tales* for so many Denizens and Aliens as shall be wanting. Cro. Eliz. 818. (b) But this being only a Misreturn, is helped by Verdict in Cases within the Statutes of Jeofail.

*Cro. Eliz.* 84. (c) 10 Co. 104. *Cro. Eliz.* 305.

If on a *Venire* of Half Denizens and Half Aliens the Sheriff return twelve all Aliens, and among them some who in Truth are not such, the Party shall not be concluded by such Return, but may notwithstanding challenge the Array for Want of a sufficient Number of Aliens. 2 *Rel. Abr.* 643

Some of the Precedents of Awards of *Venire's de Medietate Lingue* mention, that the Aliens to be returned shall be of the same Country whereof the Party alledges himself; but others direct generally, that one Half of the Jury shall be Aliens, without specifying any particular Country; and these last seem most agreeable to the Statute, and to be confirmed by the late Practice, and greater Number of Authorities. 2 *Hawk. P. C.* 420.

It hath been held, that Denizens so made by Letters Patent are Denizens within the Intent of this Statute; also that before the Union of England and Scotland under James I. a Scot was not an Alien within the Meaning of this Statute. 2 *Hawk. P. C.* 420.

It hath been held, that as to Treason this Statute is repealed by 1 & 2 *Ph. & Mar. cap. 10.* which requires that Trials of Treason shall be according to the Common Law. 2 *Hal. Hist. P. C.* 271. 2 *Hawk. P. C.* 420.

By the 2 & 3 *Ph. & Mar.* and 4 & 5 *Eliz.* Persons made Felons, as Egyptians, are to be tried by the Inhabitants of the County or Place where they shall be taken, and not *per Medietatem Lingue*.

## 9. Of peremptory Challenges.

By the Common Law, in all Capital Cases (in which only peremptory Challenges were allowed,) the Prisoner could challenge thirty-five peremptorily; and this was because the Trial by the Petty Jury came instead of the Ordeal, and the Petty Jury of twelve being after the Manner of the Canonical Purgation, and because the whole *Pares* were not on his Jury, but only a select Number was chosen by the Criminal himself, as was usual among the Canonists, therefore they took a middle Way, and gave the Defendant Liberty to challenge peremptorily any Number under three Juries, four Juries being as many as generally appeared, to make the total *Pares* of the County. Lamb. 4 cap. 14.

This Kind of Challenge, as has been observed, was allowable by the Common Law in all Capital Cases, both upon Indictments and Appeals, and also in Misprision of High Treason; but it was Enacted by 33 H. 8. cap. 23. sect. 3. That it should not be allowed in any Cases of High Treason, nor Misprision of High Treason; which Statute being repealed by 1 *Ph. & Mar. cap. 10.* the ancient Course of the Common Law, as to Trials of Treason, 2 *Hal. Hist. P. C.* 268. 2 *Hawk. P. C.* 413.

is restored, and consequently such Challenge revived; but it is made a Doubt, whether by any Statute it is revived in case of Misprision of Treason, the Statute 1 *Pb. & Ma.* not extending, as it is said, to Misprision of High Treason.

<sup>2 Hal. Hist. P. C. 267.</sup> It is enacted by 22 *H. 8. cap. 14. sect. 7.* made perpetual by 32 *H. 8. cap.* That no Person arraigned for any Petit Treason, Murder or Felony, be admitted to any peremptory Challenge above the Number of twenty; but it has been held, that 1 & 2 *Pb. & Mar.* which restores the Course of the Common Law as to Trials of Treason, has revived the old Challenge of Thirty-five in Trials of Petit Treason; and therefore it is agreed, that at this Day, in Cases of High Treason and Petit Treason, the Prisoner may challenge Thirty-five peremptorily, and twenty in all other Capital Offences.

<sup>2 Hal. Hist. 267.</sup> This peremptory Challenge seems, by the better Opinion, to be only allowable when the Prisoner pleads the General Issue; therefore by the Common Law, if a Man were outlawed of Felony or Treason, and brought a Writ of Error upon the Outlawry, and assigned some Error in Fact, whereupon Issue was joined, he could not challenge peremptorily; the like Law if he had pleaded any foreign Plea in Bar or in Abatement, which went not to the Trial of the Felony, but of some collateral Matter only.

<sup>2 Hal. Hist. P. C. 268.</sup> There seems to be some Diversity of Opinions in case of a Prisoner's Challenging peremptorily more than he is allowed by Law; and herein my Lord *Hale* lays down the Law to be, that at Common Law if the Prisoner peremptorily challenged above Thirty-five Persons, and insisted upon it, and would not leave his Challenge, then in case of an Indictment of High Treason it amounted to *Nilil dicit*, and Judgment of Death should be given against him; but in case of Petit Treason, or Felony, the Prisoner anciently was put to *Peine fort & dure*, as declining the Trial the Law appointed; the Consequence whereof was only the Forfeiture of his Goods, but it amounted to no Attainder, and consequently no Escheat of his Lands; and thus, says he, the Practice was until the Beginning of the Reign of *H. 7.* but afterwards, by the Advice of all the Judges of both Benches, it was resolved, that the Party so peremptorily challenging above Thirty-five, should have Judgment of Death, and that it amounted to an Attainder; for having pleaded to the Felony, and put himself upon the Country, here could be no standing Mute; and therefore the Judges resolved on this Course, as most consonant to Law, to be practised in all Circuits; but for all this, adds he, the better Opinion of later Times, as well as of former, is, that the Judgment in the Case of such a peremptory Challenge of above Thirty-five at the Common Law, in case of Felony, was not an Attainder, but only Penance, to which the Party was awarded without having any Jury impanelled.

<sup>2 Hal. Hist. P. C. 296, 270.</sup> There seems also some Diversity of Opinions, as to what is to be done with a Prisoner who, since the Statute of 22 *H. 8.* challenges above twenty in Felony; and herein the better Opinion seems to be, that he shall neither forfeit his Goods, nor have Judgment of Death, nor of *Peine fort & dure*, but shall only be over-ruled as to his Challenges, so far as they exceed twenty, and put upon his Trial; and herewith agrees my Lord *Hale*, and that, he says, for two Reasons; 1. Because the Statute hath made no Provision to attain the Felon, if he challenge above the Number of twenty. 2. Because the Words of the Statute of 22 *H. 8.* are, *That he be not admitted to challenge above the Number of twenty*; so that if he challenge above twenty peremptorily, his Challenge shall only be disallowed.

<sup>2 Hal. Hist. P. C. 265.</sup> If twenty Men are indicted for the same Offence, tho' by one Indictment, yet every Prisoner is allowed his peremptory Challenge; and if there

there be but one *Venire fac.* awarded to try them, the Persons challenged by any one shall be withdrawn against them all.

If *A.* be indicted and plead Not guilty, the Jury appears, he chal- <sup>2 Hal. Hist. P. C. 270.</sup> lengeth six of the Jury for Cause, and the Causes found insufficient, and the six are sworn, and the Rest of the Jury challenged off, whereby the Inquest remains *pro defectu Juratorum*; a *Tales* granted, and the Jury appear, the Prisoner may challenge peremptorily any of the six that were before challenged, for Cause allowed and sworn, for it is possible a new Cause of Challenge may intervene after the former Swearing; but if a Man challenge him for Cause, he must shew a Cause happened after the former Swearing.

But if the Prisoner, upon the first Panel, had challenged, for In- <sup>2 Hal. Hist. P. C. 270.</sup> stance, fifteen peremptorily, and then the Jury remains for Default of Jurors, and a *Disfringas* with a forty *Tales* is granted, he shall challenge peremptorily no more than will fill up his Number, *viz.* in case of Felony, at this Day, five more, and in case of Treason, or Petit Treason, twenty more, to make up his full Number of twenty peremptory Challenges in the first Case, and Thirty-five in the last.

### 10. Of Challenges by the King.

The King, or any one on his Behalf, may, on sufficient Cause, chal- <sup>Co. Lit. 156.</sup> lenge either the Array, or the Polls, in the same Manner as a private <sup>2 Inst. 431.</sup> Person may; also by the Common Law, the King, without assigning <sup>2 Hal. Hist. P. C. 271.</sup> any Reason, but barely alledging *quod non sunt boni pro Rege*, might have challenged peremptorily as many as he thought proper.

But this is remedied by 33 *E. 1.* commonly called *Ordinatio de Inquisitionibus*, which enacteth as follows; ‘Of Inquests to be taken before any of the Justices, and wherein our Lord the King is Party, howsoever it be, it is agreed and ordained by the King and all his Counsel, that from henceforth, notwithstanding it be alledged by them that sue for the King, that the Jurors of those Inquests, or some of them, be not indifferent for the King, yet such Inquests shall not remain untaken for that Cause; but if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be inquired of according to the Custom of the Court.

In the Construction of this Statute it hath been clearly settled, that <sup>Moor 595.</sup> the Words thereof being general, it extends to all Causes, as well Cri- <sup>Co. Lit. 159;</sup> minal as Civil, whereto the King is Party.

It hath also been agreed, and is now the established Practice of the <sup>Co. Lit. 156.</sup> Courts, that if the King challenge a Juror before the Panel is perused, <sup>1 Vent. 309.</sup> he needs not shew any Cause of his Challenge till the whole Panel be <sup>Raym 473.</sup> gone thro’, and it appear that there will not be a full Jury without the <sup>Skin. 82.</sup> Person so challenged; and if the Defendant, in order to oblige the King <sup>2 Hal. Hist. 271.</sup> to shew Cause presently, challenge *touts paravaile*, yet it hath been adjudged, that the Defendant shall be first put to shew all his Causes of Challenge before the King need to shew any.

### 11. At what Time a Challenge is to be taken.

It is laid down as a Rule, that there can be no Challenge either to the <sup>Hob. 235.</sup> Array, or Polls, before a full Jury appears; and therefore in a Case <sup>Vicars ver. Langham.</sup> where the Plaintiff, after he had prayed a *Tales*, challenged the Array thereof for Partiality in the Sheriff; tho’ it was objected, that this being by his own Desire; he was afterwards estopped to take any Exceptions to

the Sheriff; yet the Challenge was allowed good, and the *Venire* directed to the Sheriffs; for if he had not prayed a *Tales*, there could not have been a full Jury, and then there could be no Challenges.

Also it is laid down as a Rule, that no Juror can be challenged without Consent after he hath been sworn, either in a Criminal or Civil Case, or either at the Suit of the King or Subject, whether on the same Day, or, according to the better Opinion, on a former on the same Trial, unless it be for some Cause which happened since he was sworn.

*Co. Lit.* 158. a.  
*Felw.* 23.  
*Cro. Car.* 291.  
*Hib.* 235.  
*2 Rol. Abr.*  
658.  
*Jenk.* 310. 2 *Brownl.* 275. 2 *Hal. H. ft. P. C.* 274.

*Co. Lit.* 158. a. He who hath several Causes of Challenge against a Juror must take them all at once.

*Co. Lit.* 158. a. If a Juror be challenged by one Party and found indifferent, the other Party may challenge him afterwards.

*Co. Lit.* 158. a. In case of Treason, or Felony, if the Prisoner challenge a Juror for Cause which is held insufficient, he may afterwards challenge him peremptorily.

*Co. Lit.* 158. a. A Challenge for the Hundred must be taken before so many be sworn as will serve for Hundredors, or else the Party loseth the Advantage thereof.

*Co. Lit.* 158. a. After a Challenge to the Array, the Party may challenge the Polls; but after a Challenge to the Polls, there can be no Challenge to the Array.

## 12. How such Challenge is to be tried.

*Co. Lit.* 155.  
157. b. Here we must take Notice, that a principal Cause of Challenge being grounded on such a manifest Presumption of Partiality, that if it be found true, it unquestionably sets aside the Array, or the Juror, without any other Trial than its being made out to the Satisfaction of the Court, before which the Panel is returned; but a Challenge to the Favour, where the Partiality is not apparent, must be left to the Discretion of the Triers.

*2 Rol. Rep.*  
363.  
*Co. Lit.* 158.  
*2 Hal. H. ft.*  
*P. C.* 275. If the Array be challenged, it lies in the Discretion of the Court how it shall be tried; sometimes it is done by two Attornies, sometimes by two Coroners, and sometimes by two of the Jury; with this Difference, that if the Challenge be for Kindred in the Sheriff, it is most fit to be tried by two of the Jurors returned; if the Challenge found in Favour of Partiality, then by any other two assigned thereunto by the Court.

*Co. Lit.* 158.  
*2 Hal. H. ft.*  
*P. C.* 275. As to a Challenge to the Polls, if a Juror be challenged before any Juror sworn, two Triers shall be appointed by the Court; and if he be found indifferent, and sworn, he and the two Triers shall try the next Challenge; and if he be tried, and found indifferent, then the two first Triers shall be discharged, and the two Jurors tried and found indifferent shall try the Rest.

*2 Hal. H. ft.*  
*P. C.* 275. If the Plaintiff challenge ten, and the Prisoner one, then he that remains shall have added to him one chosen by the Plaintiff and another by the Prisoner, and they three shall try the Challenge; if six be sworn, and the Rest challenged, the Court may assign any two of the six sworn to try the Challenges.

*Co. Lit.* 158. The Triers cannot exceed two, unless it be by Consent; which was taken up in Imitation of the Trial of the Summons of the Party, which

(a) And his was by two Persons; this being, (a) whether such a Juror, as was described  
Oath is, you shall well

and truly try whether the Juryman challenged, stand indifferent between the Parties to this Issue.  
1 *Salk.* 152 — Where a Challenge is to the Array for Favour, the Plaintiff may either confess it, or plead to it; if he pleads, the Judges assign Triers to try the Array, which seldom exceed two, who being chose and sworn, the Associate, or Clerk in Court, doth declare and rehearse unto them the

scribed in the Writ, was warned, viz. one *per qu' rei verit' melius sciri* the Matter and Cause of the Chal-

lenge, and after he hath so done, concludes to them thus; and so your Charge is to inquire, whether it be an impartial Array or a favourable one; and if they affirm it, the Clerk enters underneath the Challenge *Affirmatur*; but if the Triers find it favourable, then thus, *Columpnia vera. Trials per Pais 165.*

The Triers, as far as they act herein, are Officers of the Court, and liable to be punishable for any Misdemeanor; also it is said, (a) that if they find against Law, and the Direction of the Court, they may be fined and imprisoned.

considered as Jurors, and acting in a Judicial Capacity.

The Truth of the Matter alledged as Cause of Challenge, must be made out, by (b) Witnesses, to the Satisfaction of the Triers; also the Juror challenged may, on a *Voir dire*, be asked such Questions as do not tend to Infamy or Disgrace; such as, whether he hath a Freehold, whether he hath an Interest in the Cause; and in a Civil Cause, whether he hath given his Opinion before-hand upon the Right, which he might have done as Arbitrator between the Parties.

But in no Case can a Juror be asked, whether he hath been whipped for Larceny, or convict of Felony, or whether ever he was committed to Bridewell for a Pilferer, or to Newgate for clipping and coining, or whether he is a Villein or outlawed; because these kind of Questions tend to make a Man discover that of himself which tends to Shame, Infamy and Disgrace; also it was held in (c) a Trial for High Treason, that the Prisoner, in order to challenge a Juror, could not ask him, whether he had not declared his Opinion before-hand that he was guilty, or would be hanged, because these Questions tend to Reproach, as charging him with a Misdemeanor.

If a Challenge be taken, and the other Side demur, and it be debated, and the Judge over-rule it, it is entered upon the original Record; and if at *Nisi Prius* it appears upon the *Posse* what the Judge hath done; but if the Judge over-ruled the Challenge upon Debate without a Demurrer, then it is proper for (d) a Bill of Exceptions.

must be, that he over-ruled the Challenge, not *quod recus'* the Challenge.

It is said, that a Demurrer upon a Challenge is not like to a Demurrer upon a Plea; for in Case of a Demurrer upon a Challenge, as soon as the Demurrer is agreed on at the Bar, it is good enough, without other Circumstances, such as Counsel's Hand, &c. and the Prothonotaries of Right ought to enter such Demurrer.

## (F) How Jurors are to be impanelled and sworn.

BY the 3 Georg. cap. 25. sect. 11. it is enacted, ' That the Name of each and every Person who shall be summoned and impanelled, with his Addition and the Place of his Abode, shall be written in several and distinct Pieces of Parchment, or Paper, being all, as near as may be, of equal Size and Bigness, and shall be delivered to the Marshal of such Judge of Assize or *Nisi Prius*, or of the said Great Sessions,

‘ Sessions, or of the Sessions of the said Counties Palatine, who is to try  
 ‘ the Causes in the said County, by the Under-Sheriff of the said  
 ‘ County, or some Agent of his, and shall, by Direction and Care of  
 ‘ such Marshal, be rolled up all, as near as may be, in the same Manner,  
 ‘ and put into a Box or Glafs to be provided for that Purpose; and  
 ‘ when any Cause shall be brought on to be tried, some indifferent  
 ‘ Person, by Direction of the Court, may and shall, in open Court,  
 ‘ draw out twelve of the said Parchments, or Papers, one after another;  
 ‘ and if any of the Persons, whose Names shall be so drawn, shall not  
 ‘ appear, or be challenged and set aside, then such further Number,  
 ‘ until twelve Persons be drawn, who shall appear, and after all Causes  
 ‘ of Challenge shall be allowed as fair and indifferent; and the said  
 ‘ twelve Persons so first drawn and appearing, and approved as indif-  
 ‘ ferent, their Names being marked in the Panel, and they being  
 ‘ sworn, shall be the Jury to try the said Cause; and the Names of the  
 ‘ Persons so drawn and sworn shall be kept apart by themselves, in some  
 ‘ other Box or Glafs to be kept for that Purpose, till such Jury shall  
 ‘ have given in their Verdict, and the same is recorded; or until such  
 ‘ Jury shall, by Consent of the Parties, or Leave of the Court, be dis-  
 ‘ charged; and then the same Names shall be rolled up again and re-  
 ‘ turned to the former Box or Glafs, there to be kept with the other  
 ‘ Names remaining at that Time undrawn; and so *toties quoties*, as long  
 ‘ as any Cause remains then to be tried.

*Stat. 12.* Provided, ‘ That if any Cause shall be brought on to be tried  
 ‘ in any of the said Courts respectively, before the Jury in any other  
 ‘ Cause shall have brought in their Verdict, or be discharged, it shall  
 ‘ and may be lawful for the Court to order twelve of the Residue of  
 ‘ the said Parchments, or Papers, not containing the Names of any of  
 ‘ the Jurors who shall not have so brought in their Verdict, or be dis-  
 ‘ charged, to be drawn in such Manner as is aforesaid, for the Trial of  
 ‘ the Cause which shall be so brought on to be tried.

2 *Hal. Hist.*  
*P. C.* 293.

In Capital Cases the Sheriff returns the Panel of the Jury, who being  
 called, and appearing, the Prisoners are told by the Clerk, that these  
 good Men now called, and appearing, are to pass on their Lives and  
 Deaths; therefore if they will Challenge any of them, they are to do it  
 before they are sworn; and if no Challenge hinder, the Jury are com-  
 manded to look on the Prisoners, and then severally twelve of them,

(a) But if (a) neither more nor less, are sworn.  
 thirteen are

by Mistake sworn, the Swearing of the last by Mistake is void, and the other twelve shall serve. —  
 But if eleven be sworn by Mistake, no Verdict can be taken of the eleven; and if it be, it is Error;  
 and so in a Presentment; but if twelve be recorded sworn, no Averment lies that one was unsworn. —  
 Upon Not guilty pleaded, twelve are sworn to try the Issue; after their Departure one of the twelve  
 leaves his Companions, which being discovered to the Court, by Consent of all Parties, B. another  
 of the Panel, is sworn in the Place of A. and afterwards A. returns to his Companions, which being  
 made known to the Court, A. is called and examined, why he departed; he answered, to drink;  
 and being examined whether he had spoken with the Defendant, denied it upon his Oath; whereupon  
 B. was discharged from giving any Verdict, and the Verdict taken of A. and the other eleven, and  
 A. fined for his Contempt. 2 *Hal. Hist. P. C.* 296.

2 *Hal. Hist.*  
*P. C.* 294.

(b) An Ex-  
 ception was  
 taken to a  
 Judgment in  
 an inferior  
 Court, that

Altho’ there be twenty Prisoners at the Bar for several Felonies, and  
 the Oath is general to try between the King and the Prisoners at the Bar,  
 yet the Jury is to inquire of no (b) more than what they are particu-  
 larly charged with; and therefore tho’ twenty have pleaded, and stand  
 at the Bar when the Jury is sworn, yet the Court may stay any Number  
 of the Prisoners, and so the Jury stand charged with no more than what  
 it was twelve *Probi electi, triati, Jurati, &c.* without saying *ad veritatem de premissis dicenda*; and this was  
 held Error, for they might be sworn in another Cause at the same Court; and the Difference was  
 said to be betwixt a Jury in Criminal and Civil Matters; for the Oath which the Jury take in  
 Criminal Matters is, that they shall truly try and true Deliverance make of the Prisoners at the  
 Bar, &c. so the Court may charge them with as many Prisoners as they think fit; but in Civil Matters  
 the Jury must be sworn anew in every several Case. *Mab. 29 Car. 2. in C. B. Watson and Goodman.*

are thus particularly charged upon them; and when they go from the Bar, and have brought in their Verdict touching these Particulars charged upon them, then if the same Jury pass upon the remaining Prisoners, yet they are to be called over again, the Prisoners reminded of their Challenges, and the Jury sworn *de novo* upon the Trial of the Rest of the Prisoners.

### (G) How to be kept and discharged.

WHEN the Jurors depart from the Bar, (a) a Bailiff ought to be sworn to keep them together, and not to suffer any to speak with them.

2 Hal. Hist. P. C. 296.  
(a) That a Bailiff is to be sworn in a Civil as well as Criminal Case. Palm. 380.

After their Departure they may desire to hear one of the Witnesses again, and it shall be granted, so he deliver his Testimony in (b) open Court; and also they may desire to propound Questions to the Court, for their Satisfaction, and it shall be granted, so it be in open Court.

2 Hal. Hist. P. C. 296.  
(b) Therefore in a Civil Case, where the Jury

withdrew to confer about their Verdict, one of the Witnesses, that was before sworn, on the Part of the Defendant, was called by the Jurors, and he recited again his Evidence to them, and they gave their Verdict for the Defendant; and Complaint being made to the Judge of Assize of this Misdemeanor, he examined the Jury, who confessed all the Matter, and that the Evidence was the same in Effect that was given before, *Et non aliter nec diversa*; and this Matter being returned upon the *Postea*, the Opinion of the Court was, that the Verdict was not good, and a *Venire fac. de novo* was awarded. Cro. Eliz. 189. Metcalfe and Dean.

The Jury must be kept together without Meat, Drink, Fire or Candle, till they are agreed.

Co. Lit. 227. b. 2 Hal. Hist. P. C. 297.

So in an inferior Court, if the Jury will not agree on their Verdict, the way is, as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may from Time to Time adjourn the Court till such Agreement.

1 Salk. 201. Earell. 1.

If they agree not before the Departure of the Justices of Gaol-Delivery into another County, the Sheriff must send them along in Carts, and the Judge may take and record their Verdict in a foreign County.

1 Vent. 97. 2 Hal. Hist. P. C. 297.  
But it is

made a *Quere*, whether in such Cases the Session may be adjourned before the Verdict taken.

If there be eleven agreed, and but one dissenting, who says he will rather die in Prison, yet the Verdict shall not be taken by eleven; no nor yet the Refuser fined or imprisoned; and therefore where such a Verdict was taken by eleven, and the twelfth fined and imprisoned, it was, upon great Advice, ruled the Verdict was void, and the twelfth Man delivered, and a new *Venire* awarded; for Men are not forced to give their Verdict against their Judgment.

2 Hal. Hist. P. C. 297.

If the Jury say they are agreed, the Court may examine them by Poll; and if in Truth they are not agreed, they are fineable.

2 Hal. Hist. P. C. 299.

It seems to have been anciently an uncontroverted Rule, and hath been allowed even by those of the contrary Opinion, to have been the general Tradition of the Law, that a Jury sworn and charged in a Capital Case cannot be discharged (without the Prisoner's Consent) till they have given a Verdict; and notwithstanding some Authorities to the contrary in the Reign of King Charles the Second, this hath been holden for clear Law, both in the Reign of King James the Second, and since the Revolution.

2 Hawk. P. C. 439. and several Authorities there cited; *Et vide* 2 Hal. Hist. P. C. 294-5.

## (H) In what Cases and in what Manner to have a View.

2 Rol. Abr.

725. Tit.

View.

2 Inst. 485.

Bro. Tit. View.

Fitz. Tit.

View.

(a) But it is

said, that at Common Law did not lie in a Writ of Dower *unde nihil habet*, *Intrusion*, *Breve d'entry en le quibus*, *Nuper obiit*, *Rationabili Parte*. 2 Rol. Abr. 725. Booth, *Real Actions*, 38. (b) That there are two Sorts of Views in Real Actions; 1. View by the Party. 2. View by the Jurors, as in an Assise of Novel Disseisin, Waste, Assise of Nuisance, the Party shall not have View, because the Jurors shall have View. Booth 38.

(b) 13 E. 1.

cap. 28.

By (b) *Westm. 2. cap. 48.* it is ordained and provided, ' That from thenceforth View shall not be granted but in case when View of Land is necessary; and if one lose Land by Default, and he that loseth moveth a Writ to demand the same Land, and in case when one by an Exception dilatory abateth a Writ after View of the Land, as by Non-tenure, or Misnaming of the Town, or such like, if he purchase another Writ, in this Case, and in the Case before-mentioned, from henceforth, the View shall not be granted, if he had View in the first Writ; in a Writ of Dower, where the Dower in Demand is of Land, that the Husband aliened to the Tenant, or his Ancestors, where the Tenant ought not to be ignorant what Land the Husband did alien to him or his Ancestor, tho' the Husband died not seised, yet from henceforth View shall not be granted to the Tenant. In a Writ of Entry also that is abated, because the Demandant misnamed the Entry; if the Demandant purchase another Writ of Entry, if the Tenant had View in the first Writ, he shall not have it in the second. In all Writs also where Lands be demanded, by reason of a Lease made by the Demandant, or his Ancestor, unto the Tenant, and not to his Ancestor; as that which he leased to him, being within Age, not whole of Mind, being in Prison, and such like, View shall not be granted hereafter; but if the Demise were made to his Ancestor, the View shall lie as it hath done before.

Booth 37.

2 Rol. Abr.

726.

Since this Statute, the Demandant, as to any of the Cases within the Statute, may counterplead the View, *i. e.* alledge Matter in Pleading which ousts him of View; as where he that loseth Land by Default brings a *Quod ei desorciat* for the Recovery of it, the Tenant shall not have View, because he is well enough ascertained of the Land by the former Record; so where View was had in a former Writ, and that Writ was abated after View for some Mistake that appeared upon the View, as Non-tenure, Misnaming of the Town; so in Dower, when it is brought against the same Tenant that purchased the Land of the Husband; so if the Husband died seised, it is a good (c) Counterplea of View in Dower.

(c) For this  
vide Dower,  
Letter (I).

2 Sand. 254.

(d) Where-

ever the

Plaintiff is

to recover

*per visum Ju-*

*ratorum*, there

ought to be six of the Jury that have had the View, or know the Land in Question, so as to be able

to put the Plaintiff in Possession, if he recover. *Co. Lit. 158. b.*

In an Action of Waste, in which it was agreed, that a View should have been awarded, and that six, at (d) least, of the Jurors should have viewed the Place, it was resolved, that if a View be awarded, tho' not returned by the Officer, and the Trial goes on, and a Verdict had, that the Omission of the Officer in not Returning the View is not Error; for



it was the Duty of the Court to examine whether the Jury had a View or not; and if they found they had not, the Trial ought to have been stayed.

So in an Affise in which it was likewise agreed, that a View was requisite in the same Manner, if the Officer does not return the View, it is not Error; for the Words of the Writ are, *& interim videant*, and not *& interim haberi fac' Visum*; so that the Jurors might have had the View when the Officer was not present; and if it were otherwise, the Party might have challenged the Jury for this Cause; and tho' the Officer had returned, that the Jurors had had the View, yet if upon Examination in Court it appeared otherwise, the Parties could not be concluded by such Return.

If the Court make a Rule, that the Jury shall have a View, and that they shall not hear any Evidence thereupon, and they notwithstanding hear Evidence, this is a good Cause of Challenge, and likewise a Misdemeanor, for which, it is said, they may be punished by the Court.

In an Action of Waste it was agreed; 1. That if six of the Jury are examined on a *Voir dire*, if they have seen the Place wasted, that it is sufficient, and the rest of the Jury need not be examined upon a *Voir dire*, but only to the Principal. 2. It was agreed, if the Jury be sworn that they know the Place, it is sufficient, altho' they be not sworn that they saw it; and altho' that the Place wasted be shewed to the Jury by the Plaintiff's Servants, yet if it be by Command of the Sheriff, it is as sufficient as if the same had been shewn them by the Sheriff himself.

At the Trial of a Cause, for Want of a full Jury upon the principal Panel, some *Talesmen* were sworn, and had the View, but the *Disfringas* was returnable as an original *Disfringas*, and so many of the original Panel left out who were not at the View; of which the Defendant complained, and would have set aside the Trial for Irregularity; but because no *Venire* appeared to the Court, and the Matter stood upon Record as an original Trial, and the Want of a *Venire* was helped by Verdict, and because the Cause was tried by those that were fittest, viz. those who had the View, the Court would do nothing in it.

But it was ordered, that for the future, when in order to a View the last Juror is (a) withdrawn, the Plaintiff shall take out a new *Disfringas*, *amoto* the last Man of the Panel, to distrain the other twenty-three, with an *Apponas etiam decem Tales*.

the Jury is sworn, and then by Consent a Juror may be withdrawn. 6 Mod. 211. — may be without Consent; and notwithstanding such View, a Juror may be challenged when he comes to be sworn. 6 Mod. 211.

It is said, that before the Court makes a Rule for a View, the *Venire Facias* must be (b) returned; and then the Court may make a Rule, that so many of the Panel shall view the Premises.

view before their Appearance, unless in an Affise.

A View is grantable in such Cases where the Title is in Question; and in such Cases it may be granted on Motion, on a bare Suggestion, without any Affidavit.

And to this Purpose it is Enacted by 4 & 5 Anne, cap. 16. ' That in any Actions brought in any of her Majesty's Courts of Record in Westminster, where it shall appear to the Courts in which such Actions are depending, that it will be proper and necessary that the Jurors who are to try the Issues in any such Actions should have the View of the Messuages, Lands, or Place in Question, in order to their better understanding the Evidence that will be given on the Trial of such Issues, in every such Case, the respective Courts in which such Actions shall

shall be depending may order special Writs of *Disfringas* or *Habeas Corpora* to issue, by which the Sheriff, or such other Officer, to whom the said Writs shall be directed, shall be commanded to have six out of the first twelve of the Jurors named in such Writs, or some greater Number of them, at the Place in Question some convenient Time before the Trial, who then and there shall have the Matters in Question shewn to them by two Persons in the said Writs named, to be appointed by the Court, and the said Sheriff, or other Officer who is to execute the said Writs, shall, by a special Return on the same, certify that the View hath been had according to the Command of the said Writs.

And by the 3 *Georg. 2. cap. 25.* a Provision is made for a View, in the following Words; 'That where a View shall be allowed in any Cause, that in such Case six of the Jurors named in such Panel, or more, who shall be mutually consented to by the Parties or their Agents on both Sides, or, if they cannot agree, shall be named by the proper Officer of the respective Courts of King's Bench, Common Pleas, or Exchequer at *Westminster*, or the Grand Sessions in *Wales*, and the Counties Palatine, for the Causes in their respective Courts, or, if Need be, by a Judge of the respective Courts where the Cause is depending, or by the Judge or Judges before whom the Cause shall be brought on to Trial respectively, shall have the View, and shall be first sworn, or such of them as appear upon the Jury, to try the said Cause, before any Drawing as aforesaid; and so many only shall be drawn, to be added to the Viewers who appear, as shall, after all Defaulters and Challenges allowed, make up the Number of twelve to be sworn for the Trial of such Cause.'

### (I) What Irregularities and Defects in convening, or in the Qualifications of the Jurors are amendable, and aided after Verdict.

*Vide Tit. Amendment and Jeofail.*

HERE we may lay it down in general, that by the express Words and Intent of the several Statutes of Jeofail and Amendments all Irregularities as to the Number, Qualifications, and Returns of the Jurors are aided after Verdict, so that the *Venire* be of the same Place, and in the same Action, and between the same Parties.

Where the Want of a *Venire*, *Disfringas*, &c. is aided, but not a vicious one, and where a vicious one shall be taken

So if there be no *Venire Facias*, or if there be such a Fault in the *Venire* as makes it a perfect Nullity, so that it has no Relation to the Cause, yet if there be a good *Disfringas*, that being one of the Jury Process, the Omission of the former is cured; for the Omission of any judicial Writ is aided by the Statutes, and a *Venire*, that is a Nullity, and has no Relation to the Cause, is as if there had not been any, and so of a *Disfringas* where there is a proper *Venire*.

as none, *vide Cro. Eliz. 483. Owen 59. Moor 465. Noy 57. Moor 684. pl. 535. 623. pl. 852. 696. pl. 967. Godb. 194. 1 Leon 329. 1 Bulf. 130. 3 Bulf. 185. 1 Brownl. 78. 97. Yelv. 69. 1 Rol. Rep. 22. 1 Jon. 304. Latch 116. Yelv. 109.*

1 *Rol. Abr.*  
201.  
*Moor 599.*  
1782 6 S. P.

So if the Award of a *Venire Facias* upon the Roll be well, and the Writ of *Venire Facias* wrong, yet this shall be amended by the Roll, being

being the (a) Warrant of the Writ, which is the Act of the Court, and the Default is only the Mistake of the Clerk.

was in a Cause against two Defendants, but the *Venire* against one, and amended. 3 *Bull.* 511. — *See* *vide* *Winch* 73. *Cro. Jac.* 78. — But if by the Roll the *Venire* be awarded *de Vicineto* of the right Place, but the *Venire* itself is of a Wrong, and thereupon a Jury is returned, and tries the Cause, it shall not be amended; for it appears, that the Trial was not had by such a Jury as the Roll and Law require. *Hob.* 76. *See* *vide* *Lit. Rep.* 255. — So if there be no Place on the Roll to warrant the *Venire*. *Latch* 194. — Also in Criminal Cases, to which the Statutes of Amendment do not extend, the *Venire*'s omitting any of the Parties is Error. 2 *Hawk. P. C.* 299.

So if the Writ of *Venire Facias* out of the King's Bench be *Venire Facias* 12 *Liberos & Legales Homines coram nobis apud Westmonasterium ubicunque fuerimus in Anglia*; but the Roll is well, (the Words *apud Westmonasterium* being omitted therein,) this being in *B. R.* the Writ shall be amended by the Roll; for this is but Matter of Form.

If the Return of the *Venire* be mistaken, this may be amended by the Roll, and if the *Tesle* of the *Venire* be out of Term, or before Plea pleaded, it is no Error; for the *Tesle* of Judicial Writs being only Matter of Form, if mistaken, shall not vitiate, since they have the proper Judges of the Fact by such Process.

Therefore if a *Venire Facias* be dated 7 July, and made returnable 6 July, a Day before the Date of the Writ, this after Verdict is amendable, because a Judicial Process, and the Default of the Clerk.

So if a *Venire Facias* be awarded upon the Roll, to be returned *Ostavis Trinitatis*, and the Writ is made returnable six Days after, *scilicet*, a Day out of Term, but the *Disfringas* is well without any Fault, and after the Jury impanelled find for the Plaintiff, this Writ of *Venire Facias* shall be amended by the Roll; for this was the Default of the Clerk only; for the Roll is the Warrant of the Writ.

The Award of the *Venire* must be to a Day in the same Term, or to the next Term, but it must be in Term, otherwise it is erroneous; because this is not such (b) a Discontinuance as is aided by the Statute, since it is an Error in the Court by awarding the Process, which makes it utterly uncertain when or where the Parties should appear to receive Judgment, and it is an Act of the Court, which is erroneous, and not a Mis-entry of the Clerk, which the Statutes do not intend to aid.

Discontinuance, and that being in a Criminal Case, not amendable. 1 *Bull.* 141, 142. *Yelv.* 204. *Cro. Jac.* 283. 6 *Mod.* 281. 1 *Salk* 51.

If the Place be totally (c) misawarded, this is not helped by any Statute, because they have not the proper *Judices Faci*, unless they have them from the Place where the Fact arises; but if it is only misawarded in Part, this is helped by the express Words of (d) 21 *Jac.* 1. *cap.* 13. because it is supposed that the Persons that were near any Part of the Place might know the Fact in Issue between the Parties; and by the Statute of (e) 16 *& 17 Car.* 2. *cap.* 8. the Want of a right *Venue* is aided, so as the Trial was by a Jury of the proper County or Place where the Action is laid.

*Jac.* 1. *vide* *Cro. Eliz.* 468. *Goult.* 38, 47. *Winch* 69. 4 *Leon.* 84. *Cro. Jac.* 647. *Moor* 91. *Lit. Rep.* 365. *Kelw.* 212. 5 *Co.* 36. (d) For this *vide* *Cro. Car.* 17, 162, 284, 480. 1 *Fon.* 395. *Styl.* 201, 206. *Raym.* 67. — That this Statute aids not unless the *Venue* arises from several Places, and one of those Places is truly named. 1 *Sid.* 20. — But if it arise from several Places, tho' in several Counties, and it is tried by one only, it is helped. 2 *Lev.* 122. *per Hale.* — By the Opinion of the greater Part of the Judges, where by particular Custom a Trial was to be *de Vicineto* of the four Wards next adjoining, and the *Venire* is awarded *de Vicineto* of two of them only, it is helped by the Statute. 2 *Sand.* 258. But *Sanders* *dubitavit*, whether it should extend to aid any Proceedings except such which were according to the Course of the Common Law. (e) That this Statute does not extend to any Trial in an improper County. 1 *Mod.* 37, 199. 2 *Mod.* 24. — But for the Exposition of this Statute as to this Point, *vide* 1 *Lev.* 207. 1 *Sid.* 326. 2 *Lev.* 122, 164. 1 *Sand.* 247. *Raym.* 181, 392. 1 *Vent.* 263, 272. 2 *Kel.* 496. 2 *Fon.* 82.

Yelv. 169.

If there be a Blank left for the County to the Sheriff whereof the Writ should be awarded, yet it will be amended, because it cannot be awarded to the Sheriff of any other County, and therefore it is the Omission of the Officer in entering the Award of the Court; but if there were a local Plea into another County, so that there are two Counties mentioned in the Pleadings, there the Blank cannot be amended, because there is originally no Award of the Court to whom the Process shall go; but where the Plea carries the Matter into another County, there the *Venire* must be from the last Place, because the Declaration by such Plea stands confessed.

Cro Eliz. 261.  
468.

1 Rol. Abr.

205.

Child and  
Sloper.

Cro. Car. 595.

S. C.

Yelv. 64.

S. P. cited.

After Issue joined, if upon the Roll a *Venire Facias* be awarded to the Sheriff of the County of *Somerset*, &c. and upon this a *Venire Facias* is made in this Manner, *Carolus Dei Gratia Somerset salutem*, &c. leaving out the Word (*Viccomiti*); and upon this the Sheriff of *Somerset* returns a Jury, and upon this a Verdict, &c. this shall be amended by the Roll, because this was the Fault of the Clerk merely, having the Roll before him when he made the Writ, by which he was directed to direct the Writ to the Sheriff of *Somerset*.

If the Court on an insufficient Suggestion awards the Process to an improper Officer, yet this is aided after Verdict; for that only makes an Insufficiency in the Return of the Jury, and insufficient Returns are aided;

(a) But where for it was the Design of the (a) Statute, that if the Cause was tried by a right Jury, that it should not be material what Officer got them together.

21 Jac. 1. the Award of a *Venire* to a wrong Officer, and his Return thereupon, was Error, vide 1 Brownl. 134. Cro. Eliz. 574, 586. Moor 356. pl. 482. Yelv. 15. 5 Co. 36. b.

Cro. Eliz. 181,  
674, 586.

But if on a Suggestion on the Roll Process be awarded to the Coroner, and the Sheriff returns either the Panel or *Tales*, it is said to be erroneous, because not collected by the proper Officer, and therefore they are not the *Judices Facti* of that Cause, and it appears on the Record that the Return is otherwise than the Court hath directed.

1 Salk. 265.  
Andrews ver.  
Lynton.

But the latest Resolution is, that the Returns of Ministerial Officers are to be challenged at the Day of the Return; for if the Court then admits them to be their Officers, and the Parties do not except against them, they are concluded, since the proper *Judices Facti* are admitted by them to be returned.

Cro. Jac. 383.  
Hob. 70.  
Lamb and  
Wiseman,  
adjudged.

If a *Venire* is awarded to the Coroners, and returned by two of them only, whereas at the Time of the Award and Return thereof there were two more, this is only a Misreturn, and aided.

Hob. 70.  
(b) In an  
Action, if the  
*Venire Facias*  
be *Viccomiti*

But it is said, that if one Sheriff of (b) *London* makes a Return without the other, this is not helped, being no Return at all; for they make but one Officer, and the Court knows that one Sheriff there is two Persons.

*London*, salutem, &c. *Præcipimus tibi quod*, &c. where it should be *Præcipimus vobis*, after Verdict this shall be amended; for it is the Default of the Clerk. Owen 62. Cro. Eliz. 543. 1 Rol. Abr. 200.

Hob. 113.

1 Rol. Abr.

204.

Cro. Eliz. 310.

If upon the Return of the *Habeas Corpora* the Surname of the Sheriff be omitted, as where his Name is *Bartholomæus Michel*, and it is returned *Bartholomæus Miles*, Sheriff, this shall be amended.

3 Bulf. 220.

Cro. Jac. 528.

Noy 115.

5 Co. 41.

Cro. Eliz. 587.

1 Brownl. 43.

(c) But even

before the Statute

21 Jac. 1.

it was held,

that the *Venire*

being well returned,

tho' the Issue

be tried on

the *Habeas Corpora*or *Disfringas*,

which are not

returned, or

irregularly

returned, in

Manner afore-

did not return the Writ of *Venire*, nor set his Name on the Back thereof, or omitted inserting *quod Executio istius Brevis patet in quodam Pannello huius Brevis annexo*, but it was *album Breve*, it could not be amended upon Examination of the Sheriff, being the (c) principal Process; but this is

the Statute 21 Jac. 1. it was held, that the *Venire* being well returned, tho' the Issue be tried on the *Habeas Corpora* or *Disfringas*, which are not returned, or irregularly returned, in Manner afore-said, the *Venire* being the principal Process, and right, the others should be amended. Moor 868. pl. 1203. Hob. 130. Yelv. 110. Cro. Jac. 158, 443. Cro. Eliz. 466. 704. 2 Rol. Rep. 111, 210.

now helped by that Statute, so that a Panel of the Jurors be returned and annexed to the Writ.

If the Sheriff that returns his *Venire* be discharged before the *Teste* of *Cro. Car.* 421. the *Venire*, it is Error, and shall be tried by the Record of his Discharge; because if the legal Officer did not return the Writ, the proper *Judices Facti* did not try the Cause, and so the Verdict is ill.

But if he be Sheriff at the Time of the Award of the *Venire*, and after his Discharge he returns the Panel to the *Venire*, this is no (a) principal Cause of Challenge; for the Sheriff having returned the *Nomina Jurat'* to the Court above on the *Venire*, on which they have awarded a *Disfringas* with a *Nisi Prius*, the Sufficiency of that Return is not to be controverted before the Judge of *Nisi Prius*, but above, since the Judges of *Nisi Prius* are bound down by a Record of a superior Court, on whose Records it appears he is Sheriff.

*Cro. Eliz.* 369.  
Hore and  
Broom.  
(a) But this  
may be chal-  
lenged for  
Favour, and  
the Illegality  
of the Offi-  
cer will be  
admitted as

strong Evidence of a Partial Array, since a Person who had nothing to do with the Return has intermeddled therewith; and accordingly the Array in this Case was challenged for Favour, and the Array quashed.

The Jury must come in the same Action, and between the same Parties, otherwise they are not Judges in that Cause; therefore in Ejectment where the *Venire* was *de Placito Transgressionis*, omitting & Ejection *firmæ*, the Court held the *Venire* to be ill, because it was not in the same Action; for an Action of Trespass and Ejectment are different, and there might be an Action of Trespass between the same Parties; but if the *Disfringas* had been right, they would have adjudged this *Venire* to be null, and the Want of a *Venire* is aided by the Statute.

*Cro. Car.* 32.  
H. 11. 81.  
1 *Fon.* 302.  
Godk. 194.  
*Cro. Jac.* 328.  
*Cro. Eliz.* 259.

If in an Action of Trespass Issue is joined between the Plaintiff and two Defendants, and one dies, and the *Venire* is awarded between the Plaintiff and both Defendants after such Defendant's Death, and Verdict is taken for the Plaintiff, and the Death suggested on the Roll, and Judgment against the Survivor, the *Venire* being only a Judicial Process, and pursuing the Award on the Roll, it plainly appears to be the same Cause, and that the Trial was had by proper Judges, and Judgment being given against the Defendant, who is charged with the whole Action, is good.

*Cro. Car.* 426.  
1 *Fon.* 367.  
*Piffin versus*  
*Fenton.*

If the *Jurata* mentions the Issue to be *de Placito Transgressionis*, where the Action is Debt, and the Award of the *Venire* and *Disfringas* Debt, this shall be amended; for the *Jurata* is an Award of the *Disfringas*, in Pursuance of the Award of the *Venire*, and the *Venire* being right, the (b) secondary Process ought to be made accordingly, and there is a sufficient Authority by the Writ of *Disfringas* for the Judge of Assize to try the Cause.

*Cro. Car.* 275.

(b) That the  
Award on  
the Roll be-  
ing right  
shall amend

the *Venire*, and the *Venire* being right shall amend the *Disfringas*, which is the proper Process for convening the Jurors in the King's Bench; so of the *Habeas Corpora*, which is the Common Pleas Process. *Lit. Rep.* 252, 253. — Also if a *Disfringas* is awarded where it should be a *Habeas Corpora*, this is aided. *Savil* 37.

So if the Sheriff return *Nomina Jurat' inter Partes prædict' de Placito Transgressionis*, where the *Venire* is *de Placito Debit'*, this shall be amended; for in *Dorso Brevis* he says, *Executio istius Brevis patet, &c.* which could not be, if it was not in the same Action.

*Cro. Car.* 275.  
2 *Rel. Abr.*  
202.

If the Day when, and Place where the Assize was to be held, is not mentioned in the *Disfringas*, it shall be amended by the Roll; for if there had been no *Disfringas*, the Trial had been good, because the *Jurata* is the Warrant to try the Cause, and that was right.

2 *Med.* 78.  
*Jackson and*  
*Warren.*

In Ejectment against seven Defendants, who entered into the common Rule, and pleaded to Issue, the Plea Roll, *Venire*, *Disfringas*, and *Jurata* were right, but the Issue on the *Nisi Prius* Roll was between the Plaintiff and five Defendants only; after Verdict for the Plaintiff this was amended;

1 *Salk.* 43.

for

for the Lessor's Title was the Gift of the Action, and the only Thing inquirable of by the Jury.

(a) If a *Venire Facias* be omitted, it may be amended; for it is but Form to award the particular Number and Qualifications in each Roll, which is directed by the Law in all Cases.

Words, *Nomina Juratorum*, this will be aided after Verdict, being a Judicial Writ; tho' objected, that these Words were of Necessity, and without which the Court could not know who are the Jurors, nor whom to demand to be sworn. 2 *Bulf.* 208. 1 *Roll. Abr.* 200, 204. *Cro. Eliz.* 467. *Moor* 465, 657. *Noy* 57. 2 *Brownl.* 167. — So if the Word *duodecim* be left out of the *Venire Facias*, this shall be amended after Verdict. 1 *Roll. Abr.* 204. (b) If a *Venire Facias* be *quorum quilibet quatuor Libras Terra*, omitting the Word *habeat*, this shall be amended after Verdict. 1 *Roll. Abr.* 204. — So if the Words *quorum quilibet* are omitted out of the *Venire Facias*, it shall be amended after Verdict. 1 *Roll. Abr.* 204. — So if the Words *qui nulla Affinitate attingunt* are left out of the *Venire Facias*, it shall be amended. 1 *Roll. Abr.* 204.

The *Nomina Juratorum* on the *Venire* are the proper Parties to try the Action; and if there be a Mistake in the (c) Christian Name, it is incurable; for the Statute does not extend to it, but it extends to cure Surnames and Additions; for there can be but one Name of Baptism, but there may be various Surnames and Additions; and therefore if it can be proved what Person the Sheriff meant by his Surname or Addition, it may be amended and set right.

vide *Cro. Eliz.* 57, 222. *Cro. Car.* 205. *Cro. Jac.* 116.

1 *Roll. Abr.* 196, 197. 3 *Bulf.* 18. *Hob.* 64. 1 *Brownl.* 174. Also if the Names of either Christian or Surname be wrong in the Body of the *Disfringas*, or in the Panel returned, or in the Panel of the Jury sworn, yet if it can be proved to be the same Man that was intended to be returned in the *Venire*, having there his right Christian Name, he is the proper *Judex Facti*, and it may be amended by the Statute.

1 *Roll. Abr.* 196, & vide 1 *Dan* 330-1. several Cases to this Purpose. As if *Tippett* be returned in the *Venire Facias*, and in the *Habeas Corpora* and *Disfringas Juratores* he is named *Typper*, yet if his true Name be *Tippett* according to the *Venire Facias*, and *Tippet* is sworn, and tries the Issue, it shall be amended.

1 *Fon* 302. *Fines and North.* *Cro. Jac.* 278. S. C. adjudged. If the Sheriff returns but twenty-three on the *Venire*, and twenty-four on the *Habeas Corpora*, and the twenty-fourth omitted on the *Venire* appears, and is sworn, the Verdict is ill, because he is not returned according to the Award of the Court, in Pursuance of the *Venire*, and therefore has no Authority to try the Cause; for the Award to distrain one not summoned is void, and he is not returned of the *Tales de Circumstantibus*, so that he is not a proper Juror by the Writ nor Statute.

*Cro. Jac.* 647. So if twenty-five are returned, and the twenty-fifth is sworn, and tries the Cause, it is not helped.

*Cro. Car.* 223. 278. 5 *Co.* 36. b. 37. a. *Cro. Eliz.* 194. But if the twenty-fourth Man had not been of the twelve that tried the Issue, it would be aided by the Statute; or if the Trial had been by eleven of the twenty-three, and one of the *Tales de Circumstantibus*, it had been good.

1 *Brownl.* 274. 1 *Fon.* 357. 1 *Sid.* 66. *Latch* 54.

(K) What Irregularities or Defects in convening, or in the Qualifications of the Jurors, are aided by Consent.

HERE we may lay it down as a general Rule, that all Defects in convening, or in the Qualifications of the Jurors, are aided by Consent of the Parties; for the Rule herein is, that *omnis Consensus tollit Errorum.* Co.Lit. 125. b. Dyer 367. b. pl. 40.

Therefore if a *Venire Facias* be awarded to the Coroners, where it ought to be to the Sheriff, or the Visne cometh out of a wrong Place, if it be *per Assensum Partium*, and so entered of Record, it will stand good. 5 Co. 36. b. Co.Lit. 125. b. 2 Rol. Rep. 212. Godb. 428. Noy 107. Palm. 411.

One of the Jury, after he had been sworn, and after he had heard Part of the Evidence, fell sick, and another being sworn in his Place by Consent of Plaintiff and Defendant, it was held a good Verdict.

(L) When and by Whom to be paid.

JURORS in all Civil Causes are to be paid for their Trouble and Attendance, and the (a) *Quantum* is to be proportioned according to (a) That in the Distance of Place, Badness of the Weather, &c. but if they take any Money, or other Reward, for giving a Verdict, they are not only punishable at Common Law by Fine and Imprisonment, but to a *Decies tantum* given by the Statute of 38 E. 3. cap. 12. i. e. a Forfeiture of ten times as much as he hath taken. Carth. 242. Strictness on a Trial at Nisi Prius in the same County, they are only intitled to 8 d.

and to 5 l. on a Trial at Bar, where they came out of a foreign County. *Trials per Pais* 62, 216.

But if some of the Jurors appear, and the Trial goes off *pro Defectu Juratorum*, those who appeared are not to be paid; for no Body has received any Benefit from their Attendance, and consequently not obliged to make them any Recompence. 2 Lil. Reg. 125.

But where a Cause was appointed for Trial at the Bar of B. R. by a Jury of Wilts, and a *Venire* returned, and the Jury summoned, but before the Day the Parties agreed, and the Summons not being countermanded, several of the Jury appeared; and it was ordered on Motion, that the Attornies on both Sides should pay them. 2 Show. 248.

So if the Jury find a special Verdict, the Charges of the Jury shall be equally born by both Parties. 2 Leon. 174-5.

(M) For What Misdemeanors punishable :  
And herein,

1. Where punishable by Attaint.

*Glan. lib. 8.  
cap. 9.  
2 Inst. 130.  
Co. Lit. 394.*

THE Jury when impanelled judged under the Penalty of an Attaint by the old Law, which was the only Curb they had over Juries; but this Method, from the Difficulty of attainting the Jury, and Severity of the Punishment, has been seldom used of late, and the Practice of granting new Trials, where the Jury find against Evidence and the Direction of the Court, introduced in the Room thereof; but since the Attaint is only disused, and not taken away, we shall here set down the most considerable Matters relating thereto.

*1 Rol. Abr.  
285.  
Bro. Attaint  
87.  
Dyer 53. pl. 14.  
Dyer 369.  
Godb. 271.  
Hob. 227.*

(a) But then the Plaintiff in Attaint may have an Answer thereto, and disprove it as well as he

can; but he cannot give other Evidence, nor enforce the first Evidence with more Matter than was given and disclosed before. *Dyer 212. pl. 34.*

*1 Rol. Abr.  
281, 282.*

The Jury may be attainted two Ways; 1<sup>st</sup>, Where they find contrary to Evidence. 2<sup>dly</sup>, When they find out of the Compass of the *Allegata*: But to attaint them for finding contrary to Evidence is not so easy, because they may have Evidence of their own Conuzance of the Matter before them, or they may find on (b) Distrust of the Witnesses, on their (c) own proper Knowledge.

(b) Where the Evidence of a Witness

is false in an immaterial Part, the Jury need not give him Credit in any other Part. *Cro. Eliz. 310.*  
(c) If a Jury give a Verdict on their own Knowledge, they ought to tell the Court so; but they may be sworn as Witnesses; and the fair Way is to tell the Court, before they are sworn, that they have Evidence to give. *1 Salk 405.*

*1 Rol. Abr.  
282.*

But if they find upon Evidence that does not prove the *Allegata*, there it is easy to subject them to an Attaint, because it is manifest that what is so found is on Evidence not corresponding to their Issue; and hence it is necessary that the Matters in Issue should be set forth with all convenient Certainty, that it may be seen how far and when the Jury are mistaken; as in Trespas, the Quantity and Value of the Thing demanded must be so conveniently described, that if the Jury find Damages beyond such Quantity and Value, it may be apparently excessive, and they subject to the Attaint; and so on special Contracts they must be set forth so precisely, that if Evidence be given of another Contract, and not that in the Allegations, and yet the Jury find for the Plaintiff, they may be subject to an Attaint.

*Vaugh. 146.  
1 Hawk. P. C.  
191. — But  
by Hal. Hist.*

An Attaint does not lie in a Criminal Case, as it does in a Civil; and the Reason of the Difference, according to *Hawkins*, is, that in the last Case

*P. C. 310.* the King may have an Attaint; for altho' a Man convicted upon an Indictment can have no Attaint, because the Guilt is affirmed by two Inquests, the Grand Inquest that present the Offence



Cafe a Man's Property only is brought into Question a second Time, and not his Liberty or Life; also, says he, it may be generally presumed that a Jury is likely to be equally influenced with the Fear of an Attaint from either of the contending Parties; whereas if any such Examinations of their Proceedings were allowed in Criminal Causes, they might be often in great Danger of one Side, by incurring the Resentment of a powerful Prosecutor, and provoking him to call their Conduct in Question, for their supposed Partiality; but they could have little to fear from an injured Criminal, who would seldom be in Circumstances to make his Prosecution formidable.

firm what the Grand Inquest of twelve Men have upon their Oaths

on their Oaths, and the Petit Jury that agrees with them; yet where the Petit Jury acquits, they stand as a single Verdict; for they disaff-

Where the King is sole Party against the Subject, and the Jury find for the King, no Attaint lies; but it is otherwise where the Suit is *pro Domino Rege quam pro seipso*.

4 Leon. 46  
But for this vide Cro. El. 2. 309.  
2 Jon. 14.

No Attaint lies upon an Inquest of Office; therefore if a Recovery be in a *Quare Impedit* by Default, and a Writ issues to the Sheriff to (a) inquire of the Damages and Plenarty, no Attaint lies upon this Inquest; for it is but an Inquest of Office.

Co. Lit. 355. b.  
Vaugh. 153.  
11 Co. 6. a.  
1 Rel. Abr. 280. and several Year-

Books there cited 10 Co. 119. S. P. (a) Therefore where the Matter omitted to be inquired by the principal Jury is such as goes to the very Point of the Issue, and upon which, if it be found by the Jury, an Attaint will lie against them by the Party, if they have given a false Verdict, there such Matter cannot be supplied by a Writ of Inquiry, because thereby the Plaintiff may lose his Action of Attaint, which will not lie upon an Inquest of Office. Carth. 362.

But if the Inquiry be by the same Inquest that inquired of the Issue in the *Quare Impedit*, an Attaint lies.

1 Rel. Abr. 280.  
10 Co. 119.

So in an Affise, if they are at Issue upon the Plea in Bar, and that is found for the Plaintiff, and it is inquired over of the Seisin and Disseisin, if the Disseisin be found by a false Verdict, an Attaint lies thereupon.

Fitz. Attaint 15.  
1 Rel. Abr. 28.  
10 Co. 119.

In an Action against Tenant in Tail, if he makes Default, and he in the Reversion prays to be received, supposing him to be Tenant for Life, which is counterpleaded, upon which they are at Issue, and it is found against him in Reversion, and the same Inquest taxes the Damages against the Lessee, no Attaint lies upon this Verdict; because the Judgment against the Lessee is given upon the Default; and so this is but an Inquest of Office for the Damages.

1 Rel. Abr. 280.

An Attaint lies upon a Verdict before the Sheriff in a Writ of Inquiry of Waste, because by the Statute the Sheriff is made Judge in this Case.

Co. Lit. 355. a.  
1 Rel. Abr. 280.

No Attaint lies upon a Verdict given by twenty-four Jurors, nor does it lie upon a Verdict given in an Attaint for the Thing of which the Jury is attainted; but if they find any collateral Matter *preter* the Attaint, it lies thereupon, and they shall be attainted.

2 Rel. Abr. 280.

In a Writ of (b) Right, if the Grand Affise be taken upon the meer Right, no Attaint lies thereupon; but if the Issue be taken upon a collateral Matter, and not upon the meer Right, an Attaint lies thereof.

12 H. 6. 6  
(b) Whether an Attaint lay in a Plea real because

he might have falsified in an Action of an higher Nature, vide

2 Inst. 237.

If a Deed with Witnesses be pleaded, and the Inquest passes in the Affirmative, no Attaint lies thereof; because the Witnesses have adjudged this to be true; but otherwise it is if it passes in the Negative, and Disaffirmance of the Deed; (c) for the Witnesses ought to testify nothing but what they see or hear.

1 R. I. Abr. 280  
2 Inst. 662.  
Co. Lit. 6. l.  
S. P. because Witnesses cannot testi-

fy a Negative, but an Affirmative. (c) An Attaint does not lie for not finding a Divorce, because that does not lie in their Conuzance, being a Record. 1 Rel. Abr. 281. — If the Jury find a special Matter which is not Part of their Charge, nor pertinent to the Issue, no Attaint lies for this. 11 Co. 13 — where it lies for finding falsly a Matter of Form only, the principal Matter being true. Keilw. 67

In

43 *Aff.* 41. In an Assise, if the Jury find a Special Verdict, and refer it to the  
*Bro. Attaint* Court, whether upon the Matter the Tenant be a Disseisor, and upon  
 82. the Matter the Court adjudge him to be a Disseisor, tho' in Law he be  
*Cro. Eliz.* 309. no Disseisor, yet no Attaint lies against the Jury, (a) because it is not  
*S. P. per Cur.* their Fault, but the Fault of the Court.

(a) But following the Direction of the Court will not bar an Attaint; for if the Judge declares the Law to the Jury erroneously, and they find accordingly, tho' this may excuse them from the Forfeitures, yet how-ever upon the Attaint the Judgment is to be reversed, and a Man shall not lose his Right by the Judge's Mistake of the Law. *Vangb.* 145.

1 *Rol. Abr.* An Attaint lies before Execution sued, for the Danger of the Death of  
 282. the Petit Jury in the mean Time; for after the Death of any of the Petit Jury, no Attaint lies.

9 *H.* 6. 2. An Attaint lies for excessive Damages, as also where the Jury give too  
 1 *Rol. Abr.* little; but if the Jury give excessive Damages, and the Court abridge  
 284. them, and make them reasonable, no Attaint lies against the Jury, tho' they have made a false Oath; for such Abridgment is made upon the Prayer of the Party, and therefore he shall not have an Attaint also.

1 *Rol. Abr.* So if the Court increases the Damages, and makes them reasonable,  
 284. whereas before they were too small, no Attaint lies.

1 *Rol. Abr.* So if the Jury give excessive Damages, and after the Plaintiff, to whom  
 284. they are given, releases Part of the Damages, by which the Rest of the Damages which remain are reasonable enough, no Attaint lies; for hereby the Defendant's Cause of Grievance is taken away.

12 *E.* 4. 5. In an Attaint, if the Plaintiff assigns the false Oath in excessive Da-  
*Bro. Attaint* mages, he ought to assign it in this Manner, *scilicet*, that the Goods for  
 90. which the Damages were given were but of the Value of 40 s. and that in the Damages given over this Sum they made a false Oath.

11 *Co.* 5. b. If in Trespass against two one pleads Not guilty, and this found a-  
*Sir John Hey-* gainst him, and excessive Damages given, and after the other Defendant  
*don's Case.* comes and pleads Not guilty, and this is found against him also, he may  
*Hob.* 66. have an Attaint upon the first Verdict, because bound by the Damages  
*Cro. Jac.* 351. given thereby; and tho' he is a Stranger to the Issue, yet he is privy in  
 10 *Co.* 119. Charge.  
 1 *Rol. Rep.* 31. *S. P.*

1 *Rol. Abr.* In a *Square Impedit* against two, they make several Titles; and it is  
 282. found for one Defendant, and that the other disturbed him, the other may have an Attaint upon this; for by this he loses the Presentation.

1 *Rol. Abr.* He who is Party to the Recovery shall have an Attaint, altho' he  
 282. — The was not Tenant at the Time of the first Writ brought, nor when the  
*Reversioner* Judgment was given.  
 (by the Com- Judgment was given.  
 mon Law) after the Death of Tenant for Life. *Dyer* 1. pl. 5. 3 *Co.* 4. — And during the Life of the particular Tenant, per 9 *Rich.* 2. cap. 3.

48 *E.* 3. 17. If an Action of Joint-tenancy be pleaded with a Stranger, and the  
*Godb.* 378. Stranger joins with the Tenant in the Maintenance thereof, and this is found against them, yet the Stranger shall not have an Attaint, because he is not Party to the Writ.

11 *H.* 4. 27. So in an Action against A. and B. if it is found against them upon  
 1 *Rol. Abr.* several Issues, A. shall not have an Attaint upon a false Verdict against  
 283. B. because he was not Party to this Issue.

11 *H.* 4. 30. So in Trespass against two, if one pleads a Release, upon which they  
 1 *Rol. Abr.* are at Issue, and the other pleads the same Plea as Servant to him, if it  
 283. be found against the Master, the Servant shall not have an Attaint there-upon, for he is not Party to his Issue.

1 *Rol. Abr.* So in Waste against two, if one makes Default, and the other pleads,  
 283. and it is found against him, the other who made Default shall not have an Attaint thereupon, because he is not Party to the Issue.

If a Villein be found free in a *Homine Replegiando* against the Lord, and after the Lord dies, the Heir shall have an Attaint; so if the Villein were found free by a false Verdict, in an Action of Trespas brought by him against the Lord, and after the Lord dies, his Heir shall have an Attaint, because hereby he loses his Inheritance in the Villein; but he cannot have an Attaint for the Damages, but the Executors may, because they belong to them.

The Petit Jury can plead no Plea but such as may excuse them of the false Oath; and by the 23 H. 8. cap. 3. it is enacted, that after the Plaintiff hath assigned the false Oath, the Petit Jury, if they be the same Persons, and the Writ, Process, Return and Assignment good, shall have no Answer, but only that they made a true Oath; unless the Plaintiff, in an Attaint upon the same Verdict, hath before Nonsuit discontinued, or had Judgment against the Petit Jury.

In an Attaint upon a Verdict in Trespas, one of the Petit Jury pleaded an Award between the Plaintiff and Defendant, and whether this was a good Plea *dubatur*. *Kelw.* 130.

good Plea, yet *Q. & vide Dyer* 75. pl. 27.

In an Attaint brought by the Issue in Tail, upon a Verdict in a *For-medon* against his Ancestor, the Release of the Ancestor is not any Bar, for the Attaint is intailed as well as the Land itself.

By the 23 H. 8. cap. 3. all Attaints must be taken (a) in the King's Bench or Common Pleas; and not elsewhere; but a *Nisi Prius* may be granted.

can be granted upon any Attaint, because all Attaints are to be taken either before the King in his Bench, or before the Justices of the Common Pleas, and in no other Courts, &c. *Co. Lit.* 294. b. — Where a Verdict and Judgment given in the Exchequer was removed by *Certiorari* into the Common Pleas, and an Attaint. *Vide Dyer* 201. pl. 65. *Moor* 17. pl. 60. *N. Bendl.* pl. 132. *Kelw.* 210. & vide *Dyer* St. pl. 65. *Cro. Eliz.* 645 in which Book, because the Record was not removed *in Banco*, it was adjudged against the Plaintiff, and the Court would not grant him a Day to bring in the Record, and said, the Plaintiff, at his Peril, ought to have brought it in before; & vide *Cro. Eliz.* 371, 372. — How to be removed, vide 1 *Roll. Abr.* 394. — But if an Attaint be brought on a Judgment *in Banco*, and thereupon the Plaintiff assigns the false Oath, and the Defendant pleads *Bonum & Legale fecerunt Sacramentum*, and thereupon they are at Issue, and after the first Record is removed by a Writ of Error, yet the Process against the Grand Jury and the Party shall not be stayed, but the Court may proceed. *Dyer* 284. pl. 35.

The Judgment at Common Law was very (b) severe; and, according to my Lord Coke, importeth eight great and grievous Punishments; 1. *Quod amittant Liberam Legem imperpetuum*; that is, he shall be so infamous as never to be received as a Witness, or to be of any Jury. 2. *Quod forisfaciant omnia bona & Catalla sua*. 3. *Quod terre & Tenementa in manus Domini Regis Capiantur*. 4. *Quod uxores & Liberi extra Domus suas ejicerentur*. 5. *Quod Domus sue Prostrentur*. 6. *Quod arbores sue extirpentur*. 7. *Quod Prata sua arentur*. 8. *Quod Corpora sua Carceri mancipentur*.

But the Severity of this Punishment was mitigated by the Statute 23 H. 8. cap. 3. which prescribes the Methods of Proceeding in Attaint, and inflicts certain Pecuniary Punishments on the Jurors, in Proportion to the Damages sustained by the Party by the false Verdict, in which the (c) Party recovering is to be joined.

of the Statute it lies against the Executors of the Party for whom Judgment was given. *Moor* 17. pl. 60. *N. Bendl.* 132. *Kelw.* 210. a. 1 *And.* 24. *Dyer* 201. pl. 65.

If a Man recover in an Attaint, he shall be (d) restored to all that he hath lost by the Verdict, as well his Lands as the Mesne Profits; as also his Damage, if he lost in a Personal Action.

the Tenant for Life the Reversioner recovers in an Attaint, the Tenant shall be restored to the Possession and Mesne Profits, and the Reversioner to his Arrearages of Rent, but if the Tenant be dead, or of Covin with the Demandant, the Reversioner shall, &c. per 9 *Roll. 2. cap.* 5.

- 1 *Roll. Abr.* 286. So if a Man brings Debt and is barred, and he brings an Attaint, and it is found for him, he shall recover his Debt.
- 41 *Aff.* 18. So if the Issue in Tail recovers the Land in an Attaint upon a Recovery against his Ancestor, he shall recover the Issues of the Land from the Death of the Ancestor.
- 1 *Roll. Abr.* 286.

## 2. How otherwise punishable.

And herein we must consider Jurors either in a Ministerial Capacity, as Persons bound to attend the Court, to do the Business for which they are returned till they are discharged; or in a Judicial Capacity, as Judges of the Fact to be tried.

- 3 *Co.* 38. b. In the former Capacity they are liable to be punished in several Instances; as for refusing to appear, withdrawing themselves before they are sworn, or refusing to be sworn; for which every Court of Record may, of common Right, impose such a reasonable Fine on any one returned on a Grand or Petit Jury, as shall seem convenient.
41. a.
- 2 *Inst.* 242.
- 2 *Hal. Hist.* P. C. 309.

So if after they are sworn they refuse to give any Verdict at all.

- Noy* 49. So if they endeavour to impose upon the Court; as where a Petit Jury
- 3 *Bulst.* 173. offer a Verdict to the Court as agreed by their whole Number, where in
- Vaugh.* 152. Truth some of them have not agreed to it, or where they agree upon
- 1 *Roll. Abr.* 219. two Verdicts; and first, to offer one of them to the Court, and to stand
- Cro. Eliz.* 779. to it, if the Court shall express no Dissatisfaction to it; but if the Court
- 1 *Hawk. P. C.* 146. shall dislike it, then to give the other.
- 2 *Hal. Hist.* P. C. 309. that in such Case they shall be fined every one a-part.
- S. P. and

- So for misbehaving themselves after their Departure from the Bar; as
- Dyer* 78. pl. 41. where they do not all keep together till they have given their Verdict,
218. pl. 4. or where any of them carry any Thing (*b*) eatable with them in their
- Cro. Jac.* 21. Pockets, or eat or drink, or otherwise refresh themselves, without Leave
- Vaugh.* 21. from the Court, before they have given their Verdict, tho' they were
- 2 *Hawk. P. C.* 146. agreed on it, and were also all the Time in the Custody of the Bailiff
- (*a*) Which, if appointed to take care of them.
- Charge of him for whom they give a Verdict, avoids the Verdict; otherwise if they eat or drink at their own Charge, or the Charge of him against whom they give their Verdict. 2 *Hal. Hist. P. C.* 306.

- Also where a Jury, after they departed from the Bar, being late on
- Rastb.* 27 *Car.* 2. in B. R. *Saturday* Night, separated and went every one to his own House without giving a privy Verdict, or without consulting upon the Evidence, and gave a Verdict according to the Direction of the Court; but for this Misdemeanor they were fined each forty Shillings, and a new Trial granted; and herein the Chief Justice said, that by such Trial both Parties may be prejudiced; for the Jurors going at large, without consulting together, may well forget the Evidence; and it is the Right of the King's Subjects to have their Issues determined when the Evidence is fresh in the Memory of the Jurors; and the suffering the Jurors to go to their Houses after a privy Verdict is only by Connivance, but by the strict Rules of Law ought not to be suffered.

- Also where the Jury have been divided, or in Doubt, about the Evidence, and have agreed to determine the Matter by throwing Cross or Pile, &c. and to give their Verdict as the Chance happened; this has been held such a Misdemeanor, for which they have been ordered to attend, and for which they are punishable, and for which a new Trial will be granted on the common Rule of *Juratores male se gesserunt*.
- 2 *Lev.* 140, 205.
- 2 *Fon.* 83.
- 3 *Keble.* 805.

Jurors are likewise punishable for sending for or receiving Instructions from either of the Parties concerning the Matter in Question. *2 Hawk. P.C. 147.*

So if a Jurymen have a Piece of Evidence in his Pocket, and after the Jury sworn and gone together he (a) sheweth it to them, this is a Misdemeanor finable in the Jury; but it avoids not the Verdict, tho' the Case appear upon Examination. *Cro. Eliz. 616. 2 Hal. Hist. P. C. 325. (a) But it is no Offence in a Juror to*

exhort his Companions to join with him in such Verdict as he thinks right *1 Hawk. P. C. 250.*

As to the Punishment of Jurors in their Judicial Capacity, there are several Instances where Jurors acquitting great and notorious Offenders, contrary to clear and manifest Evidence, and contrary to the Judge's Directions, have been punished in the Star-Chamber, and have also, not only in the King's Bench, but also by Justices of Oyer and Terminer and Gaol-Delivery, been fined and imprisoned, and bound over to their good Behaviour; but these Methods were thought to be contrary to the Opinions in the old Books, and contrary to the general Reason of the Law; and being fully considered in (a) *Byssel's Case*, it was there settled, and hath been ever since agreed to, that Jurors are no way punishable, except by Attaint, for giving a Verdict contrary to a Judge's Directions, and against what may seem to others clear and manifest Evidence, for that they are the proper Judges of the Fact to be tried, and may be reasonably influenced by Matters known only to themselves, as their own Personal Knowledge of the Fact, or of the Credit of the Witnesses, or of the Parties. *2 Hawk. P. C. 147 S. and several Authorities there cited. (a) Vaugh. 143. 2 Jon. 16, 17.*

And herewith my Lord *Hale* seems to agree, and shews the Unreasonableness of punishing a Jury for going contrary to the Direction of the Court in Matters of Law, because it is impossible any Matter of Law could come in Question till the Matter of Fact were settled and stated and agreed by the Jury, and of such Matter of Fact they were the only competent Judges; also, says he, it were the most unhappy Case that could be to the Judge, if he, at his Peril, must take upon him the Guilt or Innocence of the Prisoner; and if the Judge's Opinion must rule the Matter of Fact, the Trial by a Jury would be useless. *2 Hal. Hist. P. C. 165, 161, 211, &c.*

But he seems to admit, that the long Use of fining Jurors in the King's Bench in Criminal Causes, may give possibly a Jurisdiction to fine in these Cases, yet that it can by no Means be extended to other Courts of Sessions, of Gaol-Delivery, Oyer and Terminer, or of the Peace, or other inferior Jurisdictions. *2 Hal. Hist. P. C. 313.*

Also by *Hawkins*, if it shall plainly appear in any Case, that Jurors are perfectly satisfied of the Truth of a Fact, whereupon they declare to the Court, that they find it in such a particular Manner; and the Court directly tell them, that upon the Fact so found, as they have agreed it to be, the Judgment of the Law is such or such, and therefore that they ought to give a Verdict accordingly, yet they obstinately insist upon a Verdict contrary to such a Direction; it seems agreeable to the general Reason of the Law, that the Jurors are finable by the Court in such a Case, unless an Attaint lies against them; for otherwise they would not be punishable for so palpable a Partiality in taking upon them to judge of Matters of Law, which they have nothing to do with, and are presumed to be ignorant of, contrary to the express Direction of one, who by the Law is appointed to direct them in such Matters, and is to be presumed of Ability to do it. *2 Hawk. P. C. 148 for which is cited 2 Jon. 15, 16. Vaugh. 144-5. Palm. 363. & vide Kel. 50.*

Also if a Judge, for the better Direction and Information of a Jury, shall ask them their Opinions concerning such a particular Fact, and they shall refuse to answer him, and obstinately insist to deliver in their Verdict, as they think fit, contrary to his Direction, it seems questionable whether they may not be fined in such a Case also, unless an Attaint lie against *2 Hawk. P. C. 149.*

against them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in order to be governed by it, as far as shall be consistent with their Consciences.

### 3. How Abuses by others in Relation to them are punishable; and therein of the Offence of Embracery.

*Co Lit.* 369. Embracery is defined in general to be any Attempt by either Party, or a Stranger, to corrupt or influence a Jury, or to incline them to favour one Side by Gifts or Promises, Threats or Persuasions, or by instructing them in the Cause, or any other way, except by opening and enforcing the Evidence by Council at the Trial, whether the Jurors give any Verdict or not, and whether the Verdict be true or false.

*Moor* 815.  
*2 Hawk. P. C.* 259. Also it is an Offence of this Kind for a Stranger barely to labour a Juror to appear and act according to his Conscience, or for any Person to labour a Juror not to appear; but it is no Offence for the Party himself, or for any Person, who can justify an act of Maintenance, to labour a Juror to appear and give a Verdict according to his Conscience.

*2 Hawk. P. C.* 259, 260. Also it is an Offence to give Money to a Juror after the Verdict, unless it be openly and fairly given to all alike, in Consideration of the Expences of their Journey and Trouble of their Attendance.

*2 Hawk. P. C.* 260. So the bare giving of Money to another, to be distributed among Jurors, favours of Embracery, whether any of it be distributed or not; and it is an Offence of the like Kind for a Person, by indirect Means, to procure himself, or another, to be sworn of a *Tales*, in order to serve one Side; also it is as Criminal in a Juror, as in any other Person, to endeavour to prevail on his Companions to give a Verdict on one Side, by any other Arguments besides the Evidence produced, and the general Obligations of Conscience.

*2 Hawk. P. C.* 260. The Offence of Embracery is punishable at (a) Common Law by Indictment or Action; and if it were not known before the Trial, it will

(a) How it is be a good Cause to set aside the Verdict.  
further restrained and punished by Statute, *vide* 5 E. 3. cap. 10. 34 E. 3. cap. 8. 38 E. 3. cap. 12. and 1 Hawk. P. C. 260, &c.

*1 Hawk. P. C.* 58-9. Abuses by others, in Relation to Juries, are punishable by Fine and Imprisonment; as if a Man assault or threaten a Juror for having given a Verdict against him, he may be indicted as a Disturber of the Administration of Justice, and one who is guilty of a Contempt to the King's Courts.

*Hill. 10 Ann. The Queen ver. Wakefield.* Also the Court of King's Bench granted an Information against a Town-Clerk, for publishing an Order of the Court against Jurors who had found a Person guilty of Manslaughter only, upon an Indictment of Murder, by which Order the said Jurors were declared to be justly suspected of Bribery.

# Justices of Peace.

- (A) Of the ancient Officers, called Conservators of the Peace.  
 (B) Of the first Institution, and general Statutes which give Justices of Peace a Jurisdiction.  
 (C) Of their Commission, and Manner of appointing them.  
 (D) Who are qualified for the Office.  
 (E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them: And herein,

1. What Jurisdiction they have in Relation to Treason and Misprision of Treason.
2. What in Relation to Felonies.
3. What in Relation to inferior Offences.
4. How far they have Power to proceed on Indictments not taken before themselves.
5. By what Justice the Jurisdiction must be exercised; and therein how far a Justice of a County may act out of it, or within a Liberty.

## (A) Of the ancient Officers, called Conservators of the Peace.

**I**T seems to be clearly agreed, that before the Statute 1 E. 3. cap. 16. there were no Justices of the Peace, and that they were first instituted by that Statute; yet by the Common Law there were certain Conservators of the Peace, which were of two Sorts. 1. Those who in respect of their Offices had Power to keep the Peace, but were not simply called by the Name of Conservators of the Peace, but by the Name of such Offices. 2. Those who were constituted for this Purpose only, and were simply called by the Name of Conservators or Wardens of the Peace.

As to the first Sort, the King is undoubtedly the Principal from whom all Authority of this Kind is originally derived; but it is said, that he cannot take a Recognizance for the Peace, because it is a Rule that no Recognizance can be taken by any one who is not a Justice either of Record or by Commission; also the Lord Chancellor, or Lord Keeper of the Great Seal, the Lord High Steward of England, the Lord Marshal, the Lord High Constable, and every Justice of the King's Bench, and the

Master of the Rolls, and, as some say, the Lord Treasurer, have a general Authority to keep the Peace throughout the Realm, and to award Process, and to take Recognizances for it; but a Peer, as such, seems to have no more Power in this Respect, than a meer private Person.

10 H. 6. 7. b.  
Lamb. book 1.  
chap. 3. Also all Courts of Record, as such, have Power to keep the Peace within their own Precincts; and the Justices of Gaol-Delivery may take Surety of the Peace from a Person committed, for not finding such Surety.

12 H. 7. 17. b.  
Bro. Peare 13.  
Cro. Car. 26.  
F. N. B. 81. Also every Sheriff is a Principal Conservator of the Peace within his County, and may *ex officio* award Process, and take Surety for it; and, as some say, the Surety so taken is to be looked on as a Recognizance or Matter of Record, and not as a common Obligation, because it is taken by Virtue of the King's Commission.

Vide Tit.  
Coroner. Also a Coroner is another Principal Conservator of the Peace, and may bind any one to the Peace who shall make an Affray in his Presence; but he is said to have no Authority to grant Process for the Peace; and it seems, that the Security taken by him for the Peace is not to be looked on as Matter of Record, but as Matter in *Pais*, only except where it is taken by him as Judge in his own Court for an Affray in his Presence.

Vide Tit.  
Constable. Also every High and Petit Constable are, by the Common Law, Conservators of the Peace within their several Limits, and may take Order for the Keeping of the same.

The Conservators of the Peace, simply so called, were either Ordinary or Extraordinary.

Bro. Peare 18.  
Prescript. 79.  
22 E. 4. 35. b.  
Lamb. book 1.  
chap. 3.  
Co. Lit. 114.  
Doct. & Stud.  
book 1. ch. 7.  
Crompt. 6. The Ordinary were either by Tenure, *viz.* such as held their Lands by this Service, or by Election, *viz.* such as were chosen by the Freeholders of a County, in Pursuance of the King's Writ for this Purpose, or by Prescription, *viz.* such as claimed such a Power by an immemorial Usage in themselves and their Ancestors, or Predecessors, or those whose Estate they had; but the Power of none of those Conservators of the Peace seems to have been greater than that of Constables at this Day, unless it were enlarged by some special Grant or Prescription.

Lamb. book 1.  
chap. 3. The Extraordinary Conservators of the Peace were Persons specially commissioned in Times of imminent Danger, either from Rebels or foreign Invaders, to take care of and defend such a particular District committed to their Charge, and to preserve the Peace within the Limits of it; and these had Power to command the Sheriff, with his whole *Posse*, to assist them.

## (B) Of the first Institution, and general Statutes which give Justices of Peace a Jurisdiction.

(a) And therefore a Person cannot be a Justice of Peace by Prescription. JUSTICES of Peace were (a) first instituted by the Statute 1 E. 3. cap. 16. which provides in the following Words: 'That for the better Keeping and Maintenance of the Peace, the King willeth, that in every County good Men and lawful, which be no Maintainers of Evil, or Barrators in the Country, shall be assigned to keep the Peace. And have no Jurisdiction but what Statutes give them, being created within Time of Memory. 1 Salk. 406.



And by the 4 E. 3. cap. 2. it is further Enacted, ' That there shall be assigned good and lawful Men in every County to keep the Peace, and at the Time of the Assignments Mention shall be made that such, as shall be indicted or taken by the said Keepers of the Peace, shall not be let to Mainprize by the Sheriffs, nor by none other Ministers, if they be not mainpernable by the Law; and the Justices assigned to deliver the Gaols shall have Power to deliver the same Gaols of those that shall be indicted before the Keepers of the Peace, and that the said Keepers shall send their Indictments before the Justices, &c.'

And it is further Enacted by 18 E. 3. cap. 2. ' That two or three of the best Reputation in the Counties shall be assigned (a) Keepers of the Peace by the King's Commission, and at what Time Need shall be, the same, with other wise and learned in the Law, shall be assigned by the King's Commission to hear and determine Felonies and Trespasses done against the Peace in the same Counties, and to inflict Punishment reasonably according to the Law and Reason and the Manner of the Deed.'

(a) Altho' they are not named Keepers, but Justices of Peace in their Commission, yet inasmuch as by this Sta-

ture they are expressly called Keepers of the Peace, and the Keeping thereof is the principal End of their Office, it has been adjudged that the Caption of an Indictment *crim A. B. & C. D. Custodibus Pacis & Justiciariis Domini Regis* is good, without expressly naming them Justices of Peace. 2 Rol. Abr. 95. — Also it hath been resolved, that the Description of Justices of Peace by the Name of *Justiciarii Domini Regis ad Pacem conservandam*, &c. is good, without saying *ad Pacem Domini Regis*, for that it is necessarily implied. 2 Hawk. P. C. 58.

And it is further Enacted by 34 E. 3. cap. 1. ' That in every County of England shall be assigned for the keeping of the Peace one Lord, and with him three or four of the most worthy in the County, with some Learned in the Law, and they shall have Power to restrain the Offenders, Rioters, and all other Barrators, and to pursue, arrest, take, and chastise them according to their Trespass or Offence, and to cause them to be imprisoned, and duly punished, according to the Law and Customs of the Realm, and according to that which to them shall seem best to do, by their Discretion and good Advise; and also to inform them, and to inquire of all those that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandering, and will not labour as they were wont in Times past; and to take and arrest all those that they may find by Indictment or by Suspicion, and to put them in Prison, and to take of all them, that be not of good Fame, where they shall be found, sufficient Surety and Mainprize of their good Behaviour towards the King and his People, and the other duly to punish, to the Intent that the People be not by such Rioters or Rebels troubled nor endamaged, nor the Peace blemished, nor Merchants nor other passing by the Highway of the Realm disturbed nor put in the Peril, which may happen of such Offenders; and also to hear and determine at the King's Suit all manner of Felonies and Trespasses done in the same County, according to the Laws and Customs aforesaid.

And it is Enacted by 17 R. 2. cap. 10. ' That in every Commission of the Peace thro' the Realm, where Need shall be, two Men of Law of the same County where such Commission shall be made, shall be assigned to go and proceed to the Deliverance of Thieves and Felons, as often as they shall think it expedient.

And it is further Enacted by 2 H. 5. Stat. 1. cap. 4. ' That the Justices of Peace in every Shire named of the *Quorum*, (except Lords, and the Justices of either Bench, and the Chief Baron, and Serjeants at Law, and the King's Attorney for the Time that they shall be occupied in the King's Service,) shall be resident in the same Shire, and shall make their Sessions four Times by the Year, viz. in the first Week after Michaelmas, Epiphany, Easter, and the Translation of St. Thomas the Martyr, and ofiner if Need be, and that the same Justices hold their Sessions throughout England in the same Weeks every Year'

These

Salk. 475

These seem to be the most general Statutes relating to the Authority of Justices of Peace, besides which there are a very great Number of subsequent Statutes which give them particular Powers, sometimes to one Justice, sometimes to two, sometimes in their Sessions, sometimes out of their Sessions; of which in this Place I shall no otherwise take Notice than by observing, that where by Statute a special Authority is given to Justices of Peace, it must be exactly pursued.

### (C) Of their Commission, and Manner of appointing them.

Lamb. E. 1.  
cap. 5.  
Brook, Com-  
mission, cap. 5.  
Dalt. cap. 3.  
1 Lev. 219.

(a) Nor can  
a Justice of  
Peace of a  
Corporation  
created by

Patent reign. 1 Rol. Rep. 135.

JUSTICES of the Peace can only be appointed by the King's Commission, and such Commission must be in his Name; but it is not requisite that there should be a special Suit or Application to, or Warrant from the King for the granting thereof, which is only requisite for such as are of a particular Nature; as constituting the Mayor of such a Town, and his Successors, perpetual Justices of the Peace within their Liberties, &c. which Commissions are (a) neither revokable by the King, nor determinable by his Death, as the common Commission for the Peace is, which is made of Course by the Lord Chancellor according to his Discretion.

2 Hawk P.C.  
35.  
4 Inst. 171.  
Lamb. E. 1.  
cap. 9.

The Form of the Commission of the Peace, as it is at this Day, was, according to *Hawkins*, settled by the Judges about the 33 *Eliz.* and is in Substance as followeth.

2 Hawk. P.C.  
35.

Beginning with a Salutation from the King to the several Persons named in it, it afterwards assigns them, and every one of them jointly and severally, the King's Justices to keep the Peace in such a County, and to cause to be kept all Statutes made for the Good of the Peace and quiet Government of the People, as well within Liberties as without, and to punish all those who shall offend against any of the said Statutes, and to cause all those to come before them, or some of them, who shall threaten any of the People as to their Persons, or the Burning of their Houses, in order to compel them to find Surety for the Peace or good Behaviour; and if they shall refuse to find such Surety, to cause them to be safely kept in Prison till they shall find it.

2 Hawk. P.C.  
35.

Then it goes on, and assigns them, and every two or more of them, (of which Number either such or such a particular Person among them is specially required to be,) Justices, to inquire by the Oath of good and lawful Men of the same County, of all Felonies, Witchcrafts, Inchantments, Sorceries, Magic Art, Trespases, Forestallers, Regrators, Ingrossers, and Extortions whatsoever, and of all other Offences of which Justices of the Peace may lawfully inquire; also of all those who shall go or ride armed, &c. or in Companies, to the Disturbance of the Peace, and also of all Innholders, and others, who shall offend in the Abuse of Weights or Measures, or selling of Victuals, &c. and also of all Sheriffs, Bailiffs, Stewards, Constables, Gaolers, and other Officers who shall be faulty in the Execution of their Offices; and to inspect all Indictments taken before them, or any of them, or other former Justices of the Peace for the same County, and to make and continue Process against all the Persons so indicted, till they shall be taken, or render themselves, or be outlawed; and to hear and determine all the Felonies and other Offences aforesaid; provided, that if a Cause of Difficulty shall arise, they shall not

proceed to give Judgment, except in the Presence of some Justice of one of the Benches, or of Assise.

And then it commands them to make Inquiries of the Premises, and to hear and determine the same at certain Days and Places, which they, or any such two or more of them, shall appoint; and then it goes on, and commands the Sheriff of the County to return before them, at certain Days and Places to be made known to him by them, such and so many lawful Men of his Bailiwick, by whom the Truth of the Premises may be best known and inquired; and then concludes by assigning some one of them Keeper of the Rolls of the Peace in the same County, and commanding him to cause to be brought before himself and his Fellows, at the said Days and Places, the Writs, Precepts, Processes, and Indictments aforesaid.

My Lord Hale gives us the same Commission, which at present, says he, consists of two Clauses of *Assignavimus*; by the first of which each of them is made a Justice or Conservator of the Peace; by the second *Assignavimus* Power is given to them, or two of them, whereof one of the *Quorum*, to hear and determine Felonies, and other Matters; for the bare making them Justices of the Peace, without this Clause, doth not give them Power to hear and determine Indictments; he also takes Notice of a Proviso in the said Commission, viz. that in Case of Difficulty arising, then to respite Judgment till the Justices of Assise come into the County, &c.

It seems agreed, that Justices of the Peace may by Virtue of their Commission execute as well the Statutes made before the Reign of Edw. 3. for the better keeping of the Peace; such as the Statutes of *Winchester* and *Westminster*, &c. as those made since that Time; and yet the Statutes, which ordain Justices of the Peace, say nothing of the Execution of those former Statutes; from whence, says *Hawkins*, it appears that the King may by Commission authorise whom he pleases to execute a Statute.

## (D) Who are qualified for the Office.

BY the Statute 2 H. 5. Stat. 2. cap. 1. it is Enacted, ' That Justices of Peace shall be made in the Counties of *England* of most sufficient Persons dwelling in the same Counties, by the Advice of the Chancellor and of the King's Council, without taking other Persons dwelling in foreign Counties to execute such Office, except the Lords and the Justices of Assises to be named by the King and his Council, and except all the King's chief Stewards of the Lands and Seignories of the Duchy of *Lancaster* in the North Parts and in the South for the Time being.

By the 1 Mar. Seff. 2. cap. 8. it is Enacted, ' That no Person having or using the Office of a Sheriff of any County shall use or exercise the Office of a Justice of Peace, by Force of any Commission, or otherwise, in any County where he shall be Sheriff, during the Time only that he shall exercise the said Office or Sheriffwick, and that all Acts done by such Sheriff by Authority of any Commission of the Peace, during the Time aforesaid, shall be void.

By the Statute 18 H. 6. cap. 11. it is Enacted, ' That no Justice of Peace within the Realm of *England* in any County shall be assigned or deputed, if he have not Lands or Tenements to the Value of 20 l. per Annum, except in Cities, Towns Corporate, &c.

In an Indictment on this Statute, it must be shewn that he had

a Commission, and did some Act pursuant thereto, not having Lands, &c. Cro. Jac. 643 4.

And now by the 5 *Georg. 2. cap. 18.* it is Enacted, ‘ That no Person shall be capable of being a Justice of the Peace, or to act as a Justice of the Peace, for any County within that Part of *Great Britain* called *England*, or the Principality of *Wales*, who shall not have an Estate of Freehold or Copyhold to and for his own Use and Benefit in Possession for Life, or for some greater Estate either in Law or Equity, or an Estate for Years determinable upon one or more Life or Lives, or for a certain Term originally created for twenty-one Years, or more, in Lands, Tenements, or Hereditaments, lying in that Part of *Great Britain* called *England*, or Principality of *Wales*, of the clear yearly Value of one hundred Pounds over and above what will satisfy and discharge all Incumbrances that may affect the same.

‘ And it is further Enacted, That no Attorney, Solicitor, or Proctor in any Court whatsoever, shall be capable to continue or be a Justice of the Peace within any County for that Part of *Great Britain* called *England*, or the Principality of *Wales*, during such Time as he shall continue in the Business and Practice of an Attorney, Solicitor, or Proctor.

‘ And it is further Enacted, That if any Person, who shall not be qualified according to the Directions of this Act, shall accept or take upon himself the Office of a Justice of the Peace, or shall do any Act as such, the Person so offending shall for every such Offence forfeit and pay the Sum of one hundred Pounds; one Moiety whereof shall be to the King’s Majesty, his Heirs and Successors, and the other Moiety to such Person or Persons as will sue for the same by Action of Debt, Bill, Complaint, or Information in any of his Majesty’s Courts of Record at *Westminster*, in which no Essoin, Protection, Wager of Law, nor more than one Imparlance shall be allowed.

‘ Provided, That this Act shall not extend to any City or Town being a County of itself, or to any other City, Town, Cinque Port, or Liberty having Justices of the Peace within their respective Limits and Precincts by Charter, Commission, or otherwise; but that in every such City, Town, Liberty, and Place such Persons may be capable to be Justices of the Peace, and in such Manner only as they might have been if this Act had never been made.

‘ Provided also, That nothing in this Act contained shall extend to incapacitate any Peer or Lord of Parliament, or the eldest Son or Heir Apparent of any Peer or Lord of Parliament, or of any Person qualified to serve as Knight of a Shire by an Act intituled, *An Act to secure the Freedom of Parliaments, by the further qualifying Members to sit in the House of Commons*, to be a Justice of Peace for any County, or to act as such.

‘ Provided also, That nothing in this Act contained shall extend or be construed to extend to incapacitate or exclude the Officers of the Board of Green Cloth from being Justices of the Peace within the Verge of his Majesty’s Palaces, or to incapacitate or exclude the Commissioners and principal Officers of the Navy, or the two Under Secretaries in each of the Offices of Principal Secretary of State from being Justices of the Peace, in and for such Maritime Counties and Places where they usually have been Justices of the Peace.

‘ Provided also, That this Act shall not extend to any of the Heads of Colleges or Halls in either of the two Universities of *Oxford* and *Cambridge*, but that they may be made Justices of the Peace of and in the several Counties of *Oxford*, *Berks*, and *Cambridge*, and the Cities and Towns within the same, and execute the Office thereof as fully and freely in all Respects, as heretofore they have lawfully used to execute the same, as if this Act had never been made.

(E) Of their Authority and Jurisdiction pursuant to their Commission, and the general Statutes relating to them : And herein,

1. What Jurisdiction they have in Relation to Treason and Misprision of Treason.

IT seems to be clearly agreed, that Justices of the Peace have not Jurisdiction to (a) hear and determine Treason, *Præmunire*, or Misprision of Treason. *Dalt. cap. 90. 1 Hal. Hist. P. C. 305, 350, 372. 2 Hal. Hist.*

*P. C. 44. 2 Hawk. P. C. 39. (a) In 1 Hal. Hist. P. C. 372. it is laid down as the Opinion of Chief Justice Rolls, that Justices of the Peace may take an Indictment of Treason, tho' they cannot determine it. — But in another Place, viz. 1 Hal. Hist. P. C. 305. my Lord Hale says expressly, that they cannot take an Indictment of it.*

But as these Offences are against the Peace of the King and of the Realm, any Justice of the Peace may, either upon his own Knowledge, or the Complaint of others, cause any Person to be apprehended for any such Offence, and such Justice may take the Examination of the Person so apprehended, and the (b) Information of all those who can give material Evidence against him, and put the same in Writing, and also bind over such who are able to give any such Evidence to the King's Bench or Gaol-Delivery, and certify his Proceedings to the same Court to which he shall bind over such Informers; and this Doctrine seems to be established by constant Practice, especially since the Statutes of 1 & 2 Ph. & Mar. cap. 13. and 2 & 3 Ph. & Mar. cap. 10. which directing Justices of Peace to proceed in this Manner against Persons brought before them for Felony, seem to give them a discretionary Power of proceeding in like Manner against Persons accused of the above-mentioned Offences. *Vide the Authorities supra. (b) And these Informations taken upon Oath, as they ought to be, and sworn to by the Justice, or his Clerk that took them, to be truly taken, may be read in*

Evidence against the Prisoner, if the Informant be dead, or not able to travel, and sworn so to be; also, says my Lord Hale, by the Opinion of some, if he were bound over, and appear not, they may be read; but this, he says, is questionable. *2 Hal. Hist. P. C. 305. But for this vide 2 Hawk. P. C. 429.*

Also by some Acts of Parliament Justices of Peace may take Indictments of particular Treasons; but those Presentments they must certify into the King's Bench or Gaol-Delivery, as the Case shall require; as upon the Statute of 5 Eliz. cap. 1. for maintaining the Authority of the See of Rome; 13 Eliz. cap. 2. for bringing in Bulls for Absolution, *Agnus Dei*, &c. 23 Eliz. cap. 1. for withdrawing and reconciling, or being withdrawn from the King's Allegiance. *2 Hal. Hist. P. C. 44. 1 Leon. 239.*

So by the Statute of 3 H. 5. cap. 7. as to Treason for clipping, &c. Power was given to the Justices of Peace to inquire and make Process thereupon, and antiently that Clause was put into their Commission, but now omitted; for by the Statute of 1 Mar. cap. 1. the Act of 3 H. 5. cap. 6. is repealed, and consequently the Act 3 H. 5. cap. 7. that gave Power to Justices of Peace to inquire touching it. *2 Hal. Hist. P. C. 45.*

2. What in Relation to Felonies.

It seems to have been a Matter of some Doubt, whether Justices of Peace, as such, have Power to hear and determine Felonies, &c. and this Doubt seems to have arose from the general Words of 34 E. 3. *Cro. Jac. 32. Yelv. 46. 2 Rol. Rep 151. Dyer 69. pl. 29. cap. 2 Hawk. P. C. 38.*

*cap. 1.* which is exprefs, that the Persons assigned to keep the Peace shall have Power, among other Things, to hear and determine Felonies, &c.

*Stamf. P. C.*  
53.

*Crompt. 120.*

*2 Hal. Hift.*

*P. C. 43.*

*2 Hawk P.C.*

38.

But it feems to be now fettled, that Juftices of Peace have no Power to hear and determine Felonies, unlefs they be authorized fo to do by the exprefs Words of their Commiffion; and that their Jurifdiction to hear and determine Murder, Manflaughter, and other Felonies and Trefpaffes, is by Force of the fecond *Assignavimus* in their Commiffion, which gives them, or two of them, whereof one of the *Quorum*, Power to hear and determine Felonies, &c.

*Dominus Rex*

*verfus Carter,*

*Tvin. 7 Georg.*

*1. in B. R.*

And hence it hath been lately adjudged, that the Caption of an Indictment of Trefpafs before Juftices of the Peace, without adding *neon ad diverfas Felonias, &c. assignat*, is naught.

But tho' Juftices of Peace by Force of their Commiffion have Authority to hear and determine Murder and Manflaughter, yet they feldom exercife a Jurifdiction herein, or in any other Offences in which Clergy is taken away; and this, fays my Lord *Hale*, is for two Reafons:

*2 Hal. Hift.*  
*P. C. 46.*

1. By reafon of the Monition and Clause in their Commiffion, *viz.* in Cafes of Difficulty to expect the Prefence of the Juftices of Affife.

2. By reafon of the Direction of the Statute of 1 & 2 *Ph. & Mar. cap. 13.* which directs Juftices of the Peace in Cafe of Manflaughter, and other Felonies, to take the Examination of the Prifoner, and the Information of the Fact, and put the fame in Writing, and then to bail the Prifoner, if there be Caufe, and to certify the fame, with the Bail, at the next Gaol-Delivery; and therefore in Cafes of great Moment they bind over the Profecutors, and bail the Party, ifailable, to the next Gaol-Delivery; but in fmall Matters, as Petty Larceny, and fome Cafes, they bind over to the Seflions; but this is but in Point of Difcretion and Convenience, not becaufe they have not Jurifdiction of the Crime.

### 3. What in Relation to inferior Offences.

*6 Mod. 128.*

The Jurifdiction herein given to Juftices of Peace by particular Statutes is fo various, and extends to fuch a Multiplicity of Cafes, that it were endlefs to endeavour to enumerate them; alfo they have, as Juftices of the Peace, a very ample Jurifdiction in all Matters concerning the Peace.

*1 Lev. 139.*

*1 Sid. 271.*

*(a) Lat. b 173.*

*Poph. 208.*

*Cro. Jac. 32.*

*Yelv. 46.*

And therefore it hath been held, that not only Assaults and Batteries, but Libels, Barrettry, and common (a) Night-Walking, and haunting Baudy-Houfes, and fuch like Offences, which have a direct Tendency to caufe Breaches of the Peace, are cognizable by Juftices of the Peace, as Trefpaffes within the proper and natural Meaning of the Word.

*Salk. 406.*

*Crompt. 120.*

*Lamb. B. 1.*

*cap. 12.*

But neither Perjury nor Forgery, at Common Law, nor any other fuch like Offences, which do not directly tend to caufe a personal Wrong or open Violence, are cognizable by them, unlefs it be by the exprefs Words of their Commiffion, or of fome Statute.

### 4. How far they have Power to proceed on Indictments not taken before themfelves.

*2 Hal. Hift.*

*P. C. 46*

*2 Hawk P.C.*

37.

Juftices of the Peace may proceed upon Indictments taken before their Predeceffors, which depends upon the Statutes 11 *H. 6. cap.* and 1 *E. 6. cap. 7. par. 6.* the former of which, reciting the Inconveniencies that Pleas and Proceffes upon Indictments before Juftices of the Peace had often been difcontinued by making of new Commiffions of the Peace, to the great Loſs of the King, &c. ordains that fuch Pleas, Suits, and Proceffes before Juftices of the Peace ſhall not be difcontinued by new Commiffions of

of the Peace, but stand in Force, and that the new Justices, after that they have the Records of the same Pleas and Processes before them, may continue, and finally hear and determine the same; and this is confirmed by the 1 E. 6. cap. 7.

But Justices of Peace have no Power to proceed on Indictments taken before a Coroner, or before Justices of Oyer or Gaol-Delivery, or to deliver Persons suspected by Proclamation. <sup>2 Hal. Hist. P. C. 46.</sup>

But if an Indictment be taken before the Sheriff in his Torn, by the Statute of 1 E. 4. cap. 2. those Indictments are to be delivered to the Justices of Peace at their next Session, and they may proceed on those Presentments. <sup>2 Hal. Hist. P. C. 46.</sup>

### 5. By what Justice the Jurisdiction must be exercised; and therein how far a Justice of a County may act out of it, or within a Liberty.

Every single Justice has regularly a Jurisdiction thro' the whole County, which he alone may exercise for the Preservation of the Peace; and this Jurisdiction he has by Virtue of his Commission, which constitutes him a Justice of Peace; but the Power of hearing and determining Offences is by the Commission given to two, or more, (a) *Quorum unus*, &c. and therefore if two Justices, *Quorum unus*, be impowered to do a Thing, it must appear that one was of the *Quorum*. <sup>2 Hal. Hist. P. C. 44. 5 Med. 322. Comb. 200. (a) Cannot be a Session without a Justice of the</sup>

*Quorum*. 3 Mod. 14, 152.

So if a Thing be required to be done by two Justices, they must both be present at the Execution of it; as if two Justices adjudge a Person the Father of a Bastard Child, and the Examination is said to be by one of them, this is naught; for the Examination being a Judicial Act ought to be by both, and it is not sufficient that one of them examined, and made a Report to the other; but if they are both present, and one alone examines, or asks Questions, it is well enough: So where two Justices are enabled to bail a Person, they ought both to be present to do it, and not one of them first to sign the Recognizance, and then send it to another. <sup>6 Mod. 180.</sup>

A single Justice cannot bail a Person that is committed by Order of the Sessions; for he that bails must have as high a Power as he who commits. <sup>1 Keb. 857, 897. Vide Tit. Bail.</sup>

But whatsoever Power is given to a Justice, or to two Justices of the Peace, by any Statute, is given to the Sessions of the Peace, which consists of a Collection of Justices. <sup>2 Keb. 78.</sup>

It has been held, that where a Statute says the next Justice, it must be the next; but where it says the Justices of Peace in or near the Place, there any Justice of Peace in the County will serve. <sup>1 Keb. 559.</sup>

Justices of the Peace are to execute their Authority as Justices of the Peace within the County wherein they are Justices, and cannot regularly do a Judicial Act out of such County. <sup>2 Hal. Hist. P. C. 50. 2 Hawk P. C. 37.</sup>

Therefore if a Justice of Peace live or be out of the County wherein he is Justice, he cannot by his Warrant fetch a Person out of the County whereof he is Justice, to come before him in the County where he is. <sup>13 E. 4. S. b. Plow 37. a. Platt's Case.</sup>

And as Justices of the Peace have no coercive Power out of their County, they cannot make an Order of Bastardy, or such like Orders, out of their County. <sup>2 Hawk P. C. 37.</sup>

But a Justice of Peace may do a Ministerial Act out of the County, such as examine a Party robbed, whether he know the Felons, according to the Statute, or not. <sup>Cro. Car. 211. 1 F. N. 259.</sup>



2 Hawk. P. C.  
57.  
2 Hal. Hist.  
P. C. 51.

Also by the better Opinion, Recognizances and Informations voluntarily taken before them in any Place are good; for those, says my Lord Chief Justice *Hale*, are Acts of voluntary Jurisdiction, and may be done out of the County, as well as a Bishop may grant Administration, Institution, or Orders, out of his Diocese.

2 Hal. Hist.  
P. C. 51.

But a Justice of Peace cannot imprison a Person for not giving a Recognizance, or commit a Person for a Crime, for these are Acts of compulsory Jurisdiction, which he cannot exercise out of his proper County.

2 Hal. Hist.  
P. C. 51.

If *A.* commit a Felony in the County of *B.* where he lives, and goes into the County of *C.* and is there taken, a Justice of the Peace of the County of *C.* may take his Examination and Informations in the County of *C.* tho' the Felony were committed in the County of *B.* but my Lord *Hale* says, that upon his Arraignment in the County of *B.* he would never allow these Examinations to be given in Evidence, because tho' he may commit and examine, and give an Oath to the Informers, yea and bind them over to give Evidence, or commit them, yet that is but for Necessity of preserving the Peace, for he hath really no Jurisdiction in the Case.

1 Hal. Hist.  
P. C. 580.

If *A.* commit a Felony in the County of *B.* and upon a Warrant issued against him by a Justice of Peace in the County of *B.* he is pursued and flies into the County of *C.* and there is taken, he must not, by Virtue of that Warrant, be carried to a Justice of Peace of the County of *B.* where he committed the Felony, but to a Justice of Peace in the County of *C.* where he was taken.

1 Hal. Hist.  
P. C. 581.

But if *A.* were taken by the Warrant in the County of *B.* and break away into the County of *C.* and be there taken upon fresh Suit by them that first took him, he may be either brought to a Justice of the County of *C.* where he was last taken, or before the Justice of the County of *B.* by whose Warrant he was first taken; for in Supposition of Law he was always in Custody.

2 Hal. Hist.  
P. C. 115.

But if he escape before Arrest into another County, if it be a Warrant barely for a Misdemeanor, it seems the Officer cannot pursue him into another County, because out of the Jurisdiction of the Justice that granted the Warrant; but in case of Felony, Affray, or dangerous Wounding, the Officer may pursue him, and raise Hue and Cry upon him into any County; but if he take him in a foreign County, he is to bring him to the Gaol or Justice of that County where he is taken, for he doth not take him purely by the Warrant of the Justice, but by the Authority which the Law gives him, and the Justice's Warrant is a sufficient Cause of Suspicion and Pursuit.

2 Hal. Hist.  
P. C. 581.

If *A.* be a Justice of Peace in two adjacent Counties, tho' by several Commissions, as the Recorder of *London* is, he, whilst he lives in one County, may send his Warrant to apprehend Malefactors in another, and send them to *Newgate*, which is the common Gaol both for *London* and *Middlesex*.

4 Co. 46. a.  
Wigg's Case.  
2 Hal. Hist.  
P. C. 52.

The Justices of the Peace have Jurisdiction of Felonies arising within the Verge.

2 Hawk. P. C.  
37.  
2 Hal. Hist.  
P. C. 49.

Justices of the Peace for a County have, by their Commission, an express Authority as well within Liberties as without, and may execute their Office within a Town which has a special Commission of the Peace for its own Limits, unless such Commission have a Clause, that no other Justices, except those named in it, shall any way concern themselves in the Keeping of the Peace within the Liberties of such Town.

2 Hal. Hist.  
P. C. 47.  
2 Hawk. P. C.  
37.

Also it seems, that tho' such Commission have a special exclusive Clause, of which the Justices have Notice, yet their Acts within a Liberty are not void, tho' perhaps they may be punished for Proceeding in Defiance of such restrictive Clause, as for a Contempt of the King's Prohibition.



By the 9 *Georg. 1. cap. 7. sect. 3.* it is enacted, ‘ That if any Justice of Peace shall dwell in any City, or other Precinct, that is a County of itself, situate within the County at large, for which he shall be appointed Justice of Peace, altho’ not within the same County, it shall and may be lawful for any such Justice of Peace to grant Warrants, take Examinations, and make Orders, for any Matters which any one or more Justice or Justices of the Peace may act in, at his own Dwelling-house, altho’ such Dwelling-house be out of the County where he is authorized to act as a Justice of Peace, and in some City, or other Precinct adjoining, that is a County of it self; and that all such Warrants, Orders, and other Act or Acts of any such Justice of Peace, and the Act or Acts of any Constable, Tythingman, Headborough, Overseer of the Poor, Surveyor of the Highways, or other Officer, in Obedience to any such Warrant or Order, shall be valid, good and effectual in the Law, altho’ it happen to be out of the Limits of the proper Precinct or Authority; Provided always, that nothing in this Act contained shall extend to give Power to the Justices of Peace for the Counties at large, to hold their General Quarter-Sessions of the Peace in Cities or Towns, which are Counties of themselves, nor to empower Justices of Peace, Sheriffs, Bailiffs, Constables, Headboroughs, Tythingmen, Borholders, or any other Peace-Officers of the Counties at large, to act or intermeddle in any Matters or Things arising within Cities or Towns, which are Counties of themselves, but that all such Actings and Doings shall be of the same Force and Effect in Law, and none other, as if this Act had never been made.

## Leases and Terms for Years.

**A** Lease for Years is a Contract between Lessor and Lessee, for the Possession and Profits of Lands, &c. on the one Side, and a Recompence for Rent, or other Income, on the other.

This is esteemed in Law a middle Kind of Interest between an Estate for Life and a Tenancy at Will; for those who held large Districts and Tracts of Lands, being unacquainted with the Arts of Husbandry and Tillage, found it their Interest to lease out their Demesnes, which for want of Care and Cultivation lay Waste, and afforded them little or no Profit; and this way of Letting for Years was thought best to answer the Design and Intentions of the Lord, as well as the Expectations of the Tenant; for if they had let them for Life, this had given the Tenants too great a Power over the Lord, because then they would have had a Property in the Freehold, and by suffering Disseisins, or feigned Recoveries to be had against themselves, might have shaken or endangered the Inheritance of the Owner; and on the other Side, if they had leased their Land only at Will, few would have been willing to bestow  
any

*Spelm. Rem. 2.*

any great Pains or Industry upon so precarious a Possession, which the arbitrary Will and Pleasure of a peevish Lord might have defeated.

*Vide Tit. Co-  
venant, and  
1 Saik. 137.*

Originally Leases for Years were but of little Regard, the Tenant having only *utile*, not *directum Dominium*, and was said *Tenere nomine alieno*; and as he had only the Perception of the Profits, whoever recovered the Freehold reduced likewise the Possession, whether such Recovery were true or feigned; and the Lessee had no other Remedy but an Action of Covenant against the Lessor; and this, at least, was thought a just Construction, that he who had de vested himself of the Profits of his Lands for a Time, by giving them to another, should be obliged to maintain that Gift, or be liable to make Satisfaction if he did not; and this was the more reasonable, because the Lessee was equally bound to answer and make good the Rent during the Term; and if he did not, the Law allowed the Lessor to maintain an Action of Covenant, as well as of Debt against him, for with-holding thereof; and as they made this Construction for the Lessor upon the Words *Tielling* and *Paying*, which were no exprefs Covenant in themselves, it was but reasonable they should make the like Construction for the Lessee upon the Word *Dimisit*, which in itself no more imported an exprefs Covenant on his Part; but by making this Construction mutual, they did Justice to both, and by making of it at all, they plainly shewed their Opinions of the Lease to be no other than a Contract or Agreement between the Parties, and not such an Act as transferred any Property to the Lessee; and this is one Reason why Leases for Years are considered as Chattels, and go to (a) Executors.

(a) Therefore if a Lease be

made to a Bishop, Abbot, Parson, or any other sole Corporation, and his Successors, for such a Number of Years, yet it shall go to the Executors or Administrators of the Lessee, and not to his Successors, because a Term for Years being looked upon as a Chattel, the Executors or Administrators are the only Persons the Law allows to succeed thereto; and this Succession to the Chattel cannot be altered or controuled by any Limitation of the Party; but yet in such Case it seems, that the Executors or Administrators of the Lessee shall hold it in the Right of, and as Trustees for the Successors; for the Book says, they shall have it in *Auter droit* *Co. Lit. 9. a. 46. h. 90. a.* — But this Rule, as to the Succession of Chattels, hath two Exceptions. 1. In case of the King, who by his Prerogative may take any Chattels in Succession, and consequently a Lease made to him and his Successors for Years is good, and shall go accordingly, and not to his Executors or Administrators. *Co. Lit. 90. a. 11 Co. 92. a.* — The second Exception is in case of the Chamberlain of London, who, by Custom of the City, confirmed by divers Acts of Parliament, may take Chattels in Succession for the Benefit of Orphans; but *Quere*, if this Custom extends to Leases for Years, for the Books only mention Recognizances, Obligations, &c. which are given or entred into to the Chamberlain and his Successors, by way of Security for Orphans Portions; *Quere* therefore if a Lease may be made to the Chamberlain and his Successors for Years. *Cro. Eliz. 464. 4 Inst. 249. 4 Co. 65. Fulwood's Case.*

*Co. Lit. 45. b.  
Mirror 164.  
293.  
3 Vent. 55.*

Another Reason was, because at first these Leases were made but for a small Number of Years, (for my Lord Coke tells us, that by the ancient Law of England, no Man could have made a Lease for above forty Years at the most,) and the Reason thereof seems to be, because they were only made to serve the Occasions and Exigencies of the Lord in cultivating and improving his Demesnes, not to borrow Money on or raise Portions for Daughters, or such other Uses as are now made thereof; therefore there was no Need to extend them to any great Length of Time, since they might be renewed as often as Occasion required; besides, the Lessees, if they were evicted, being only to recover Damages, it would have been fruitless to prolong Leases for the Term of 1000 Years, when the Persons who were to possess under such Leases had no Remedy for their Damages but by Recourse to the Representatives of the original Lessor.

*Vide Tit.  
Fines and Re-  
coveries.*

Also another Reason might be, because these Leases for Years were under the Power of the Freeholder to destroy by a Recovery, for the Person coming in by the Recovery, was supposed to come in by Title Paramount, and so was not bound or obliged by them, and by Consequence

quence few would be willing to take Leases for any long Term, which they might so easily be defeated of.

But tho' in the Reign of *H. 7.* it was resolved, that the Lessees should not only recover Damages as a Recompence for the Possession lost, but should also recover the Possession itself; and the Statute 21 *H. 8. cap. 15.* gives the Termor Power to falsify all Manner of Recoveries had against the Tenant of the Freehold, upon feigned and untrue Titles; from whence Men began to limit long Leases, because by such Purchases they escaped the Warship, Relief, and other Burthens that were annexed to the ancient Tenures, yet no Alteration was made in the Succession to them, the Law having been formerly settled as to that Point; and if they had not carried the Succession in the Manner they formerly did, they had lost the End of such Limitation.

And tho' at this Day Terms for Years are multiplied to a much longer Duration than they were formerly, and there is now ample Remedy to recover the Term itself, yet the Succession continues the same; for besides the Reasons already given, it would be inconvenient to have had one Rule of Property for short Terms, and another for those that were longer, being all of the same Nature, and still no more than Leases for Years; besides, the Difficulty of fixing the just Bounds to any precise Determinate Number of Years, since one or two Years, more or less, would have made very little Difference in Reason, were the Bounds affixed to Leases of never so long a Continuance, and long or short are only Terms of Comparison; as a Lease for forty Years is long with respect to one of eight or ten Years, and yet short with respect to another of a hundred Years; therefore that there might be an Uniformity in the Law, all Leases for Years are held to be of less Value than Estates for Life, as being Originally of much shorter Duration, and also because they were under the Power of the Tenant of the Freehold to destroy, and therefore are considered only as Chattels, and cast upon the Executors.

*Bro. Tit. Leases 26. F. N. B. 198, 220. Vargh 127. 4 Co. 80. 1 Lev. 46. 2 Mod. 18.*

We shall consider this Head under the following Divisions.

- (A) Of what Things Leases may be made for Years.
- (B) Of the Persons by whom Leases may be made; and therein, 1. Of Leases by Infants.
- (C) Of Leases made by Husband and Wife: And herein,
  - 1. Of Leases made by the Husband and Wife by the Common Law.
  - 2. Of Leases made by them pursuant to the Statute of 32 *H. 8.*
- (D) Of Leases by Tenant in Tail: And herein,
  - 1. What Leases Tenant in Tail might have made by the Common Law.
  - 2. What Leases Tenant in Tail may now make to bind his Issue, since the 32 *H. 8.*
  - 3. When and in what Cases the Issue in Tail, or Strangers, shall be bound by voidable Leases made by Tenant in Tail.

## (E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

1. What Leases they might have made by the Common Law, and of the several enabling and disabling Statutes, with some general Observations on them.
2. Of the Rules to be observed, and Qualifications requisite to the Perfection of such Leases: And therein,

*Rule 1.* Where an Indenture or Deed is necessary.

*Rule 2.* When such Leases are to begin: And herein,

1. When such Leases as have no Date at all, or a void or impossible Date, are to begin.
2. Such Leases as have a good Date, and are delivered on the same Day; in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.
3. Such Leases as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on such Leases is to be framed.

*Rule 3.* Within what Time the old Lease is to be surrendered; and therein of concurrent Leases.

*Rule 4.* That such Leases are not to exceed three Lives or Twenty-one Years.

*Rule 5.* Of what Things Leases may be made to bind the Successor.

*Rule 6.* What shall be said a usual Letting to Farm upon the several Statutes, and by what Persons.

*Rule 7.* What Rent is to be reserved: And herein,

1. That there must be a Rent reserved.
2. That this Rent must continue due, and be payable to the Lessors and their Successors.
3. That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made: And herein,

1. What shall be said to be the ancient Rent where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.

2. In what Manner such Reservation is to be made.

3. Where the Addition of more Land, with or without the Addition of more Rent, shall avoid such Leases.

4. Where a Reservation of the whole Rent, or only *pro Rata* on a Lease of Part, should be good.

*Rule 8.* That such Leases must be made without Impeachment of Waste.

(F) **Of Leases by Parsons, Vicars and others, with respect to other Qualifications.**

(G) **Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons : And herein,**

1. Where Confirmation is necessary either in respect of the Leases or Estates made, or of the Persons making the same.
2. What Persons are to confirm such Leases or Estates, and in what Manner.
3. What Estates they who make such Confirmation are to have.
4. At what Time such Confirmation is to be made.
5. How far Regard is to be had to the true Naming of the Corporation or Persons who do confirm.

(H) **Of void or voidable Leases by Ecclesiastical Persons : And herein,**

1. Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.
2. By what Means and in what Cases such voidable Leases may be made good.
3. The Manner of avoiding such Leases as are only voidable.

(I) **Of Leases made by those who have but a particular Estate or Interest in the Lands leased : And herein,**

1. Of Leases made by Tenant in Dower or Curtesy.
2. Of Leases made by Tenant for Life.
3. Of Derivative Leases, or by one who is but a Lessee for Years himself.
4. Of Leases made by a Disseisor or Disseisee.
5. Of Leases made by Joint-tenants or Tenants in common.
6. Of Leases made by Copyholders.
7. Of Leases made by Executors or Administrators.
8. Of Leases made by a Bailiff of a Manor.
9. Of Leases made by a Guardian.
10. Of Leases made pursuant to Authority.
11. Of Leases made pursuant to Powers in private Conveyances and Settlements.

(K) **By what form of Words Leases may be made.**

(L) **What Certainty is requisite to Leases for Years as to their Beginning, Continuance and Ending : And herein,**

1. With Regard to the Date of the Lease.
2. With Regard to other Circumstances taken Notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.
3. The Certainty of Leases for Years as to their Continuance.
4. The Certainty of Leases for Years as to their Duration and Ending.

(M) **In**

- (M) In what Cases and to what Respects an Entry by the Lessee is requisite to the Perfection of his Lease.
- (N) Leases for Years, when to take Effect as a Reversion, when as a future Interest, and when neither the one nor the other.
- (O) Leases for Years by Coppel, how far and against whom such Leases are good.
- (P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and where an Entry before the Term begun is a Disseisin.
- (Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.
- (R) Leases for Years, when merged by Union with the freehold or fee.
- (S) Of Surrenders of Leases for Years: And herein,
1. Of Surrenders in Fact or Express: And herein again,
    1. By what Words such Surrender may be made.
    2. Upon what Estate such Surrender may operate.
    3. Of Surrenders in Law, or implied Surrenders: And therein,
      1. With Regard to Leases in Possession.
      2. With Regard to Leases *in Futuro*.
      3. With Regard to the Thing itself so surrendered.
- (T) Leases, when determined by cancelling the Deed.

### (A) Of what Things Leases may be made for Years.

AFTER such Time as Leases for Years began to be looked upon as fixt and permanent Interests, and that the Lessees were sufficiently provided to defend themselves, and their Possessions, against the Acts and Inroachments as well of the Lessor as of Strangers, Men found it their Interest to improve and incourage this Sort of Property, and therefore extended it to all Sorts of Interests and Possessions whatsoever, being led thereto by that known Rule, that whatsoever may be granted or parted with for ever, may be granted or parted with for a Time; and therefore not only Lands and Houses have been let for Years, but also Goods and Chattels, tho' the Interest of the Lessee therein differs from the Interest he hath in Lands or Houses so let for Years: For if one lease for Years a Stock of live Cattle, such Lease is good, and the Lessee hath only the Use and Profits of them during the Term; but yet the Lessor hath not any Reversion in them to grant over to another, either during the Term or after, till the Lessee hath re-delivered them to him, as he would have of Lands in case of such Lease for Years, for the Lessor hath

Godb. 112.  
 1 Leon. 42.  
 Owen 139.  
 5 Co. 16, 17.  
 Dyer 56. a.  
 110. a. 212. b.  
 Bro. Tit.  
 Leases 25.  
 2 Bull. 7.

hath only a Possibility of Property in case they all outlive the Term; for if any of them die during the Term, the Lessor cannot have them again after the Term; and during the Term he hath nothing to do with them, as consequently of such as die, the Property rests absolutely in the Lessee; so whether they live or die, yet all the young ones coming of them, as Lambs, Calves, &c. belong absolutely to the Lessee as Profits arising and severed from the Principal, since otherwise the Lessee would pay his Rent for nothing; and therefore this differs from a Lease of other dead Goods and Chattels; for there if any Thing be added for the Repairing, Mending or Improving thereof, the Lessor shall have the Improvements and Additions, together with the Principal, after the Lease ended, because they cannot be severed without destroying or spoiling the Principal; neither is the Succession of young ones, in case any of the old ones die, to be resembled to a Corporation Aggregate, whereof when any die, those that succeed shall be said Part of the same Corporation, for the Corporation, in its publick Capacity, never dies; but this being a Lease of such and such individual Cattle, when any of them die, the Possibility of reverting Property, which was left in the Lessor, is determined and at an End; but the Lessee in such Case cannot kill, destroy, sell, or give them away, during the Term, without being subject to an Action of Trespass, as it should seem; but in case of a Lease of a House, together with Goods, it is usual to make a Schedule thereof, and affix it to the Lease, and to have a Covenant from the Lessee to re-deliver them at the End of the Term, and without such Covenant the Lessor could have no other Remedy but Trover or Detinue for them after the Lease ended.

*Lit. sect. 712*  
*Co. Lit. 57. d.*

If one hath a Corody for Life, he may let it to another, or to the Grantor himself; so may the Grantee of House-Boot, or Hay-Boot; but in case such Lease be to the Lessor himself, rendering Rent, he can only have them by way of Retainer, being to arise out of his own Provision, or his own Land.

*Bra. Tit.*  
*Leases 40.*

But as to Lands, or other Things of Inheritance, as they may be granted or departed with for ever, so they may for a Time, and consequently may be leased for Years in all Cases where no Inconvenience or Injury to the Publick is like to ensue; for then Mens private Interests must give way to the Publick, and what might otherwise in its own Nature be good and allowable, must upon that Account be disallowed and stand condemned; wherefore it having been settled, that all Leases for Years were but Chattels, and as such should go to Executors or Administrators; the first Case wherein we find any Objection to a Lease for Years is, that of the Office of Marshal of the King's Bench Prison, for that being an Office of great Trust, concerning the Administration of Justice in the Keeping of Prisoners, if it should be granted for Years, might be injurious to the Publick, by being in Suspence till Probate of the Will or Administration taken out; and if the Officer should die indebted, so that none would prove his Will, or take out Administration, then there would be no Officer at all, and Executors or Administrators would be in by Act of Law, without Allowance of the Court; also it might be a Question, if such Office should not be forfeited by Outlawry, or be Assets in the Executor's Hands; and many other Inconveniencies would follow, if such Grant for Years were allowed; for the same Reasons it was held likewise, that the Offices of *Custos Brevium*, Chirographer, Clerk of the Pipe, of the King's Silver, or of the Crown, Remembrancer or Chamberlain of the Exchequer, Prothonotaries, and other Offices in the several Courts of Justice, cannot be granted for Years; and tho' the Offices of Sheriff and Coroner were granted for Years, till restrained by 14 E. 3. cap. 7. yet it was never debated what Inconveniencies might ensue by allowing thereof; and these Reasons held equally good

*Hard. 357.*

9 Co. 97.

1 Rol. Abr.

847.

2 Rol. Abr.

153. Sir

George Rey-

nolds's Case.

Cr. Car. 587.

1 Jon. 503.

Heb. 153.

3 Mod. 145.

(a) In 2 Chan. against granting the Office of Warden of the Fleet, or any other (a) Ca. 70. it is said by my Lord Chancellor, that he thought the Case of a Gaolership not grantable for Years too easily slip over.

6 Mod. 57. And altho' it hath been resolved; that the Office of the Marshal of the  
Sutton's Case. King's Bench Prison cannot be granted for Years, yet it hath been held, that a Lease thereof for Years during the Life of the Grantee is good; for hereby the Danger of the Office's going to Executors is avoided, which the Book says is the sole Reason why the Office is not absolutely grantable for Years.

Raym. 216. Also it appears that the Dean and Chapter of Westminster made a Lease  
2 Lev. 71. for Years of the Gatehouse Prison, and the Lessee had committed several  
3 Keb. 32. Offences which amounted to a Forfeiture, for which the Office was seised,  
The King ver. but no (b) Objection made to its being let for Years.  
Lady Brough-  
ton.

(b) Note; There seems a Difference between Sir George Reynolds's Case and this, because in Sir George Reynolds's Case the Grant for Years was from the Crown, in whom all Offices, in Relation to the Administration of Justice, are originally and inherently lodged; and therefore for the Crown to grant out such Office for Years may be liable to the Objections before-mentioned; but in this Case the Dean and Chapter are the immediate Grantees of the Crown, and they have the Office to them and their Successors for ever in Fee, and are perpetual Gaolers themselves, and answerable to the Crown, notwithstanding any superior Lease to another; and therefore they always take Security of such Under-Lessee for their own Indemnity.

Hard. 46. But such Offices as do not concern the Administration of Justice, but  
Jones and only require Skill and Diligence, may be granted for Years; because they  
Clerk. may be executed by Deputy, without any Inconvenience to the Publick: Therefore where a Grant for Years was made of the Office of Garbler of Spices in London, it was adjudged to be a good Grant, or at least a good Appointment for Years, within the Intent of the Statute 1 Jac. 1. cap. 19.

Hard. 352. The Office of Printer was granted for Years 6 Car. 1. and held a good Grant, being but an Employment: So the Office of Post-master was granted to the Lord Stanhope for Years, and held good.

Hard. 351, The Office of Register of Policies of Assurance in London concerning  
354, 357. Merchants was granted by the King for Years, and adjudged to be a good Grant; because it did not concern the Administration of Justice in any Court, but required only the Skill of writing after a Copy: So the Office of making and sealing Subpœna's granted for Years, and allowed to be good; and there several Precedents are cited of Offices granted for Years; as, first, Offices in which the Safety of the Realm was concerned, as the Office of the Warden of a Haven or Port by H. 6. of Gunpowder 1 Car. 1. of making Gunpowder by Car. 2. Also Offices concerning the Trade of the Realm have been granted for Years; as 1 H. 7. of the Exchange of Money; 18 H. 8. of Gager; 17 Rich. 2. of Aulnager, tho' a Seal belongs to it, with which the Officer is intrusted; of the Letter-Office, 3 Car. 1. Also Offices in Courts of Justice have been granted for Years; as the Office of Surveyor of the Green Wax, of the Sixpenny Writs in Chancery and Subpœna's, of Comptroller and Customer, and of making out Process in C. B. All these, and several others, have been granted for Years; but no Dispute having been made of the Validity of them, how far some of them would hold at this Day, may be a Question.

2 Lev. 245. But where one made a Grant for Years of the Stewardship of a Court-  
2 Jon. 126. Leet and Court-Baron, this was held void as to the Court-Leet, being a  
Howard and Judicial Office, but good as to the Court-Baron, being only ministerial,  
Wool. and the Suitors Judges thereof; but the Grant appearing afterwards to be for Years, determinable upon the Death of the Lessee, it was held good for both, because there was no Danger of its coming to Executors or Administrators.

Measure of Cloths appointed by Stat



One Mrs. *Dennis* was found by Office to be an Ideot *a Nativitate*; the King grants the Custody of Body and Estate to Sir *Alexander Frazier*, his Executors and Administrators, during the Ideocy; Sir *Alexander* dies, and then the King grants the Custody to Mr. *Prodgers*; and whether he or the Executrix of Sir *Alexander* had the better Title, was the Question; it was said to be a Trust in the King, and therefore not grantable to Executors or Administrators, and that if the Grantee die intestate, there would be none to take Care of the Ideot. On the other Side it was said, that the King had not only a Trust, but an Interest, and might have disposed of the Profits to his own Use, or grant them over as he thought fit, in Case of an Ideot, tho' it was otherwise in Case of a Lunatick, and that it being a Chattel should naturally go to Executors; and to this Opinion my Lord Chancellor inclined, but directed the Validity of the Patent to be tried at Law; and (a) in *B. R.* the Grant to Sir *Alexander* was held good; for the King has the same Interest in an Ideot that he had in his Ward, which always went to the Executor of his Grantee, tho' it was otherwise in the Case of a Lunatick.

2 Chan. Ca.  
Prodgers ver.  
Lady Frazier.  
1 Vern. 9,  
137. S. C.

+ Grant of the Custody of the Body  
of an Ideot goes to his Executors, or  
of a Lunatick —————  
(a) 3 Mod 43.

The Office of Park-keeper was granted for Years, and no Objection made to it; for this does not concern the Administration of Justice, but only requires Diligence and Care.

2 Rol. Rep.  
274.  
Godb. 415.

Dignities or Honours cannot be granted for Years, as to be Earl, Duke, Baron, &c. because then they must go to the Executors or Administrators, whilst the Estate that should support them would go to the Heir, and so introduce Confusion and Absurdity.

Co. Lit. 16. b.  
9 Co. 97. b.

By 23 *H. 6. cap. 10.* it is provided, that no Sheriff shall let to Farm in any Manner his County, nor any of his Bailiwicks, Hundreds, or Wapentakes; which proves that before this Statute it was not unusual to let them to Farm.

23 H. 6.  
cap. 10.

By the 12 *Car. 2. cap. 23. sect. 27.* the Lord Treasurer or Commissioners of the Treasury for the Time being have Power to let to Farm all or any the Rates or Duties of Excise upon Beer, Ale, Cyder, and other Liquors therein mentioned, so as the same exceed not the Term of three Years; without which Clause the Treasurer or Commissioners of the Treasury could not have made such Lease, tho' perhaps the King himself might, having the absolute Interest and Ownership therein.

12 Car. 2.  
cap. 23. sect.  
27.

By the 12 *Car. 2. cap. 25. sect. 3.* Power is given to the King's Agents for granting of Wine Licences to any Person or Persons for any Time or Term not exceeding twenty-one Years, if such Person or Persons shall so long live, upon such Rent as shall be agreed on, to be paid Half-yearly, and such Licence not to be granted to any but those who personally use the Trade of selling by Retail, or to the Landlord of such House, nor shall the same be assignable, or of any Benefit but only to the first Taker.

12 Car. 2.  
cap. 25. sect. 3.

By the 12 *Car. 2. cap. 25. sect. 16.* it is provided, that his Majesty, his Heirs and Successors, may grant the Office of Postmaster General, with all Profits, Fees, &c. to any Person or Persons for Life, or Term of Years not exceeding twenty-one Years, under such Rents and Covenants as shall be thought best for the Good of the Kingdom.

12 Car. 2.  
cap. 25. sect.  
16.

By the 22 & 23 *Car. 2. cap. 14. sect. 6.* Power was given to the Master and Chaplains of the *Savoy*, to encourage the Rebuilding thereof, to demise any of the Lodgings for any Term not exceeding forty Years, under such Rents as they could procure, without renewing.

22 & 23 Car.  
2. cap. 14.  
sect. 6.

(B) Of the Persons who may make Leases ;  
and therein, first, of Leases made by Infants.

AS to Leases made by Infants, or such as are under the Age of twenty-one Years, what seems most considerable is, whether any, and what Leases for Years made by such are absolutely and *ipso facto* void, or only voidable by them; about which the Opinions of the Books seem a little unsettled.

Some Opinions are, that all Leases for Years made by Infants (*a*) without Reservation of Rent, are absolutely void, and not only voidable.  
*Moor* 105. 2 *Leon*. 218. *Hutton* 102.  
1 *Roll. Rep.* 441. (*a*) So if a Trifle only had been reserved, as a Pepper corn. 1 *Mod.* 263. — But that a Lease made by an Infant to try his Title is good, tho' no Rent be reserved. *Moor* 105. 2 *Leon*. 216. *Noy* 130.

Other Opinions there are, that Leases for Years in general by Infants are only voidable, and not void, without taking Notice whether any Rent were reserved on such Leases, or not; and some even seem to hold, that tho' no Rent at all be reserved, yet the Leases are not thereby absolutely void, but only voidable by the Infants when they come of Age, and that they may confirm the same at their full Age by accepting of Fealty, which is at least incident to every Lease.

Also most of the Books agree, that if a Rent were reserved on such Lease for Years, then it would be only voidable by the Infant at full Age, without saying how it would be if no Rent at all were reserved, unless by Implication that it would be void in such Case.

But all the Books agree, that if an Infant make a Lease for Years, he cannot plead *Non est factum*, but must avoid it by pleading the special Matter of his Infancy; which seems to favour the Opinion of those who hold, that the Lease is not absolutely void; for if the Lease were absolutely void, there does not seem to be any good Reason why he might not plead *Non est factum*, as a Feme Covert certainly may do in such Case, whose Lease is absolutely void, so that no Acceptance of Rent after her Husband's Death can make it good.

An Infant Copyholder without Licence of the Lord made a Lease for Years by Parol, rendering Rent, and at full Age was admitted, and accepted the Rent, and then ousted the Lessee; and in this Case tho' it was agreed, that a Lease for Years, rendering Rent, by an Infant, of Freehold Lands was only voidable, yet it was urged that in Case of a Copyhold it would be otherwise, because the Lease not being warranted by the Custom would be a Disseisin to the Lord, and consequently a Forfeiture of his Copyhold, which being a great Mischief to the Infant, the Court ought rather to help him, by adjudging such Lease to be absolutely void; but notwithstanding this, it was adjudged that the Lease was a good Lease till avoided, and that a Lease for Years by a Copyholder without Licence is not a Disseisin; and admitting it should be a Forfeiture in this Case, yet if the Lord enters for it, the Infant may re-enter upon him, and so is at no Mischief, and therefore having accepted the Rent at full Age, hath made it good and unavoidable.

this Reason principally it was adjudged such Acceptance made it good.

If an Infant takes a Lease for Years of Lands, rendering Rent, which is in Arrear for several Years, then the Infant comes of Age, and still  
*Cro Jac.* 320. *Kentley* and *Elliot*.  
*Godb.* 120. 2 *Bulf.* 60. 1 *Roll. Abr.* 731. S. C. adjudged.

continues the Occupation of the Land, this makes the Lease good and unavoidable, and by Consequence makes him chargeable with all the Arrears incurred during his Minority; for tho' at full Age he might have departed from his Bargain, and thereby have avoided Payment of the Arrears which the Lessor suffered to incur during his Minority, yet his Continuance of Possession after his full Age ratifies and affirms the Contract *ab Initio*, and so gives Remedy for the Arrears of Rent incurred from the Time of the Contract made.

But if an Infant possessed of a Term for Years sells it for Money, and after he comes of full Age receives Part of the Money for it, he shall avoid the Grant notwithstanding; for the Contract, as said, being void in the Commencement, it cannot be made good by any subsequent Act.

By Custom in some Places an Infant seised of Lands in Socage may at the Age of fifteen Years make a Lease for Years, which shall bind him after he comes of Age; for the Custom makes fifteen his full Age for that Purpose.

An Infant made a Lease for Years, and at full Age said to the Lessee, *God give you Joy of it*; this was held by *Mead* a good Affirmation of the Lease; for this is a usual Compliment to express one's Assent and Approbation of what is done.

If the King within Age makes a Lease for Years, this is binding presently, and cannot be avoided by him either during his Minority, or when he comes of Age; for the Politick Rules of Government have thought it necessary that he, who is to govern and manage the whole Kingdom, should never be considered as a Minor, incapable of governing himself and his own Affairs.

*Dalf. 64. per Curiam.*

*Co. Lit. 45. b.*

*4 Leon. 4.*

*Plow. 212.*

*Dyer 209.*

*Case of the Dutchy of Lancaster.*

## (C) Of Leases made by Husband and Wife : And herein,

### 1. Of Leases made by the Husband and Wife by the Common Law.

IT is clearly agreed, that if a Husband seised of Lands in Right of his Wife make a Lease thereof by Indenture or Deed-Poll, reserving Rent, that this is a good Lease for the whole Term, unless the Wife by some Act after the Husband's Death shews her Dissent thereto; for if she accepts Rent which becomes due after his Death, the Lease is thereby become absolute and unavoidable; the Reason whereof is, that the Wife after her Intermarriage being by Law disabled to contract for, or make any Disposition of her own Possessions, as having subjected herself and her whole Will to the Will and Power of her Husband, the Law thereupon transfers the Power of dealing and contracting for her Possessions to the Husband, because no other can then intermeddle therewith, and without such Power in the Husband they would be obliged to keep them in their own Manurance or Occupation, which might be greatly to the Prejudice of both; but to prevent the Husband's Abusing such Power, and lest he should make Leases to the Prejudice of his Wife's Inheritance, the Law has left her at Liberty after his Death either to affirm and make good such Lease, or to defeat and avoid it, as she finds most subservient to her own Interest.

So if the Wife join in such Lease for Years by Indenture, if not made pursuant to the 32 H. 8. she is after her Husband's Death at Liberty

*Bro. Tit. Acceptance 10.  
Tit. Leases 24.  
Cro. Jac. 332.  
Jordan and Wikes.  
2 And. 42.  
Co. Lit. 45. b.  
Plow. 157. \**

*Cro. Jac. 563.  
Cro. Car. 165.  
406*

*Cro. Jac. 617. Telw. 1. Cro. Eliz. 769. 1 Rel. Abr. 350.*

either to affirm it by Acceptance of Rent, or to dissent to, and avoid it by bringing of Trespass, &c. in the same Manner as if she had been no Party thereto; for her joining during the Coverture, when she was not *sui Juris*, but under the Power of the Husband, will not bind her after his Death; and if she chuses to avoid such Lease, notwithstanding her joining therein, then it is so absolutely defeated *ab Initio* as to her, that she may plead *Non dimisit*, because as to any Interest that passed from her she did not demise, nor in Truth had any Power to contract, but the whole Interest passed from the Husband, and the Lessee is in merely by Virtue of the Husband's Contract; and yet because the Lessee by his Acceptance of such Lease admitted them both to have Power to join therein, he must accordingly during the Coverture declare of the Lease by them both, as an essential Part of the Description of the Lease whereby he makes Title.

2 Co. 61. But the Indenture or Deed Poll, whereby such Lease was made, being  
3 Co. 21. no essential Part either of the Description or Lease itself, because the  
Plow. 431. a. Husband during the Coverture might have made it by Parol only; there-  
1 Leon. 192. fore it is neither necessary nor usual for the Lessee in his Declaration to  
Cro. Eliz. 438, make any Mention thereof.  
482.  
Sav 109, 110,  
112. Cro. Car. 527.

Yelv. 1. Wil- So also if the Wife's Part in such Lease were merely void, and her  
son and Rich. joining therein would have no Effect to help the Description of the Lease,  
Cro. Car. 165. then the Lessee ought in his Declaration upon such Lease to leave out  
Hopkins's the Wife, otherwise his inserting of her as one of the Lessors will vitiate  
Case; and his Declaration; therefore where the Husband and Wife sealed a Lease  
the S. C. for Years of the Wife's Lands, and at the same Time executed a Letter  
2 Bulf. 13. of Attorney to a third Person to deliver such Lease as their Deed to the  
obscurely Lessee, which he did accordingly, and then the Lessee brought an Eject-  
put, seem ment, and declared of this by Baron and Feme; to which Not guilty  
cont. being pleaded, this special Matter was found; and the Court, after Argu-  
ment, gave Judgment that the Plaintiff had failed in his Declaration,  
because, as this Case was, it was only the Lease of the Husband; for the  
Delivery of the Deed being essential to make it a complete Deed, this  
ought to have been done by the Wife herself in Person; for she being not  
*sui Juris* could not by such Letter of Attorney delegate any Power or  
Authority whatsoever to another, but such Delegation was merely null  
and void; and by Consequence the Attorney's delivering it in her Name  
was to no Purpose, but it was only the Lease of the Husband, as being  
only effectually delivered by him; and therefore the Plaintiff ought to  
have declared accordingly; for upon the Matter it was no Lease by the  
Husband and Wife, and then the Plaintiff declaring upon it as such, hath  
failed in his Description of the Lease whereon he was to recover.

Cro. Jac. 617. Accordingly in another Case, where in Ejectment the Plaintiff declared  
Gardiner and on a Lease by the Husband only, and Not guilty pleaded, the like spe-  
Norman cial Matter was found as in the former Case, and Exception taken to the  
Declaration, because the Wife was omitted; yet the Court held the De-  
claration good, and disallowed the Exception, because her Manner of  
joining in the Lease was merely void, as if she had not been named there-  
in, and then the Plaintiff in his Description of such Lease did well to  
omit her.

Cro. Eliz. 656. But now if the Husband and Wife join in a Lease for Years by Parol  
Walsall and of the Wife's Lands, rendering Rent, or if the Husband solely make such  
Heath. Parol Lease, rendering Rent, this determines absolutely by his Death, so  
Cro. Jac. 563. that no Acceptance of Rent, or other Act done by the Wife, will prevent  
Dyer 91, 146. its Avoidance; the Reason whereof given in the Books is, that her Assent  
1 Leon. 192, ought to appear to be given at the Time when the Lease was made,  
204. which without some Deed or Instrument in Writing it cannot do; but  
this seems a very indifferent Reason, when in the Case of a Lease for  
Years

*The delivery of the Lease by the  
wife of her lands must be in  
person —*

Years by the Husband, solely by Deed, her Assent appears not at all, but rather the contrary; and yet she may affirm such Lease, if she thinks fit, after his Death, as well as if she had joined therein; therefore a better Reason for this Distinction seems to be, that the Inheritance and Right of the Estate continuing still in the Wife, notwithstanding the Intermarriage, if the Husband does nothing to discontinue or divest that Estate, all Charges of his thereout fall off with his Death, which determines his Power and Interest over the Estate; but a Lease for Years being an immediate Contract for or Disposition of the Land itself, if the same appears in Writing duly executed, so that there can be no Variation or Deviation therefrom attempted by the Lessee after the Husband's Death; the Law so far gives Countenance to such Lease, for the Encouragement of Farmers and Husbandmen, that the same shall continue in Force till the Wife's actual Dissent or Disagreement thereto; but because there can be no such Certainty of the Terms of a Parol Lease, when nothing appears in Writing to manifest them; therefore they, like other Charges of the Husband, fall off and drop with his Estate or Interest therein.

If the Husband and Wife make a Lease for Years of the Wife's Land, without Reservation of any Rent, yet it hath been adjudged that this is a good Lease by them both during the Coverture, and that the Wife, after the Husband's Death, may affirm the same by Acceptance of Fealty, or bringing an Action of Waste; so that the Reservation of Rent is not essential to the Existence or Continuance of such Lease after the Husband's Death, but only a Writing attesting the same, and the Wife's Allowance and Approbation thereof; for as the Husband made such Lease at first, without any Reservation of Rent; so the Wife, if she thinks fit, may continue the Lessee in Possession, after his Death, upon the same Terms.

The Husband being seised of Copyhold Lands in Right of his Wife in Fee, makes thereof a Lease for Years, not warranted by the Custom, which is a Forfeiture of her Estate; yet this shall not bind the Wife, or her Heirs, after the Husband's Death, but that they may enter and avoid the Lease, and thereby Purge the Forfeiture; and the Diversity seems between this Act, which is at an End when the Lease is expired or defeated by the Entry of the Lord, or the Wife, after her Husband's Death, and such as are a continuing Detriment to the Inheritance; as wilful Waste by the Husband, or such Acts as tend to the Destruction of the Manor, as Non-payment of Rent, Denial of Suit or Service; such Forfeitures as these bind the Inheritance of the Wife after her Husband's Death; but in the other Cases the Husband cannot forfeit by his Lease more than he can grant, which is but for his own Life.

If the Husband, seised of a Copyhold Manor in Right of his Wife, lets Copyhold Land, Parcel thereof for Years, by Indenture, and dies, this shall not destroy the Custom of demising by Copy, because the Wife may enter and avoid that Lease, the Husband having no Power by his own Act or Disposition to bind the Inheritance of his Wife.

A Man seised of Lands, in Right of his Wife, makes a Lease for Years thereof by Parol, and then he and his Wife levy a Fine to a Stranger, and die; it was adjudged, that the Conuzee of the Fine should avoid this Lease; for being made by Parol only, it was absolutely void as to the Wife, so that no Acceptance, or Act of hers, after his Death, could make it good; and then the Conuzee, who came in wholly by the Wife, shall take Advantage thereof as the Wife herself should have done, for the Husband's joining in the Fine was only for Conformity; for the whole Estate and Inheritance passed from the Wife, and nothing from the Husband; and of void Acts, or when they begin to be so, Strangers may have the Benefit.

*Distinction upon a lease  
Parol not good against the  
wife altho she rec'd Rent after  
the husband's Death.*

Hutt. 102.  
Cro. Eliz. 112.  
Jackson and  
Mordant.

2 Rol. Rep.  
344, 361.  
Cro. Car. 7.  
Savern and  
Smith.  
Cro. Eliz. 149.  
Head and  
Chiloner.  
4 Co. 27.

Cro. Eliz. 475.  
Conishy ver.  
Rusky.

Cro. Eliz. 216.  
1 Leon. 247.  
2 Co. 77.  
Harvey and  
Thomas.

But

5 Leon. 153.  
154  
Cro. Eliz. 152  
Cadee and  
Oliver.

But where the Husband and Wife by Indenture made a Lease for Ninety-nine Years of the Wife's Lands, tho' without Reservation of Rent, and after joined in levying a Fine of the Reversion to a Stranger; the better Opinion was, that the Conuzee should hold subject to this Lease, for being by Indenture, it was not absolutely void, but only voidable by the Wife after her Husband's Death; and then when she joins in a Fine of the Reversion, before her Time of Election for Avoidance thereof comes, this destroys her own Power of Election, because now she has nothing more to do with the Estate; and it cannot transfer a like Power of Election to the Conuzee, because that was a Thing meerly in Action, and peculiar to the Wife, in Regard of her Coverture, and consequently the Lease is become absolute, and the Conuzee shall hold subject thereto.

Cro. Jac. 417.  
1 Rol. Rep.  
401.  
3 Bulf. 272.  
Hob. 204.  
1 Rol. Abr.  
592.  
3 Mod. 300.  
*Quere*, if the  
Husband in  
this Case has  
any, and  
what Remedy  
for the  
Rent in-  
curred after  
the Wife's  
Death, for the  
Reversion to  
which it was  
incident goes  
to the surviving  
Joint-tenant,  
but he being  
in of that by  
Title Paramount,  
the Lease has  
nothing to do  
with the  
Rent, and the  
Husband, for  
want of a  
Reversion, can  
neither distrain  
nor avow for  
the same. But  
*Quere*, if he  
may not maintain  
an Action of  
Debt or Covenant  
in Law, or  
express Covenant  
for Payment  
of the Rent,  
if there were  
any; & vide  
Bro. Tit. Leases  
4. Det. 7. Dyer  
28. b. 29. a. 1  
Rol. Rep. 442.

*A.* and *B.* Joint-tenants for their Lives, *A.* takes *C.* to Husband, and they, by Indenture, let their Moiety for Twenty-one Years, reserving Rent; then the Wife dies, and *B.* the surviving Joint-tenant, would have avoided this Lease, as the Wife might have done if she had survived her Husband; but it was adjudged, that the Lease being only voidable, and not void, *quoad* the Wife, by her Death this Power of avoiding it is gone, and cannot be transferred to the surviving Joint-tenant, who claims not under, but Paramount her; and then the Lease is become unavoidable during the Life of the other Joint-tenant, for the Lease being good at first, the Wife's Disagreement to make it void, was more necessary than her Agreement was to make it good.

Cro. Eliz. 287.  
Moor pl. 514.  
Grule and  
Lo. roft.  
1 Co. 155.  
S. C.

Husband and Wife, Joint-tenants for sixty Years, if they, or either of them, so long live, the Husband by Indenture lets the Land for fifty Years, to commence immediately after his Decease, and dies, the Wife survives; and if this was a good Lease to bind the Wife, was the Question; it was objected, that it could not bind the Wife, because it was not to commence till after the Husband's Death, and he might have outlived the whole Term; and therefore it was as if he had granted the Term to commence after his Death, which being but a Grant of bare Possibility, had been clearly void. 2. It was objected, that the Husband dying before the Lease took Effect, the Interest in the whole Term vested in the Wife by Survivorship, and then the Husband's Disposition, which took not Effect till his Death, came too late to prevent it; but notwithstanding it was adjudged to be a good Lease, and not like the Case put of a Grant of his Term after his Death, for there nothing passed till his Death but a bare Possibility only; but here a good Term is created in Interest presently, to take Effect in Possession after his Death. 3. That the Husband having an Interest to dispose of, he might in his Life-time have disposed of the whole Term, and it would have bound his Wife, then here when he hath by an Act, executed in his Life-time, disposed of an Interest in Part of the Term; this, by the same Reason, must be good and binding upon his Wife.

Dyer 159.  
1 Rol. Abr.  
475.  
1 Rol. Rep.  
132.

Husband and Wife made a Lease for Years, by Indenture, of the Wife's Land, reserving Rent, the Lessee enters, the Husband, before any Day of Payment, dies; the Wife takes a second Husband, and he at the Day accepts the Rent, and dies; and it was held, that the Wife could not now avoid the Lease, for by her second Marriage she transferred her Power of avoiding it to her Husband, and his Acceptance of the Rent binds her as her own before such Marriage would have done; for he by the Marriage succeeded into the Power and Place of his Wife, and

what

what she might have done, either as to Affirming or Avoiding such Lease, before Marriage, the same may the Husband do after the Marriage.

A Woman, Guardian in Socage, marries and joins with her Husband, by Indenture, in making a Lease for Years of the Ward's Lands, yet after her Husband's Death she may avoid the same; for tho' the Husband has absolute Power to dispose of all Chattels, either Real or Personal, whereof he is possessed in Right of his Wife, and the Wardship of the Body and Land, in this Case is but a Chattel; yet the Wife being possessed of it in Right of the Infant, and accountable to him for the Profits when he comes of Age, the Husband's Disposition shall not bind her after his Death, but that she may avoid it in Right of the Infant, whose Guardian she still continues to be; and her own Joining in the Lease was not material, because she was then under Coverture, and had no disposing Power at all.

As the Wife's Acceptance of Rent or Fealty, &c. will make good and unavoidable Leases for Years, made by her and her Husband, or by her Husband solely, if it be by Indenture or Deed Poll; so if the Wife die before her Husband, the same Election and Power of affirming or avoiding such Lease descends to her Issue or Heir; for such Leases are good, till those who succeed to the Estate defeat and avoid them by their Disagreement thereto.

Therefore where a Woman Tenant in Tail, having Issue by a former Husband, after his Death married a second Husband, and they, by Indenture, joined in a Lease for Years of the Wife's Lands, rendring Rent, and then the Wife died without Issue by the second Husband, so that he was not intitled to be Tenant by the Curtesy, yet it was held, that till the Issue by the first Husband entered, this Lease remained good; and therefore the Husband there recovered in an Action of Covenant against the Lessee, upon Issue found for him, that there was no Entry made by the Wife's Issue, because till then the Lease was still subsisting, and consequently the Lessee bound by his Covenants in such Lease.

So where a Man seised of Land in Right of his Wife, makes a Lease for Years, rendring Rent, and then his Wife dies without Issue by him, whereby he is no Tenant by the Curtesy, but his Estate determined; yet he may avow for the Rent till the Heir hath made his actual Entry, because the Lease was at first good, and drawn out of the Seisin of the Wife; and therefore, till the Entry of the Heir, remains good between the Lessor and Lessee, so that the Lessee may maintain an Action of Covenant, and the Lessor Debt or Avowry for the Rent, till the Heir hath entered.

## 2. Of Leases made by Husband and Wife pursuant to 32 H. 8.

This Statute hath made an Alteration in the Common Law, and enabled all Husbands, seised of Lands in Right of their Wives, to make Leases for Twenty-one Years, or three Lives, observing the Directions therein mentioned; and such Leases to bind the Wives and their Heirs, so that they cannot now, after the Husband's Death, avoid such Leases as they might have done at the Common Law; but if the Directions in that Statute are not observed, then the Common Law takes Place, and the Wives, and their Heirs, are at Liberty to avoid such Leases in the same Manner as they might have done before.

But as to the several Qualifications requisite to make such Leases good and binding, they being treated of at large under the Head of Leases by Ecclesiastical Persons, Letter (E), we shall here only insert one Case for the better Understanding of the Statute.



*Cro. Jac. 22.*  
*Smith ver.*  
*Trinder.*  
 (a) Note;  
 there was no  
 Question  
 made upon  
 these Words,  
 if, &c. as to  
 the Conti-  
 nuance of  
 the Lease,  
 which, as it  
 seems, deter-  
 mined the  
 Lease by the  
 Death of  
 either of  
 them. *Cro.*  
*Jac. 37S.*  
*5 Co. 9.*

Husband and Wife, the Husband purchased Land to him and his Wife, and their Heirs, and afterwards he, without his Wife, lets this Land for sixty Years, (a) if they should so long live, rendring 280 l. per Ann. Rent at the two usual Feasts, during the Term, then the Husband dies; and if this Lease should bind the Wife, by the 32 H. 8. cap. 28. was the Question; and it was held by three Justices that it should; for the Words of the Act are, *That all Leases to be made by any Person or Persons having any Estate of Inheritance in Fee-simple or Fee-tail, in the Right of their Wives, or jointly with their Wives, of an Estate of Inheritance, made before the Coverture or after, shall be good, provided that the Wife be made Party to every such Lease to be made by her Husband of any Manors, &c. being the Inheritance of the Wife; and that every such Lease be made by Indenture in the Name of the Husband and Wife, and she to seal the same, and that the Rent be reserved to the Husband and Wife, and to the Heirs of the Wife, according to her Estate of Inheritance therein; so that the Wife is appointed to join only when she hath the sole Inheritance by the Appointment of the Rent, to be reserved to the Heirs of the Wife, and not when she hath a Joint Estate, as in this Case; and then clearly, by the Body of the Act, the Lease by the Husband solely is good, and the Proviso does not extend to it.*

### (D) Of Leases by Tenant in Tail: And herein,

#### 1. What Leases Tenant in Tail might have made by the Common Law.

*Co. Lit. 45. b.* IF Tenant in Tail after the Statute *de donis* had made a Lease for Years, and died, this Lease was not absolutely determined by his Death, but the Issue in Tail was at Liberty either to affirm or avoid it as he thought fit; and the Reason why such Leases for Years were not held to be absolutely determined by the Death of Tenant in Tail, who made them, was, either because they were drawn out of an Estate of Inheritance, which by Possibility might continue for ever, and therefore was capable of enduring such a Lease for Years thereof; or because being executed by the Entry of the Lessee, there ought to be an Act of equal Notoriety to defeat and undo it; which if the Issue in Tail thought fit to wave, the Lessee then continued his Possession in Virtue of the first Contract and Entry; and this was but a reasonable Liberty given to the Issue in Tail, because it might well be supposed that his Ancestor was not qualified to keep all his Possessions in his own Manurance and Occupation, but must necessarily let them out to Farmers and Husbandmen, who, by their Skill and Understanding in the Arts of Agriculture and Husbandry, would be best able to preserve and improve the Soil; and by their yielding an Annual Rent or Income to the Lessor or Tenant in Tail himself, would enable him equally to provide for the Necessaries and Exigencies of himself and his Family; and since the Issue in Tail, who was to succeed to the Inheritance and Possessions of his Ancestor, might be supposed equally ignorant of the Way and Manner of improving and managing them to the best Advantage, and would therefore be under the like Necessity of letting them out to others, and yet, perhaps, not be able to get so good a Rent or Income for them, therefore to prevent the Charge and Trouble of renewing such Leases, or the Difficulty of finding out new Tenants upon every Death, the Law thought fit not



to intermeddle one way or another therewith, but left it to the Choice of the Issue in Tail, whether he would continue them or not. Another Reason why the Law would not condemn such Leases as absolutely void by the Death of the Tenant in Tail, might be the Discouragement that would thereby arise to Farmers and Husbandmen, who would not be easily induced to take Leases, or bestow any great Pains or Labour upon Possessions, which they were to hold by so precarious a Title as the Life of the Tenant in Tail only; and therefore for these and other Reasons, such Leases for Years were not looked upon to be absolutely void and determined by the Death of the Tenant in Tail who made them; but the Issue in Tail successively, as each came into the Estate, was at Liberty either to continue or avoid them, as they found convenient; and by this Liberty the Issue in Tail was sufficiently secured against any Injury or Inconvenience arising from the Contracts or Leases of his Ancestor, and the Statute *de donis* in no Danger of being impeached, since it was in the Issue's own Choice to consider thereof, and to govern himself accordingly, either in the Affirmance or Avoidance of such Leases, as he found most for his Advantage; therefore (a) Acceptance of the Rent, or Fealty, or bringing an Action for Recovery thereof, or an Action of Waste, were such Acts as amounted to a Confirmation of the Lease, because these plainly manifested his Intent to continue the Lessee in Possession upon the Terms of his Lease; and by Consequence such Issue could never afterwards avoid it during his own Life.

If Tenant in Tail makes a Lease to *A.* for twenty Years, and the Lessee makes a Lease to *B.* for ten Years, and then the Tenant in Tail dies, and the Issue accepts the Rent of *B.* this is no Affirmance of the Lease, because *B.* was under no Obligation of paying his Rent to him, and is answerable for it over again to *A.* and therefore his Payment to the Issue in Tail was voluntary, and in his own Wrong, and the Issue's Acceptance thereof not conclusive more than if he had received it of a meer Stranger; and by Consequence the Issue in Tail, notwithstanding such Acceptance, may enter and avoid the Lease; but if the Issue had accepted the Rent from *A.* this had amounted to a Confirmation of the Lease made to *A.* and by Consequence he could not after avoid the Lease to *B.* which was derived thereout; but if *A.* had assigned five Acres of the Land in Lease to *B.* for the Residue of twenty Years, and the Issue in Tail had accepted the Rent from *B.* this would amount to a Confirmation of the intire Lease to *A.* because the Rent issuing out of the Whole, and out of every Part of the Land, *B.* as to these five Acres, succeeded in the Place of *A.* by having his whole Interest therein; and then the Issue in Tail, by Acceptance of the Rent from one, whose Part, as to him, was equally chargeable with the whole Rent, hath given his Consent, that the whole Estate chargeable therewith shall continue, tho' he chose to take his Rent out of Part only; for otherwise he would do Injustice to *A.* who would be liable to make Recompence to *B.* for the Overplus of the Rent, and yet have no recompencing himself, if the Issue might defeat the Residue of the Lease remaining in his Hands.

Tenant in Tail, before 27 H. 8. of Uses, made a Feoffment in Fee to the Use of himself and his Heirs; and after he and his Feoffees made a Lease for Years, rendring Rent, and after the Statute made, Tenant in Tail dies seised, and his Issue aliens the Land by Fine before Entry upon the Lessee, or Receipt of the Rent; and the great Question was, if he might after avoid this Lease; and by the better Opinion of the Justices of both Benches, *præter Sanders*, the Alience could not avoid it, whether he received the Rent or not, for the Lease was not absolutely void by the Death of the Tenant in Tail, but only voidable by the Issue by his Entry; then when the Issue, before such Entry, conveys over the Land

(a) 7 Co. 37.  
37. Count. of  
Bedford's  
Case.  
Bro. Tit. Ac-  
ceptance 12.  
Iyer 46. a.  
51 b. 95. pl. 4.

Bro. Tit. Ac-  
ceptance 13.

Iyer 51. b.  
7 Co. 37. a.  
1 Rol. Rep.  
260, 405.  
3 Leon. 154.  
2 Bulf. 44.  
4 M. d. 5.

to

to a Stranger, the Lease being not then avoided, continues still a Charge upon the Estate, and the Stranger cannot enter to avoid it, because a Right of Entry can no more be transferred to a Stranger than a Right of Action, and by Consequence the Conuzee must hold subject thereto, having no Means to avoid it.

*Co. Lit.* 349. a.  
*Mo. r* 315.  
*Dyer* 51. b.

If Tenant in Tail enfeoffs his eldest Son within Age, and he after full Age makes a Lease for Years, and then the Father dies, whereby he is remitted to the Estate-tail, yet he shall not avoid the Lease; so if the Son had disseised his Father, and had made a Lease for Years, and then the Father had died, by which the Disseisin was purged, yet the Lease would continue good and unavoidable, because in these Cases the Estate, out of which the Lease was derived, is not defeated, but only the Nature of it altered and changed; and the Lease for Years being an immediate Disposition of the Land itself, so long as that continues in the same Person that made the Lease, so long there is an Estate capable of enduring the Lease, and consequently the Lessor shall not avoid it; but if the Son, after such Feoffment or Disseisin had at full Age, granted a Rent-Charge, Common of Pasture, &c. and then the Father had died, this Remitter and Alteration of the Nature of the Estate would discharge the Land of those Charges, because being granted at first out of a defeasible Estate, they were of Course liable to be defeated with that Estate, and then when that Estate is defeated and gone, such Collateral Charges drop and fall off with it; but the Lease for Years, in the other Case, carries the very Possession of the Land itself, and then the Alteration that is made by the Remitter can only work upon the Reversion which was left in the Lessor, not upon the Possession of the Lessee, which was divided and taken out of the Estate before that Remitter took Effect; and the Lease being made when he was of full Age, prevents the Operation of the Remitter as to that Lease, which was his own Act.

*Moor*, pl. 1143.

Tenant in Tail made a Feoffment in Fee to the Use of himself and his Heirs, and after made a Lease for Years, rendring Rent, and died; the Issue accepted the Rent, and it was held, that this did not affirm the Lease, because the Issue was remitted to the Estate-tail by Descent, and so the Lease utterly void, being made by the Father, then Tenant in Fee-simple; and the Difference between this Case and the Case next but one above-mentioned, seems to be, that the Lease there being before 27 H. 8. the Possession passed from the Feoffees, and not from the Tenant in Tail himself, and then when that Statute came, it could not execute the Possession to the Use, as to the Reversion which was left in the Feoffees; and so the Possession of the Lessee continued untouched by that Statute, and drawn out of the legal Possession of the Feoffees, and then the bare Remitter of the Issue, as to the Reversion, could not defeat the Possession of the Lessee, which was not drawn out of any Estate his Ancestor had then in Possession, but he must avoid it by Entry upon the Aid and Construction of the Statute *de donis*; but in this the Lease for Years is drawn out of the Fee-simple and Estate, which the Tenant in Tail had in Possession himself; and then the Remitter, which is wrought by the Descent, defeating that Estate, avoids the Lease likewise.

*Dyer* 279. a.  
*Plow.* 436.

If Tenant in Tail makes a Lease for ten Years to begin ten Years hence, and dies, and the Issue within the ten Years enters and makes a Feoffment in Fee, the Feoffee, at the End of the ten Years, shall have Election either to affirm and make good such Lease, or to avoid it; for upon the Death of Tenant in Tail the Possession was become vacant, and none had a Right to enter but the Issue in Tail, for the Time of the Lessee's Entry was not yet come; then, when the Issue enters generally, his Primary Right was, in respect of the Inheritance, descended to him as Issue in Tail, and he had no Occasion to direct his Entry at that

Time to any other Purpose; and therefore his Entry shall be intended, in Respect of the Estate-Tail descended to him; and when after such Entry he makes a Feoffment in Fee to a Stranger, this transfers the Possession just in the same Plight as the Issue in Tail himself had it, without any thing done to determine his Election one Way or another; and then the same Power of Election passes incorporated in the Feoffment; and the Feoffee, when the Time for making Use thereof is come, may use it either to determine the Lease by ousting the Lessee, or to affirm or make it good by Acceptance of Rent from him.

If Tenant in Tail makes a Lease for Years, to begin after his Death, rendering Rent, and dies, and the Issue accepts the Rent, yet *Manwood* *Fyer* 279. *a.* *Flow.* 436. was of Opinion, that he might notwithstanding enter, and avoid the Lease; and the Reason he gave was, because the Lease did not take Effect in Possession during his Life; *sed* Catlyn *hoc negavit*, and it seems with good Reason; for since the Estate-Tail is an Estate of Inheritance, capable of enduring such a Lease, where the Difference is between letting it to begin presently, and letting it to begin after his Death, or, as it is in the next preceding Case, to begin ten Years hence, when he himself dies in the mean time, does not at all appear; for the Lease binds from the Time of the making in one Case, as well as in the other, tho' the Time of their Commencement in Possession be different; and since the Issue in Tail is no more bound by the one than the other, it seems hard and inconsistent to take from him his Power of Election to continue the one Lease, and yet to allow it him in the other; therefore it should seem the Lease in neither Case is (a) absolutely void, but that the Issue hath Election to continue or avoid it, as he himself thinks fit, and by Consequence his Acceptance of the Rent hath determined his Election to continue the Lease, and then he can never enter after to avoid it. (a) But *quere*; for in *Curth.* 258. in the Case of *Symonds* and *Cudmore*, it is

said to be agreed and resolved by the Court, that if Tenant in Tail makes a Lease of any of the Lands intailed to commence after his Death, this is void *ab initio*; and so is *Cro. Jac.* 458.

If Tenant in Tail makes a Lease for Life, by which he gains a new Reversion in Fee during the Life of Tenant for Life, and after he grants a Rent-charge, or makes a Lease for Years, and then the Tenant for Life dies, whereby he is become again Tenant in Tail, and the Reversion in Fee, out of which the Rent-charge or Lease for Years were to take Effect, defeated, yet shall the Lease or Rent continue good against himself, because tho' they were granted out of a defeasible Possession, yet they were granted likewise by him who had the true and antient Right in him, and such Grant or Lease would have bound both, if the defeasible Possession had been in Hand, and the antient Right in another, and both had joined therein; so by the same Reason, when such defeasible Possession and antient Right are conjoined in one Person, and he makes such Lease or Grant, tho' the one fails, yet the other will be called in to support them; so if such Tenant in Tail had made a Feoffment in Fee upon Condition, to the Use of himself and his Heirs, and then had made such Lease, or granted such Rent-charge, and after the Condition were broken, yet the Lease or Grant would still continue good against him during his own Life, because made by one who had all the Right, both antient and new, in him at the Time of making or granting thereof.

*A.* Tenant in Tail, Remainder to *B.* in Tail, *A.* makes a Lease for the Life of the Lessee not warranted by the Statute of 32 *H. 8.* and dies, leaving *B.* in Remainder his Heir, *B.* by Indenture makes a Lease for 99 Years, to commence after the Death of the Tenant for Life, rendering Rent, then the Tenant for Life surrenders to *B.* upon Condition, and dies, *B.* suffers a common Recovery with single Voucher, and dies, the Lessee for Years enters, and the Heir of *A.* distrains for the Rent; and if this Distress was lawful, was the Question; for the Lessee it was argued,

that it was not; for either *B.* was remitted by the Surrender, or he was not; if he was remitted, then the Lease for 99 Years, which was derived out of the new Reversion in Fee, descended to him from *A.* was by such Remitter determined, the Reversion out of which it was derived being vanished and gone; and then he could not distrain for Rent where no Lease was in Being; or if he was not remitted, the Acceptance of the Surrender being his own Act, and but upon Condition, then he was still in of the defeasible Estate descended to him from *A.* and by Consequence his Recovery with single Voucher could not bind his Entail, nor the Remainder over; and then when he died without Issue, (as to make it a Case it should seem he must,) both his defeasible Estate by the Death of the Tenant for Life, and his own Estate-Tail were determined and gone; and consequently, admitting the Lease continued, (which it did not,) yet his Heir was not intitled to the Rent, but those in Remainder, but it was adjudged in *C. B.* that the Distress was lawful; for the Lease for Life made by *A.* could be a Discontinuance no longer than during the Life of the Lessee; then when *B.* after the Death of *A.* made a Lease for 99 Years by Indenture, he having then the Right of the Entail in him, clothed with a defeasible Fee-simple, this Lease when the Discontinuance was at an End, (as it was by the Surrender of the Tenant for Life, or at least by his Death,) is good against himself by Estoppel, if not in Point of Interest, and then he being Tenant in Tail, the Recovery with single Voucher binds that Estate-Tail and Remainder, and by Consequence his Heir has good Title to the Rent, and his Distress well taken for it. *Note;* A Writ of Error was brought of this Judgment in *B. R.* and the Case is argued, but no Judgment appears, nor are the Reasons before-mentioned taken Notice of in the Report; but yet they seem easily deducible from the Report, and are the chief Reasons (as it should seem) upon which the Judgment in *C. B.* could be founded.

*Dyer* 51 *b*  
in Margin.

*A.* Tenant for Life, Remainder to *B.* in Tail, *B.* lets to *C.* for Years, to commence after the Death of *A.* then *B.* suffers a Recovery to *D.* and dies, the Lease for Years holds good against *D.* In this Case it must be intended that the Recovery was suffered after the Death of *A.* for during his Life *B.* was not Tenant to a *Præcipe*; then admitting the Recovery to be after the Death of *A.* this was after such Time as the Lease took Effect against *B.* so as to be absolutely binding upon him; then when he afterwards suffers a Recovery, this bars the Estate-Tail, in respect of which only the Lease was voidable, and by Consequence the Recoverer, who has not that Estate-Tail, must hold subject to the Lease, and can no ways avoid it.

1 *Lev.* 167.  
1 *Sid.* 260.  
*Raym.* 152.  
1 *Keb.* 778.  
*Opey* and  
*Thomasjux.*  
4 *Mod.* 6.  
*S. C.* cited,  
and there  
said by Ju-  
stice *Dolben*,  
that it was  
neither well

So Tenant in Tail, with Power to make Leases, &c. made a Lease for twenty-one Years not pursuant to his Power, and then levied a Fine, and died, leaving Issue; and if the Conuzee should avoid this Lease, as the Issue might have done, if the Fine had not been levied, was the Question; for the Lease did not take Effect during the Life of the Tenant in Tail; and it was agreed, that (a) if Tenant in Tail grant a Rent, or acknowledge a Statute, or make a Lease for Years to begin after his Death, that these are void as to the Issue, and not only voidable; but if Tenant in Tail makes a Lease for Years without Reservation of any Rent, this is not void, but only voidable, because the Issue may affirm it by Acceptance. stated nor well reported in the Books; for upon the Roll it was thus: A Man seised in Fee made a Lease for 99 Years, if three Persons so long lived; then he settled the Reversion upon himself in Tail, with Power to make Leases for 21 Years, and then he made such a Lease, and died; the Son, who was the Issue in Tail, and not the Father, (as it is reported in the Books,) levied a Fine, and sold the Reversion; the first Lease determined, and the Court thought the Conuzee might avoid the second Lease, because it never was in the Election of the Tenant in Tail, or his Issue, to avoid it, they having conveyed away their Estates before this second Lease was to commence; for if Tenant in Tail makes a Lease to commence *in presenti*, and conveys away his Estate by Fine, the Conuzee must hold it charged with such Lease; *scilicet* where it is to commence *in futuro*, because it cannot be avoided before its Commencement; but no Judgment was given. (a) *Vide Cro Jac.* 455. *Griffin* and *Stankope*.

ance of Fealty; and by all, except *Twissien*, the Lease in the principal Case was held not to be absolutely void upon the Death of the Tenant in Tail, but only voidable, because it was an immediate Disposition of the Land itself, and therefore differed from the Cases of collateral Charges granted thereout; and they held it to be for the Benefit of the Issue to have such Leases only voidable; and so indeed it is, as appears by all the Cases and Reasons before-mentioned; then this Lease not being absolutely void, but only voidable, when the Tenant in Tail levies a Fine, by which he binds the Estate-Tail, and bars the Issue before the Time of Election for Avoidance thereof is come; this does not make the Lease indefeasible, but transfers the Estate chargeable with the future Lease just in the same Manner it was in the Hands of the Tenant in Tail, without any Act done either to affirm or avoid it; and then the Conuzee, when the Lease is to commence in Possession, must have the same Election of avoiding or affirming it, as the Issue in Tail would have had; for if the Lease was voidable, and the Levying the Fine before its Commencement had no Influence upon it one way or another; then it must continue voidable still, and it must continue so only as to the Conuzee; for the Tenant in Tail, or his Issue, have nothing to do therewith, and by Consequence, if it does not continue voidable as to the Conuzee, then he may use his Power either to affirm or avoid it, as he sees most convenient; and a Diversity was taken between a voidable Lease by Tenant in Tail, which is to commence *in presenti*, and such voidable Lease as is to commence *in futuro*; for (a) if Tenant in Tail makes a Lease for Years to begin presently, which is not warranted by 32 H. 8. and consequently is voidable by his Issue, if he in the mean time conveys over the Land by Fine, the Conuzee shall hold subject to that Lease, and shall never after avoid it, because the Lessee was then actually in Possession of his Lease, and so that Possession divided and taken out from the Inheritance which the Conuzee purchased; and then the Right of Entry, which would have come to the Issue, and was necessary to the Avoidance thereof, cannot by the Fine be transferred to the Conuzee, who is a Stranger; and the Issue is bound by the Fine from making any Use of that Right of Entry, and by Consequence the Lessee shall take Advantage thereof, and hold his Lease without Avoidance from either; but where such voidable Lease is to commence *in futuro*, and before the Commencement of it the Tenant in Tail levies a Fine to a Stranger, there the Election to avoid or continue it passes incorporated in the Fine, and it cannot be said to be either a Right of Entry or a Right of Action; for the Lessee not being yet in Possession, no Entry is needful or can be made to avoid his Lease, and the Fine has no Effect upon it one Way or other, but leaves it just as it was; and by Consequence being voidable after the Fine as much as it was before, the Conuzee only can use the Power of avoiding or continuing it, since the Issue is bound by the Fine, and has nothing to do with it, and it must continue the same after the Fine as it was before, because the Time for its Commencement was not then come; and it could not be either affirmed or avoided before it had a Beginning, and so it should seem to be; and for the same Reasons, where Tenant in Tail makes a Lease for Years, to begin expressly after his Death, this is not absolutely void by his Death, but only voidable, notwithstanding the Opinion at the Beginning of the Case.

Tenant in Tail of a Manor before 27 H. 8. made a Feoffment in Fee to his own Use, and died, and in the Time of the Issue the Statute of Uses is made, and after the Issue makes a Lease for Years of a Tenement, Parcel of the Manor, rendering Rent, and dies; whereby his Issue was remitted by the Descent of the Fee and Freehold in Law, without Entry, tho' the first Issue was not remitted, by reason of the Statute of Uses, which executed the Possession in the same Manner as he had the Use (and that was in Fee) before Entry, and his Issue makes a Feoffment in Fee

(a) For which  
see 2 Lev.  
27, 28.  
1 A. & C. 109.  
Person versus  
Bacon and  
Hudjon.

(b) But *quere*,  
& see *supra*.

1 Rob. Rep.  
260.  
Biddiman  
and Charlton.

Fee of the Manor, and Livery in another Part, not in the Tenement, leased in the Name of the whole ; and if this was a Discontinuance of this Tenement, was the Question ; *Cocentry* was of Opinion it was not, because the Issue who made the Lease granted it out of the Fee and Right of the Tail, which was in himself at the Time of the Lease made ; and therefore by the Remitter of his Issue the Lease was not void before Entry, but only voidable ; for he might have made it good by Acceptance of the Rent from the Lessee ; and by Consequence if this was a Lease continuing at the Time of the Feoffment of the Manor, this Tenement could not pass by the Livery made in another Part of the Manor ; but at last the whole Court held, that this Tenement passed by the Feoffment, because by the Remitter of the Issue the Lease for Years was absolutely defeated and gone, and the Lessee become Tenant at Sufferance ; and if the Issue had accepted the Rent, this would not have made the Lease good, because the Reversion and Inheritance, out of which it was derived, was by the Remitter vanished and gone ; and then by the Continuance in Possession of the Tenant at Sufferance at the Time of the Feoffment of the Manor is no Impediment to the Operation of the Livery upon that Tenement, and that the Remitter destroyed the Lease in this Case.

*Dyer* 107. b.  
*115. a. 332. b.*  
*Plow.* 560.  
*Hob* 324, 346.  
*Cro. Eliz.* 512.  
*Yelv.* 152.  
*1 Rol. Rep.*  
 260.  
*Godb.* 324.  
*2 Rol. Rep.*  
 491.  
*Co. Lit.* 45. b.

Tenant in Tail, Reversion in the Crown, makes a Lease for Years, rendering Rent, and dies, leaving *B.* his Son and Heir in Tail, who accepts the Rent, and hath Issue *C.* then *B.* commits Treason, and is attainted thereof, and by Act of Parliament all his Lands and Possessions are forfeited, and given to the King ; and if the King was concluded by this Acceptance of the Rent by the Issue, so that he shall be adjudged in by him, and could not avoid the Lease so long as there was any Issue in Tail, was the Question ; and it was adjudged, that by the Attainder the Estate-Tail was determined, and the King in in Point of Reverter, and then all Leases, Charges, &c. of the Tenant in Tail are determined as if he were dead without Issue ; the Reason whereof, given in the Books, is, that if it should be otherwise, the King would have two Fees in him, which the Law will not allow ; and this may be a good Reason ; but it is such a one as wants another Reason to explain it ; for the same Books agree, that if Tenant in Tail with the Reversion in the King had made a Lease for Years, and after had levied a Fine to the King, that the King in that Case should not avoid the Lease for Years, no more than he should if the Remainder in Fee had been in a Stranger, or in the Tenant in Tail himself, and yet in these Cases the King hath two Fees in him, and the Law allows them to consist well together ; therefore the Reason of the Difference between the Cases seems to be, that where the Reversion is in the Crown, the Crown by Consequence must be the Donor, and give out the Estate-Tail : Now all Donations created a Tenure between the Donor and Donee, to which Homage, Fealty, and other Duties and Services were incident and annexed, as the Conditions whereby the Tenant was to hold and continue the Enjoyment of his Land ; now Treason was the greatest Violation possible of these Duties of Fidelity, Obedience, and Service, whereto the Tenant was obliged, as the very Terms and Conditions upon which the King at first was prevailed on to give him the Land, and which he, when he accepted thereof, undertook to observe, by the Solemnity of an Oath ; so that when the Donee commits Treason, he breaks the Condition whereby he holds his Estate, and the King is in for that Condition broken, and by Consequence his Title by Virtue of that Condition is paramount all Leases, Grants, or Charges of the Tenant in Tail ; for they being derived out of his conditional Estate can subsist no longer than that does, and by his Attainder of Treason the Condition is broken, and that Estate forfeited and gone to the King in Reversion, who gave it ; and by Consequence all derivative Leases or Charges thereout are determined likewise ; but now when the King has only the

Remainder

Remainder in Fee, there is no immediate Tenure of the King, nor is the Tenant obliged to any particular Duties or Services of Homage or Fealty to the King, as annexed to his Donation, more than any other of his Subjects; for he had not his Estate of the Gift of the King, but of his own immediate Donor; and then tho' the Law has given the Forfeiture of all Estates for Treason to the King, of whomsoever held, yet this is a positive Law, introduced but lately, and the King in such Case is in under or by Way of Coveyance of the Estate-Tail, and his Title thereto begins but from the Time of the Treason committed, and by Consequence he shall hold subject to all Leases or Charges made by the Tenant in Tail before that Treason committed, as the Tenant in Tail himself should have done; and in the principal Case, where the Issue in Tail by Acceptance of the Rent had made good the Lease of his Ancestor, as against himself, if the Remainder in Fee had been in the Crown, and the Issue in Tail had been after attainted of Treason, tho' the King should have the Forfeiture, yet he should hold it subject to the Lease, which the Issue by such Acceptance had made good against himself; and it should seem likewise, that the King being a Stranger, and coming in under the Estate-Tail, shall be bound by that Lease, not only during the Life of the Issue who accepted the Rent, but also as long as there were any Issue of the Body of the Donor; for the King being a Stranger cannot have the Right of the succeeding Issue to avoid it; and whether the Right of Entry or Action, which such succeeding Issue would have had to avoid the Lease, be transferred to the King, depends upon the Words and Construction of the Act of Parliament which gives the Forfeiture in such Case; so in the Case of the Fine, where the Tenant in Tail makes a Lease for Years, and after conveys the Lands by Fine to the King, tho' the King in that Case was the immediate Donor, and had the Reversion in him at the Time of the Fine levied, yet he should be bound by such Lease, because the Fine was only a Conveyance of Record, and passes the Estate to the King, as it would do to any other Person, and consequently the King shall take subject to that Lease, as any other Person must do; and in the principal Case, where the Reversion was in the Crown, tho' the Lease for Years had been in every thing warranted by 32 H. 8. and the Issue in Tail after the Death of his Ancestor had accepted the Rent, and then been attainted of Treason, yet the King should hold discharged thereof; because by the Attainder the Estate-Tail was forfeited, determined, and gone, as if the Tenant in Tail had died without Issue, and the King was in of his old or immediate Reversion.

If Tenant in Tail makes a Lease for Years, and dies without Issue, the Lease is absolutely determined by his Death, tho' it were in all Things pursuant to the 32 H. 8. so that no Acceptance of the Rent by him in the Remainder or Reversion can make it good; for the Estate, out of which it was derived, being determined, that likewise must fall off with it; and the Intent of the Statute was only to enable the Tenant in Tail by such Leases to bind his Issue, which in no Case before he could do, not to bind or any ways affect those in Remainder or Reversion after the Estate-Tail determined.

So if Tenant in Tail makes a Lease for three Lives according to 32 H. 8. this is no Discontinuance, but determines with the Estate-Tail; and where *Cro. Car.* 156. *Salvin* and *Clerk* holds that it is a Discontinuance, all the other (a) Books are against it; and (b) *Vaughan* says, that Case is all false, and misreported, and that such Lease being warranted by the Statute cannot be a Discontinuance; because the Parliament, to which every Man is Party, allows of such Leases; which if they were Tortious, as all Discontinuances are, the Parliament would never have allowed; and therefore if a Warranty were annexed to such Lease, yet it would make no Discontinuance, because that determines with the Estate likewise.

8 Co. 34.  
Moor 133.  
Co Lit 44. a.  
Cro Eliz. 602.  
Bro. Tit. Ac-  
ceptance 19.

(a) As 8 Co.  
34. a.  
Cro Eliz. 602.  
Co. L. t. 333. a.  
Noy 66.  
Stow. 77.  
(b) *Vaughan*.  
385.



3 Co. 50.  
9 Co. 140. b.  
2 Rol. Abr.  
59. Walter  
and Jackson.

But if such Lease for three Lives were not warranted by 32 H. 8. then it would be a Discontinuance, because it was a greater Estate than the Tenant in Tail had Power to make, and passed by Livery, which took out the Estate from the Tenant in Tail, and turned it into a Reversion in Fee, determinable upon three Lives; so if such Lease for three Lives, not warranted by that Statute, were made of Parcel of the Demesnes of a Manor, and then the Tenant in Tail should lease for Life, or convey the Manor in Fee to another, and the Lessee attorn, yet the Reversion thereof would not pass, because the first Lease was a Discontinuance of that Parcel, so as the Reversion thereof for the Time was no Parcel of the Manor.

Godd 9 pl.  
12.

Tenant in Tail, the Remainder in Fee, the Tenant in Tail makes a Lease for Lives, according to 32 H. 8. and after dies without Issue, and before any Entry he in the Remainder grants over his Remainder by Fine; and if the Conuzee of the Fine might enter upon the Lessee, and avoid his Lease, was the Question. *Fenner* argued that he could not, because where a Freehold is given by Livery, it cannot be defeated without Entry; and cited a Case where a Man made a Lease for Life, Remainder in Fee, the Tenant for Life granted over his Estate; then a *Formedon* was brought against the Grantee or Assignee, and the Tenant for Life died, pending the Suit; and it was held by all the Justices, (except *Littleton* and divers Serjeants,) that the Writ should not abate, unless he in the Remainder had entered; so here, and then when before Entry, he in the Remainder grants over his Remainder, the Grantee shall have it but as a Remainder, for so is his Grant, and so the Estate of the Tenant for Life, which was but voidable, is made good; and of this Opinion were *Wyndam* and *Periam*; but *Mead* and *Dyer* held, that by the Death of Tenant in Tail without Issue, the Lease made by him, tho' for Life, was absolutely void; and not only voidable, because by his Death without Issue, the Estate, out of which the Estate for Life was derived, is determined and gone; and so must the Estate for Life be also, for *cessante causa cessat & effectus*; and this seems the better Opinion and most consonant to the Cases before put; for the Death of the Tenant in Tail without Issue was in Law as much the Determination of the Lease for Life, as if it had been expressly so limited; and then when that Time comes, the Operation of the Livery, and the End for which it was made ceases, and then there needs no Entry to avoid that which by Effluxion of Time and Operation of Law is already spent and run out; and therefore the Conuzee of the Fine comes immediately to the Possession both in Law and Right, and the Lessee's Continuance of Possession after is a Wrong and Trespass to him, and cannot be by Force of the Lease which is run out and expired, and by Consequence must have determined the Operation of the Livery with it.

1 Fon. 61, 62.  
2 Rol. Rep.  
498.

But if Tenant in Tail makes a voidable Lease for Years or Life, and dies, and the Issue, before Entry on the Lessee, levies a Fine to a Stranger, the Conuzee shall not avoid the Lease, because such Lease being only voidable by Entry, when the Issue before Entry conveys over the Land by Fine, the Power of Entry, which was the only Means of avoiding such Lease, is by the Fine destroyed and gone; for a Right of Entry cannot be transferred to a Stranger, any more than a Right of Action; so if the Tenant in Tail himself, after such Lease, had levied a Fine to a Stranger, or even to the Reversioner, and died, yet they could not avoid the Lease ever after, because if they could, it must be by reason of the Right of Entry transferred by the Fine, which would have come to the Issue if no such Fine had been levied; and the Law absolutely condemns all Alienations of Right only, whether it be Right of Entry or of Action, and consequently in these Cases, by such Alienation, the Lease is become absolute and unavoidable.



A Woman, Tenant in Tail, makes a Lease for Years, not warranted by 32 H. 8. and after takes Husband, and they have Issue, and then the Wife dies, the Issue cannot avoid this Lease during the Life of the Husband, because he is Tenant by the Curtesy of the Freehold and Reversion expectant thereupon; and tho' he should surrender his Estate by the Curtesy to the Issue, yet this would not help him to avoid the Lease till his Death, because his Estate, as Tenant by the Curtesy, is a Continuance of his Wife's Estate, and so long as that lasts, the Issue's Time for avoiding the Lease is not come, and notwithstanding the Surrender, yet as to the Lessee, who is a Stranger, the Estate by the Curtesy has still an Existence and Continuance, as if no Surrender had been made; for he being a Stranger shall not suffer by such voluntray Act of the Tenant by the Curtesy; and (a) *Walsh* was of Opinion, that the Power of avoiding such voidable Leases runs so in Privy to the Issue in Tail, that if such Issue should marry, and his Wife, after the Death of the Ancestor in Tail, be endowed of the Reversion of the Lands in Lease, that she should not avoid the Lease, as her Husband, the Issue in Tail, might have done; because tho' she be in, in Continuance of the Estate-tail, yet she is not privy to her Husband as to that Purpose; also it was further held in the principal Case, that if the Woman, Tenant in Tail, had before Marriage acknowledged a Statute, and then married, and died, that this Statute should be extendible in the Hands of the Tenant by the Curtesy, and of the Issue too, if he came in by Surrender of the Tenant by the Curtesy during his Life; but if after such Statute the Woman had made a Lease for Years, rendring Rent, and then married, and died, leaving Issue, the Statute should not be extended upon the Lessee; for as the Statute was absolutely void and determined as to the Issue, and the Lease voidable by him likewise, the Statute shall never be set up against the Lessee, tho' the Issue in Tail thinks fit to wave his Power of avoiding the Lease; for then that would take away from him the Rent, which might be the chief Inducement that prevailed on him to affirm such Lease; or if such Lease were in all Respects warranted by 32 H. 8. and so not voidable by the Issue; yet since the Statute fell off, and became void by the Death of the Tenant in Tail, as to the Issue it shall never take Place against the Lessee, because that would take from the Issue the Rent, which 32 H. 8. never intended to permit, but, on the contrary, made the Issue's Enjoyment of the Rent the principal Reason of their Investing the Ancestor with Power by such Lease to bind the Issue.

*Dyer* 46. b. in *Margent.* 51. b. in *Margent.* 363. l. *Co. Litt.* 326. a. 338. a. b. & *vide Moor* 50.

(a) In *Bendish* 65. but *Q.*

But if Tenant in Tail grants a Rent-Charge, and after makes a Lease for Years, or Lives, warranted by 32 H. 8. the Lessee shall hold the Land charged during the Lease, not only in the Life-time of the Lessor, but also after his Death; by *Jones and Telverton*: For this Rent-Charge meddles not with the Possession, as the Statute in the other Case does; and therefore the Lessee, in Respect of the Possession which he hath, shall be liable to pay the Rent reserved to the Issue; whereas in the other Case, if the Statute should prevail, this would deprive the Issue from distraining for the Rent, by divesting the Lessee of the Possession whereon the Distress ought to be made.

2 *Rel. Rep.* 499  
1 *Mod.* 110.

## 2. What Leases Tenant in Tail may now make to bind his Issue, since the 32 H. 8.

Here we shall premise, that the Statute 32 H. 8. cap. 28. is an enabling Statute, and was made purposely to give the Tenant in Tail (amongst others) Power, by observing the Directions therein specified, to bind his Issue; so that they shall not now, after his Death, avoid such Leases as they

*Co. Litt.* 44.

they might have done before by the Common Law, which was found to be very inconvenient, and a great Discouragement to Farmers and Lessees, who after they had paid great Fines, and been at great Costs and Charges in building and otherwise improving the Lands and Tenements so leased to them, were, after the Death of their Lessors, cruelly expelled and put out (as the Statute speaks) by the Heirs of the Lessors, by reason of private Gifts in Tail, &c. to their great Impoverishment and Undoing; therefore to prevent such Mischiefs for the future, that Statute provides, that all Leases to be made of any Manors, Lands, Tenements, or other Hereditaments, by Writing indented, under Seal for Term of Years, or for Term of Life, by any Person or Persons being of full Age of Twenty-one Years, having any Estate of Inheritance, either in Fee-simple or Fee-tail, &c. shall be good and effectual against the Lessors and their Heirs, &c. provided that the said Act shall not extend to any Leases to be made of any Manors, Lands, &c. being in the Hands of any Farmer or Farmers, by Virtue of an old Lease, unless the same old Lease be expired, surrendered or ended, within one Year next after the making of the said new Lease; nor to any Grant to be made of any Reversion of any Manors, Lands, &c. nor to any Lease of any Manors, Lands, &c. which have not been most commonly letten to Farm, &c. by the Space of twenty Years next before; nor to any Lease to be made without Impeachment of Waste, or which shall exceed the Number of Twenty-one Years, or three Lives, from the Day of the Making thereof; and that upon every such Lease there be received yearly, during the same Lease, due and payable to the Lessors and their Heirs, &c. to whom the same Lands, &c. after the Death of the Lessors, would have come if no such Lease had been made, so much yearly Farm or Rent, or more, as hath been most accustomedly yielded or paid for the Manors, Lands, &c. so letten within twenty Years next before such Lease thereof made, &c.

These are the several Qualifications requisite to all Leases to be made by Tenant in Tail to bind his Issue within the Statute, the particular Branches whereof being considered under the next Head, Letter (D), I shall here only mention some scattered Cases, not so easily reducible to the Method there used.

Hard. 89.  
Cotter and  
Merri. k.

Tenant in Tail, to him and the Heirs Male of his Body, had Issue two Sons by divers Venters, and died, the eldest Son entered and made a Lease for Twenty-one Years, reserving Rent generally to him and his Heirs and Assigns, and died without Issue, leaving two Sisters, his Heirs at Law; and if by this Reservation the Rent belonged to the second Brother, to whom the Reversion descended as Heir Male of the Body of the Father, was the Question; for if not, then the Lease could not bind him within 32 H. 8. and it was strongly urged, that the Rent could not go to him, because he was neither Heir General nor Special to the Lessor, that the Reservation being to the Heirs of the Lessor could not go to the Brother of the Half-Blood; but notwithstanding it was adjudged to be a good Lease, and that the Rent should go along with the Reversion; for the Words of the Statute are, that the Rent shall be reserved to the Lessor and his Heirs, or to those to whom the Lands would go if no such Lease had been made; and Judges are to expound Statutes, so as not to frustrate the Design and Intent of them; and here the Intent was, that the Rent should go along with the Reversion; and so it may here, for Rent naturally follows the Reversion, and the second Brother is Heir to the Intail and Reversion, tho' not to the Lessor, and Heirs *dicuntur ab Hereditate*, and therefore shall be taken *secundum subjectam materiam*, & *ut res magis valeat*, to comply with the Intent of the Statute; and they cited (a) *Austen's Case* as a Case in Point, and so Judgment was given accordingly.

Two Coparceners Tenants in Tail, the Husband of one of them, after her Death, being Tenant by the Curtesy, joins with the other in a Lease for Years, rendering Rent to them and their Heirs; this was held no good Lease within 32 H. 8. because it is not reserved to the Donee and his Heirs, but to the Tenant by the Curtesy, jointly with the other, for Rent goes strictly as it is reserved by the Lessor, and not otherwise; and perhaps as this Reservation is, if the Tenant by the Curtesy should survive, the whole Rent would go to him by Survivorship, and so the Issue of the other Coparcener have no Recompence for his Part of the Lands leased; or if the Rent should not survive, in Regard of their several Interests in the Lands leased, yet since Heirs, in case of the Coparcener who joined, must be intended Heirs of the Body, to bring it within 32 H. 8. so must it likewise be in the Case of the Tenant by the Curtesy, and that may not happen to be the Issue inheritable by force of the Gift, because he may have Issue a Son by a former Venter, who would be Heir of his Body; and therefore this seems to differ from the former Case, because the same Word *Heirs* being applied to both indifferently, cannot be intended to mean one Sort of Heirs in one Case, and another in the other; and the Tenant by the Curtesy can have no Heirs of his Body inheritable as Heirs of his Body to the Entail, for he had no Estate-tail in him; and therefore Heirs of his Body, if it should be so construed, cannot be restrained or governed by the same Reasoning as will prevail in the Case of the Coparcener.

So if Tenant by the Curtesy, and the Heir in Reversion in Tail, join in a Lease for Years, rendring Rent to them and their Heirs, this Lease is not warranted by 32 H. 8. by reason of such general Reservation, which will carry a Moiety of the Rent, at least, to the Heirs general of the Tenant by the Curtesy, and so may cut off the Issue in Tail from that Recompence the Statute intended them as the Consideration of their Ancestors being allowed by such Leases to bind them.

Lands were given to Baron and Feme, and to the Heirs of their two Bodies; the Baron dies, leaving Issue by his Wife, who makes a Lease for Years according to 32 H. 8. and if this Lease was good by that Statute, was the Question; the Objection against it was, that the Statute says, the Lease shall be good against the Lessor and his Heirs, and the Issue does not claim as Heir to the Wife only, but as Heir to them both; but *Wyndham* and *Rhodes*, Justices, agreed clearly that the Lease should bind the Issue within the Intent of that Statute, for between Baron and Feme there are no Moieties, and the Wife surviving is perfect and absolute Tenant in Tail, and consequently may make all such Leases as that Statute impowers Tenants in Tail to make.

Tenant in Tail makes a Lease for Years, rendring 20 s. Rent, and after releases all the Rent except 12 d. and dies, and his Issue accepts the 12 d. and the Question was, if thereby he were concluded to distrain for the other 19 s. reserved upon the Lease; and *Sanders* and *Cothyn* were of Opinion that he was concluded, but *Whidden* and *Dyer contra*; and put this Case, that if the Lessor, after such Lease, should grant to the Lessee that he should hold his Lease without Impeachment of Waste, yet the Issue may maintain an Action of Waste against him, of which there seems no Doubt; or that the Issue, if he had not accepted the 12 d. might have distrained for the whole 20 s. for if such Release, either of Rent or Waste, should prevail, the Statute 32 H. 8. would be totally eluded; but it should seem, the Issue's own Acceptance of the Rent hath concluded him, for his own Time, to distrain for any more.

If Tenant in Tail makes a Lease for Years, reserving the usual Rent to his Issue, without any Reservation to himself, this is not pursuant to the Words of the Statute; yet *Fleming*, Chief Justice, held it to be a good Reservation, and the Lease not voidable, for this Reason, within 32 H. 8.

*Lat. b. 45.  
Thompson v.  
Caly.*

*Palmer, 494.  
Lat. b. 257.  
Stacy ver.  
Clerk.*

*Godb. 102 pl.  
119.*

*Dyer 123.  
304. a. pl. 55.  
2 Rel. Rep.  
403, 407  
Ley 78.*

*Hard 90, 9.*

because the Issue, for whom the Statute chiefly intended to provide, sustains no Prejudice.

- 3 Co 64. b. An Estate is made to Husband and Wife and the Heirs of the Body of the Husband, the Husband makes a Lease for forty Years, rendring Rent, and dies, the Issue accepts the Rent, yet this shall not bind him, because his Time for Acceptance thereof was not come, the Whole being vested in the Wife for her Life by Survivorship.
- Dyer 246. a. Tenant in Tail makes a Lease for twenty Years, rendring the usual  
1 Leon. 148. Rent, *Habendum* from *Michaelmas* next ensuing; this seems a good Lease,  
Et vide tho' it did not begin from the making of the Lease, according to the  
2 Bendl. 74. Proviso 32 H. 8. for the Intent of the Statute was only that the Lease  
Pl. 58. should not exceed the Number of twenty-one Years from the making,  
(a) Popb. 8. which this Lease did not; and in the Margent a Case is of (a) *Thompson*  
and *Trafford* 35 Eliz. in B. R. was cited to be adjudged, *per totam Curiam*, that it was a good Lease, and well warranted by the Statute; tho'  
(b) Co. Lit. my Lord Coke lays it down for one of his (b) Rules, that Leases upon  
44. a. 45. b. that Statute are not good, if they do not commence from the Day of  
the Making, which perhaps may be reconciled upon the said Diversity,  
where they are under Twenty-one Years; and where not so, that from  
the Time of the sealing and executing the Lease, till the Expiration  
thereof, there does not intervene more than Twenty-one Years; for if  
the Commencement of the Lease be at such a Distance, that between  
the Time of the sealing and executing thereof, and the Expiration, there  
do not intervene above Twenty-one Years, then such Lease seems to  
be without any Aid from this Statute, tho' the Time for Continuance  
thereof in the Possession of the Lessee be under Twenty-one Years; for  
otherwise the Tenant in Tail might so procrastinate the Commencement  
of the Lease, as to have always the greatest Part of the Twenty-one  
Years running out in the Time of his Issue, which the Statute never in-  
tended to Countenance.
- 1 Leon. 148. So where one made a Lease for ten Years, and after made another  
Lease for eleven Years, both these Leases are good, because they do not  
in all exceed Twenty-one Years, and so the Inheritance not charged with  
more than a Lease for Twenty-one Years, which the Statute allows.
- Cro. Car. 44. Leases by Tenant in Tail, or Husband seised in Right of his Wife of  
Copyhold Lands, are not within this Statute of 32 H. 8. but remain per-  
fectly at Common Law.
- Moor. pl. 1084. Tenant in Tail made a Lease to a Feme Covert for Life, the Husband  
Sydnams and surrenders, and then the Tenant in Tail makes a Lease for three Lives,  
Capts. and dies; the Wife, after the Death of her Husband, entered, claiming  
(a) 5 Co. 2. her Lease, and dies; and (c) held, that the Issue shall not avoid the  
Co. Lit. 44. b. Lease for three Lives, and yet a conditional Surrender of a former  
Lease hath been expressly held not to be a sufficient Surrender to make  
good any new Lease to be made by Virtue of this Statute; *Quære* there-  
fore the Difference.

### 3. When and in what Cases the Issue in Tail, or Strangers, shall be bound by voidable Leases made by Tenant in Tail.

- 2 Bull. 42, 43. As this has already been in some Measure cleared under the first  
Errington ver. Branch of this Head, there remains but a few Cases here to be in-  
Errington. serted.  
4 Mod. 3.  
S. C. cited.

Baron and Feme, Tenants in Special Tail, with Reversion in Fee to the Baron, the Baron dies, A. his Son and Issue in Tail, having also the Re-

Reversion in Fee, by Indenture, in the Life-time of the Wife, makes a Lease to B. for forty Years, to begin after the Death of the Wife, rendering Rent, and dies without Issue; C. his Sister, to whom the Reversion descended in the Life-time of her Mother, levies a Fine *come ceo*, &c. with Proclamations to J. S. then the Wife, Tenant in Tail, dies; and if J. S. the Conuzee of the Fine, was bound by this Lease, was the Question: No Judgment is given in the Case, but the Opinion of the Court, upon the first and second arguing of the Case, seemed to be, that the Conuzee could not avoid this Lease; and the Reason they went upon was, because this Lease, at first, took its Effect out of the Estate-tail by way of Conclusion, and out of the Reversion in Fee by way of Interest; but the taking Effect by way of Conclusion was at an End by the Death of the Issue who made it, because he died before the Estate-tail came to him, and so it rested barely upon the Reversion in Fee, which was well charged therewith; then when C. the Sister, inheritable likewise to both the Intail and Reversion in Fee, levied a Fine in the Life-time of the Mother; this passed the Reversion in Point of Interest charged with that Lease, and it likewise carried the Estate-tail; (not as an Estate-tail, for that none could have but the Donees and their Issue, inheritable by Force of the Gift; much less when the Issue who levied it had then nothing in the Intail, her Mother, who had the whole Estate-tail in her, being then living;) but it passed the Estate-tail by way of Bar or Extinguishment, so that the Lease, which would have taken Place out of the Estate-tail by way of Conclusion, if it had ever come to the Lessor, and which did take Place out of the Reversion in Point of Interest, now that the Estate-tail is put out of the way by Virtue of the Fine, the Lease then takes Place out of the Reversion presently, and by Consequence the Conuzee, who has that Reversion by Conveyance subsequent to the Lease, must hold it subject thereto; and the Sister could not by the Fine convey over the Possibility of avoiding the Lease, which she herself would have had if the Estate-tail had come to her; and some held, that if either the Brother, or Sister, after the Brother's Death, had acknowledged a Statute, and then after levied the Fine, and then the Mother had died, that the Estate-tail would be so barred and gone, *quoad* the Conuzee of the Statute, that he might lay on his Statute against the Conuzee of the Fine, who hath the Fee-simple absolute in him, out of which the Lease or Statute were to take Place; and the Issue in Tail only is inheritable to the Privilege of avoiding such Charges by Virtue of his Estate-tail, not the Conuzee, who is a Stranger, and cannot have that Estate. But afterwards when Coke came to be Chief Justice, he was clear of Opinion, that the Conuzee of the Fine was not bound by this Lease, for he held the Lease to be clearly and absolutely void as against the Sister and her Conuzee, and not only voidable; indeed if the Son had come to the Estate-tail, it would have bound him, and so it would his Conuzee, if he had levied the Fine in the Life of his Mother; but he dying in the Life-time of the Mother, who was perfect Tenant in Tail, the Sister was not at all bound by this Conclusion, but the Lease, as to her, was absolutely void; and then of all void Charges a Stranger may take Advantage, tho' of such as are only voidable, Privies only, and not Strangers, can take Advantage: And he divided the Case, and put it as if the Reversion in Fee had been in the Donor, and such Donor had made a Lease for Years, or granted a Rent-Charge, and then the Issue in Tail, in the Life of the Tenant in Tail, had levied a Fine, and then the Tenant in Tail had died, clearly the Conuzee of the Fine should hold the Land so long as there were any Issue in Tail; for during that Time the Conuzee hath a Fee-simple; and tho' the Issue in Tail here had the Reversion in Fee, which he passed to the Conuzee, together with a Fee determinable on the Failure of Issue, and that the Conuzee cannot have two Fee-simples in him, yet he hath  
such

such a Fee-simple as shall be discharged of the Lease during the Continuance of the Estate-Tail, if it had not been barred, and the one Fee-simple shall not determine or drown the other, but both shall have Continuance *quoad* Strangers, as if they were in several and distinct Persons; and he also held, that if the Daughter in this Case had entered, and accepted the Rent, yet clearly this Acceptance would not have bound her, or made good the Lease, because, as to her, it was absolutely void, and not only voidable; and this seems the most reasonable and best Opinion; but no Judgment was given, but the Case ended by Agreement.

4 *Mo.* 1, 2.  
1 *Salk.* 338.  
*Carth.* 257,  
258.  
1 *Stow.* 370.  
S. C. *Symonds*  
and *Cathore.*

A Tenant in Tail, with Reversion to himself in Fee, makes a Lease for 99 Years, if two Lives should so long live, to commence after the Determination of a Lease for Years then in Being, A. dies, leaving B. his eldest Son and Heir, who being the Issue in Tail levied a Fine to the Use of himself and his Heirs; the first Lease determines, then B. enters upon his Father's Lessee; and if his Entry was lawful, was the Question, and it was adjudged, that it was not; for this was an Interest derived out of the Estate-Tail, and also out of the Reversion, and being made by Tenant in Tail was not absolutely void as against his Issue, but only voidable; then when the Issue, without taking the Advantage the Law gave him in respect of his Estate-Tail to avoid this Lease, levies a Fine of the Estate, his Estate-Tail by such Fine is extinguished or barred and gone, and by Consequence his Power to avoid this Lease in respect of that Estate-Tail is gone likewise, and the Conuzee has no Power to avoid it, because he is a meer Stranger, and no ways in Privy of the Estate-Tail, nor could this Power to avoid the Lease be transferred to the Conuzee, when the Issue in Tail had it only in respect of his Estate-Tail, which is now barred, or rather extinguished, as it was held to be, and so the Lease took Place of the Reversion in Fee. *Note*; This Case seems to differ from that of *Errington's supra*, where the Son, who had made the Lease, died without Issue in the Life-time of his Mother, who was perfect Tenant in Tail.

1 *Rev. Abr.*  
842.  
1 *Fon.* 60.  
*Hutton* 84.  
*Cro. Jac.* 688.  
2 *Roll. Rep.*  
490, 498.  
*Crocker and*  
*Kelsey.*  
1 *Sid.* 62.  
1 *Keb.* 182.  
S. C. cited.

Husband and Wife Tenants in Special Tail, with Remainder to the Husband in Fee, by Conveyance made by the Husband, during the Coverture have Issue a Son, the Husband dies, the Son in the Life-time of his Mother levies a Fine to the Use of himself and his Heirs, the Wife after makes a Lease for twenty-one Years without reserving the antient Rent, and so not warranted by 32 H. 8. and dies, the Son hath Issue, and by his Will devises these Lands to the Defendant, and dies, the Defendant enters upon the Lessee, who brings Ejectment; and it was adjudged in B. R. for the Plaintiff, and that Judgment afterwards affirmed in Error in the Exchequer Chamber, after divers Arguments; and in the Case two Points were made: 1. If this Lease, being made by a Jointress within 11 H. 7. and not warranted by 32 H. 8. be voidable by the Issue in Tail, upon the Statute 11 H. 7. in Case no such Fine had been levied. 2. If the Conuzee of the Fine should have the same Power to avoid the Lease, either in Respect of the Estate-Tail or the Remainder in Fee, as the Issue should have had, if no such Fine had been levied. As to the first Point, it was resolved, that this Lease was not within the 11 H. 7. for it was no Discontinuance, but only an ordinary Lease for Years, which the Wife might survive, and therefore this differs from a Lease for Life or Lives made by a sole Jointress, not warranted by 32 H. 8. for that makes a Discontinuance presently, and is expressly within 11 H. 7. also this differs from the Case put in (a) *Sir George Brown's Case*, that if a Woman Jointress in Tail accepts a Fine *come ceo*, &c. and grants and renders the Land for 500 or 1000 Years, to evade the Act, that yet this is an Alienation within the Meaning of that Act, as much as if she had expressly levied a Fine for 500 or 1000 Years, because in both Cases, after her Death, such Fine would bind the Issue in Tail, which that Statute intended

(a) 5 *Co.* 51.  
2 *Roll. Rep.*  
491; & *vide*  
3 *Keb.* 333,  
436, 448.

tended to prevent; but because such Fines passing only an Interest for Years, and not meddling with the Freehold, make no Discontinuance, nor can be forfeited with collateral Warranty, therefore during the Life of the Jointress they continue good, she continuing still Tenant in Tail, as she was before, at least in Case of the Fine levied by her for Years; but after her Death the Issue in Tail may avoid them, because otherwise they would be prejudicial to him in binding his Inheritance; and so would be equivalent to a Discontinuance, and therefore after the Death of the Jointress in such Case the Issue in Tail may avoid them by 11 H. 7. but not before; but this Lease for twenty-one Years being made in the ordinary Form, by Indenture, is not within the Statute 11 H. 7. and therefore if the Jointress in this Case had made a Lease for 100 or 1000 Years by Indenture only, this would be no Alienation within 11 H. 7. because the Issue might avoid it by the Statute *de Donis*; so that there appears a manifest Difference between Leases for Life or Lives, and Leases for Years, and also between Leases for Years made by Fine, and Leases for Years made only by Indenture or Deed Poll; but if such Lease, either for Lives or Years, were in all Things warranted by 32 H. 8. then they would be good and binding upon the Issue. As to the second Point, if the Conuzee of the Issue in Tail should have the same Power of avoiding the Lease, either in Respect of the Estate-Tail or the Remainder in Fee, as the Issue himself should have had if no such Fine had been levied; as to this it was resolved, that he should not, but that the Lease was good, and unavoidable; for notwithstanding the Fine levied by the Son, the Mother continued perfect and absolute Tenant in Tail; and therefore the Lease made by her would not have been absolutely void against the Issue; but only voidable, if he had levied no Fine; but now having levied a Fine, this hath barred the Issue and the Entail, so that the Issue himself cannot avoid this Lease; for he hath nothing to do with the Entail, and the Conuzee cannot avoid it, because he is a Stranger to the Entail, which could not be transferred to him by the Fine, but only be extinguished as an Estate-Tail; and the Statute *de Donis* helps only the Issue and those in Reversion or Remainder; and tho' the Fine carried likewise the Remainder in Fee, and after the Death of the Wife the Entail was not in *Effè*, but determined; yet this was only between the Conuzor and Conuzee; for as to the Feme, and all Strangers, the Estate-Tail continues so long as there is any Issue, and no Diversity when the Fine of the Issue is precedent to the Lease, and where subsequent; for the Lease is good against all, but those who are aided by the Statute *de Donis*; and when the Issue in Tail by his own Act hath extinguished or barred the Estate-Tail, and destroyed the Privity, the Lease continues good and unavoidable so long as any of the Issue in Tail are in Being; and if the Feme in this Case, after the Fine levied by the Issue, had made a Feoffment in Fee, and died, the Feoffee should have held the Land against the Issue and his Conuzee, so long as there were any Issues in Tail; and if Tenant in Tail makes a Lease for Years, and after levies a Fine to him in the Reversion, and dies, leaving Issue, tho' in this Case he in Reversion shall be in of his antient Reversion, yet he shall not avoid the Lease during the Lives of the Issues in Tail; for as to Strangers, the Estate-Tail hath Continuance in Right, tho' as to other Purposes he shall be in of an Estate in Fee; and therefore the Difference between this and Sir George Brown's Case is, that the Lease there for three Lives was a Discontinuance, and then 11 H. 7. gives Title of Entry to him to whom the Interest after the Death of the Feme should appertain, to avoid it; but here this Lease for Years was no Discontinuance, nor at all within that Statute; and then it remains at Common Law, where none but the Issue in Privity of the Estate-Tail, or those in Reversion or Remainder, shall avoid it; and here the Estate-Tail, as to all Strangers, hath Continuance, and then the Issue cannot avoid it, because he hath no Estate-Tail,



nor the Conuzee, because a Stranger to the Entail; and so the Lease remains absolute and unavoidable.

*Carth. 260.*  
in the Case  
of *Symonds*  
and *Cudmore*,  
by *Holt C. J.*  
against the  
three others,  
who doubt-  
ed.

If Tenant in Tail makes a future Lease, and dies before it is to commence, such Lease is merely void, without more Circumstances; but the Issue in Tail has his Election to make it good by accepting the Rent, or by Distraining and Avowry, which amounts to an Admittance of the Lease, and so estops and concludes the Issue to deny it; so that the Election of the Issue in that Case is only to support and make good the Lease by some Act of his own Conclusion, and not an Election to avoid it by his own Act, because there is no such Act necessary; for the Law esteems it void *ipso facto* by the Death of the Tenant in Tail, unless the Issue doth by some Act make it good.

Where Leases are voidable only, the same may in some Cases be avoided by one Person, and yet revived and made good by another; and in some Cases an Avoidance of such Leases by one Person concludes all others to revive or set them up again; wherein the Diversity is between those who at the Time of the Avoidance have the absolute Fee and Inheritance in them, and those who have only a temporary and particular Estate or Interest therein.

*7 Co. 35.*  
*Co. Lit. 46. a.*

Therefore if Tenant in Tail, or Bishop, make a Lease for Years not warranted by the Statute, so that the Issue in Tail or Successor may avoid them, if during these Leases the Temporalities come into the Hands of the King by the Vacancy of the Bishoprick, or the Wardship of the Issue, and his Lands come to the King, or any other, upon the Death of the Tenant in Tail, by reason of a Tenure by Knight's Service; in these Cases the King, or other Guardian, may avoid these Leases in Right of the Bishoprick or Issue, whether made by the Ancestor within Age, or by the Ward himself; but yet the Successor, or Issue, when they come to the actual Possession of these Lands themselves, may by the Acceptance of the Rent, &c. and Waver of the Possession, re-establish and set up such Leases again; so where the King for his *Primier Seisin* avoided a Lease for Years made by a Tenant in Tail, yet it was adjudged, that after Livery had, the Issue in Tail had Election either to defeat or abide by such Avoidance; and therefore if he accepted the Rent from the Lessee, and waved the Possession, this set up the Lease again.

*7 Co. 36.*

So if the Wife of Tenant in Tail, being endowed of those Lands, avoids a Lease made by her Husband during the Coverture, for thirty or forty Years, yet after her Death the Issue in Tail, by Acceptance of Rent, and Waver of the Possession, may set up such Lease again.

*Co. Lit. 46. a.*  
*7 Co. 3.*  
*Godb. 325.*

So if Tenant in Tail makes a Lease for thirty or forty Years, rendering Rent, and dies without Issue, his Wife *privement enseint* with a Son, and the Donor enters, and as to himself avoids the Lease; then the Son is born, and the Lessee re-enters; the Son at full Age may either affirm or avoid such Lease, as he thinks fit; for the Lease was not absolutely determined or avoided, more than the Estate-Tail itself, out of which it was derived, but only *secundum quid*, and subject to be set up again upon the Birth of the Issue, which revived the Estate-Tail; but if such Lease were made by the Tenant in Tail before Marriage, rendering Rent, and then he married, and died, leaving his Wife *privement enseint*, and the Donor enters, and as to himself avoids the Lease, yet if the Wife be after endowed, the Lease is revived as against her, because her Estate is *quodam modo* a Continuance of the Estate-Tail of the Husband, and therefore revives all Charges made by him before the Marriage; but if the Wife be after delivered of a Son, and dies, now the Issue may again avoid that Lease or affirm it, as he thinks fit; or if such Lease were made after Marriage, and the Wife, being endowed thereof, avoids that Lease, yet after her Death the Issue in Tail may revive it; for in all these Cases the Avoidance of such Leases being only by those who had a temporary Estate or Interest in the Land, cannot bind those who



succeed to the Inheritance thereof, but that they may, if they think fit, re-establish and set up such Lease again, which, as to them, was at first only voidable, and not absolutely void.

But if a Woman be endowed of an Advowson, which was appropriated, during the Coverture, and the presents, and her Presentee is admitted, instituted, and inducted, tho' the Incumbent dies during the Life of the Dowress, yet is the Appropriation defeated and dissolved for ever; because the Incumbent, who came in by her Presentation, had the whole Fee and Estate in him, as much as any Incumbent ever can have, and consequently there can be no reversionary or contingent Interest left to revive the Appropriation; but if the Wife in this Case had died before any Presentation, then the Appropriation had remained untouched; for then nothing had been done to defeat or alter it, and make it presentable; for the actual Presentation only defeats and dissolves the Appropriation, not the bare Power of Presenting, without it be reduced into Execution. 7 C. 36.  
Co. Lit. 46 l

## (E) Of Leases for Lives or Years by Ecclesiastical Persons: And herein,

### 1. What Leases they might have made by the Common Law; and of the several enabling and disabling Statutes, with some general Observations on them.

AS to Leases made by Ecclesiastical Persons, by the Common Law, Comp. Incumb. 415. we shall but briefly observe, that all Ecclesiastical Persons had in former Times as full Power and Authority to lease, grant, or alien their Possessions, as Temporal Persons had, that is, if the Grant, &c. made by a sole Corporation was with the Consent of others, whose Confirmation was in such Case necessary; for tho' Deans and Chapters, Masters and Fellows of Colleges, Masters and Brethren of Hospitals, and such like Corporations Aggregate, might of themselves alone, without the Consent or Confirmation of any, have made long Leases for Lives or Years, or Gifts in Tail or Fee, at Pleasure; yet Bishops, Deans, &c. seised in Right of their Bishopricks, Deanries, &c. so Archdeacons, Prebendaries, Parsons, Vicars, &c. if they aliened or leased, must have had the Consent and Confirmation of others, that had the Power of confirming in that Behalf, and then their Grants, &c. were as good as those made by Aggregate Corporations.

But the Law, as to the Capacity of Clergymen in granting, leasing, &c. being greatly altered by divers Acts of Parliament, and those not a little intricate and perplexed, it will be necessary to set down the Statutes themselves, to render the Cases reducible to them more clear and intelligible.

The first Statute concerning Leases by Ecclesiastical Persons, which is also the only Statute that gives Directions concerning Leases by Tenant in Tail, or Husbonds seised of Lands in Right of their Wives, is 32 H. 8. 32 H. 8. cap. 28. which provides as followeth: 'Where great Numbers of the King's Subjects have heretofore taken Leases of Lands, Tenements, and other Hereditaments, for Term for Years, and divers of them for Term of Life, and have given and paid great Fines and Sums for the same, and also been at great Costs and Charges, as well in and about great Reparations and Buildings upon their said Farms, as otherwise concerning their said Farms; yet notwithstanding the said Farmers, after

' after the Deaths or Resignation of their Lessors, have been, and be  
 ' daily, with great Cruelty, expelled and put out of their said Farms  
 ' and Takings by the Heirs or Successors of their said Lessors, or by  
 ' such Persons as have Interest therein, after the Deaths or Resignations  
 ' of their said Lessors, by reason of privy Gifts of Intail, or for that  
 ' the Lessors had nothing in the Lands, Tenements, or other Heredita-  
 ' ments so letten at the Time of the Leases thereof made, but only in  
 ' the Right of their Wives, or such other like Cause, to the great Im-  
 ' poverishment, and in a Manner utter undoing, of the said Farmers; for  
 ' Reformation whereof, be it enacted, &c. That all Leases to be made of  
 ' any Lands, Tenements, or other Hereditaments; by Writing indented;  
 ' under Seal, for Term of Years, or for Term of Life, by any Person  
 ' or Persons, being of full Age of Twenty-one Years, having an Estate  
 ' of Inheritance either in Fee-simple or Fee-tail, in their own Right, or  
 ' in Right of their Churches and Wives, or jointly with their Wives,  
 ' of an Estate of Inheritance, made before the Coverture or after, shall  
 ' be good and effectual in the Law against the Lessors, their Wives,  
 ' Heirs and Successors, and every of them, &c. *Provided* that the said  
 ' Act shall not extend to any Leases to be made of any Manors, Lands;  
 ' Tenements or Hereditaments, being in the Hands of any Farmer or  
 ' Farmers, by Virtue of an old Lease, unless the same old Lease be  
 ' expired, surrendered, or ended, within one Year next after the making  
 ' of the said new Lease; nor shall extend to any Grant to be made of  
 ' any Reversion of any Manors, Lands, Tenements or Hereditaments,  
 ' which have not most commonly been letten to Farm, or occupied by  
 ' the Farmers thereof, by the Space of twenty Years next before such  
 ' Lease thereof made; nor to any Lease to be made without Impeach-  
 ' ment of Waste, nor to any Lease to be made above the Number of  
 ' Twenty-one Years, or three at the most, from the Day of the making  
 ' thereof; and that upon every such Lease there be reserved yearly,  
 ' during the same Lease, due and payable to the Lessors, their Heirs  
 ' and Successors, to whom the same Lands should have come after the  
 ' Deaths of the Lessors, if no Lease had been thereof made, and to  
 ' whom the Reversion thereof shall appertain, according to their Estates  
 ' and Interests, so much yearly Ferm or Rent, or more, as hath been  
 ' most accustomedly yielded or paid for the Manors, &c. so to be letten  
 ' within twenty Years next before such Lease thereof made; and that  
 ' every such Person or Persons, to whom the Reversion of such Manors,  
 ' &c. so to be letten shall appertain, as is aforesaid, after the Deaths of  
 ' such Lessors, or their Heirs, shall and may have such like Remedy  
 ' and Advantage, to all Intents and Purposes, against the Lessees there-  
 ' of, their Executors and Assigns, as the same Lessor should or might  
 ' have had against the same Lessees; *Provided* also, that this Act ex-  
 ' tend not to give any Liberty or Power to any Person to take any  
 ' more Farms, Leases or Takings, of any Manors, &c. than he should or  
 ' might lawfully have done before the making of this Act; nor extend  
 ' to any Liberty or Power to any Parson, or Vicar of any Church or  
 ' Vicaridge, for to make any Lease or Grant of any of their Messuages,  
 ' Lands, Tenements, Tythes, Profits or Hereditaments, belonging to  
 ' their Churches or Vicaridges, otherwise, or in any other Manner,  
 ' than they should or might have done before the making of this Act.

10 Co. 60. a.

This Act extends only to sole Corporations, as Bishops, Deans, &c.  
 but as to Corporations Aggregate, as Deans and Chapters, &c. tho' they  
 be seised in Right of their Churches, this is no enabling Statute; for  
 they, by the Consent of the major Part of them, might have made any  
 Leases or Grants of their Estates without Limitation before this Statute,  
 and so they might have done after, till by other subsequent Statutes they  
 were restrained, this being meerly enabling, and not at all restraining  
 them; and tho' by this Statute the sole Corporations before mentioned  
 could

could not, without the Consent and Confirmation of others, have made Leases for three Lives, or Twenty-one Years, yet with Confirmation they might have made longer Leases, or absolute Alienations, of any of their Possessions; and therefore to restrain Bishops, and other Ecclesiastical Persons, were the Statutes of 1 & 13 *Eliz.* made, which are as follow.

*Mar. 12*

For restraining of Bishops, the 1 *Eliz. cap. 19.* says, ‘ That all Gifts, Grants, Feoffments, Fines, and other Conveyances, or Estates, from the first Day of this present Parliament had, made, done or suffered, or to be had, made, done or suffered, by any Archbishop or Bishop, of any Honours, Castles, Manors, Lands, Tenements, or other Hereditaments, being Parcel of the Possessions of his Archbishoprick or Bishoprick, or united, appertaining, or belonging to any of the same, to any Person (other than the (a) Queen, her Heirs and Successors) whereby any Estate should or might pass from the Archbishop or Bishop, other than for Term of Twenty-one Years, or three Lives, from such Time as any Lease, Grant or Assurance, shall begin, and whereupon the old accustomed yearly Rent, or more, shall be reserved payable yearly during the said Term of Twenty-one Years, or three Lives, shall be utterly void; any Law, Custom, &c. notwithstanding.

(a) This Statute leaving Bishops their former Power of granting to the Queen, her Heirs and Successors, to

little Effect, for that many Estates were granted to the Queen, upon Design that she should grant them over to others, to prevent which was the Statute 1 *Jac. 1. cap. 3.* made, which disables all Archbishops and Bishops from granting any of their Possessions to the King, his Heirs or Successors, and makes all such Leases, Grants, &c. to the King, his Heirs or Successors, utterly void and of none Effect. 11 *Co. 71. Grif. Codex 679.*

The Statute which disables all other Ecclesiastical Persons is 13 *Eliz. cap. 10.* which is as followeth: ‘ And for that long and unreasonable Leases made by Colleges, Deans and Chapters, Parsons and Vicars, and others, having Spiritual Promotions, be the chiefest Causes of the Dilapidations and the Decay of all Spiritual Livings and Hospitality, and the utter impoverishing of all Successors, Incumbents of the same, be it enacted, ‘ That from henceforth all Leases, Gifts, Grants, Feoffments, Conveyances or Estates, to be made, had, done or suffered, by any Master and Fellows of any College, Dean and Chapter of any Cathedral or Collegiate Church, Master or Guardian of any Hospital, Parson, Vicar, or any other, having any Spiritual or Ecclesiastical Living, or any House, Lands, Tithes, Tenements or other Hereditaments, being any Parcel of the Possessions of any such College, Cathedral, Church, Chapel, Hospital, Parsonage, Vicaridge, or other Spiritual Promotion, or any ways appertaining or belonging to the same, or any of them, to any Person or Persons Bodies Politick or Corporate (other than for the Term of Twenty-one Years, or three Lives, from the Time as any such Lease or Grant shall be made or granted; whereupon the accustomed yearly Rent, or more, shall be reserved and payable during the said Term) shall be utterly void, and of none Effect, to all Intents and Purposes whatsoever; any Law, Custom, &c. notwithstanding: *Provided*, &c. that nothing herein extend to make good any Lease, or other Grant, to be made by any such College or Collegiate Church within either of both the Universities of *Oxford* and *Cambridge*, or elsewhere, within the Realm of *England*, for more Years than are limited by the private Statute of the same College: *Provided* also, that this Act shall not extend to any Lease hereafter to be made, upon Surrender of any Lease heretofore made and now continuing, so that the Lease to be made do not contain more Years than the Residue of the Years of the former Lease, now continuing, shall be at the Time of such Lease hereafter to be made, nor any less Rent than is reserved in the said former Lease.

5 Co. 2. On these Statutes we shall observe, 1. That the Statute of 1 *Eliz. cap.*  
 4 Co. 76. 19. is but a private or particular Statute, and must be specially pleaded,  
*Moor* 253. else the Court will take no Notice of it; but 13 *Eliz. cap.* 10. is a  
*Cro. Jac.* 112. general Law, whereof the Judges are bound *ex officio* to take Notice,  
 2 *Roll. Abr.* 466. tho' it be not pleaded, because it extends to all Ecclesiastical Persons  
 1 *Leon.* 306. whatsoever, except Bishops, who were before provided for by the 1 *Eliz.*  
*Yelv.* 106. *cap.* 19.  
 1 *Mod.* 205.  
 2 *Mod.* 56.

2. It has been adjudged and held in Parliament, that the King was  
 5 Co. 15. b. bound by 13 *Eliz. cap.* 10. tho' not named, because the Statute was  
 11 Co. 75. general and for the publick Good; but for some Time the Law was held  
 1 *Roll. Abr.* 578. otherwise, and therefore where a Lease was made to the King by a  
 1 *Roll. Rep.* 151. Dean and Chapter, and the King had assigned it over, after that, the Law  
 came to be held that the King was bound, the Assignee had his Lease  
 made good to him in Chancery against the Statute, because he could not  
 know the Law in a Matter so dubious.

3. That all Leases made according to 13 *Eliz.* by any single Corpora-  
*Comp. Incom.* 417. tion, if not warranted likewise by 32 *H. 8.* must be confirmed by those  
 who by Law are to confirm the same.

4. That these Statutes of 1 & 13 *Eliz.* are meerly restraining, so that  
*Comp. Incom.* 419. tho' Bishops, and other Ecclesiastical Persons, might, with the Confirma-  
 tion of those required by Law, have made any Lease or perpetual Grant,  
 yet now no Confirmation whatever will make them good for above three  
 Lives, or Twenty-one Years.

5. That no Lease by an Archbishop or Bishop for three Lives, or  
 10 Co. 60. b. Twenty-one Years, made according to the Exception of 1 *Eliz.* is good  
 Co. Lit. 45. a. to bind the Successor, if it be not in every Thing pursuant to 32 *H. 8.*  
*Moor* 108. unless it be confirmed by the Dean and Chapter; for Leases for Twenty-  
 one Years, or three Years, being only exempted and taken out from  
 the general Disability imposed on Bishops by the first Part of the Act,  
 receive no Sanction at all from that Act, but as they are taken out to  
 rest upon 32 *H. 8.* and therefore tho' they are for Twenty-one Years,  
 or three Lives; yet if Part of the Land were not in Possession, or that  
 the old Lease were not surrendered or expired within one Year before  
 the new Lease made, or in any other Respect, such new Lease were  
 not warranted by 32 *H. 8.* to bind the Successor, there must be the Con-  
 firmation of the Dean and Chapter; because at Common Law such  
 Confirmation was necessary; and these Leases not being warranted by  
 32 *H. 8.* which is the only Statute that enables Bishops solely to make  
 Leases to bind their Successors, remain at Common Law, and by Con-  
 sequence, without Confirmation, are voidable by the Successors as much  
 as if they were made for one Hundred Years or Lives.

6. That 13 *Eliz. cap.* 10. hath been always construed largely and  
 11 Co. 76. beneficially to prevent all Inventions and Evasions against the true In-  
*Magdalen* intent thereof; therefore where the Statute says, Master and Fellows of  
*College's* any College, yet it hath been often held, that be the College incor-  
*Case.* porated by that Name, or by the Name of Warden and Fellows, or  
 Warden and Scholars, or Warden, Fellows and Scholars, or Master,  
 Fellows and Scholars, or Master and Scholars, or Provost, Fellows and  
 Scholars, or by any other Name of Corporation, and be the College  
 Temporal for the Advancement of the Liberal Arts and Sciences, or  
 meer Ecclesiastical or Mixt, that all these are within the Restraint of  
 this Act; so where the Statute says Master or Wardens of any Hospital,  
 be the Hospital incorporated by any other Name, and be it a sole Cor-  
 poration, or Corporation Aggregate of many, yet the Statute extends to  
 them.

The next Statute that made any Alteration in these Things was 14 *Eliz.*  
 14 *Eliz. cap.* 11. which as to Houses in Cities and great Towns is as followeth: Whereas  
 in an Act made 13 *Eliz.* there is no Branch to avoid certain Leases to  
 be

‘ be made by Masters and Fellows of Colleges, Deans and Chapters of Cathedral or Collegiate Churches, Masters or Guardians of any Hospital, or by any Parson or Vicar, or any other having any Spiritual or Ecclesiastical Living ; Be it Enacted, That the said Branch, nor any Thing therein contained, shall not extend to any Grant, Assurance, or Lease of any Houses belonging to any Persons or Bodies Politick or Corporate aforesaid, nor to any Grounds to such Houses appertaining, which Houses be situate in any City, Borough, Town Corporate or Market-Town, or the Suburbs of any of them ; but that all such Houses and Grounds may be granted, demised, and assured as by the Laws of this Realm and the several Statutes of the said Colleges, Cathedral Churches and Hospitals they lawfully might have been before the making of the said Statute, or lawfully might be, if such Statute were not, so always that such House be not the Capital or Dwelling-House used for the Habitation of the Persons aforesaid, nor have Ground to the same belonging above the Quantity of ten Acres ; provided that no Lease shall be permitted to be made by Force of this Act in Reversion, nor without reserving the accustomed yearly Rent at the least, nor without charging the Lessee with the Reparations, nor for longer Term than forty Years at the most ; nor any Houses shall be permitted to be aliened, unless in Recompence thereof there shall be a good and sufficient Assurance made in Fee-simple absolutely to such Colleges, Houses, Bodies Politick or Corporate, and their Successors, of Lands of as good Value, and of as great yearly Value at the least, as shall be aliened ; any Statute to the contrary notwithstanding.’

*Note ;* This Statute makes no Alteration of the Statute 1 *Eliz.* nor has any Relation to it, but only to the Statute 13 *Eliz.* and therefore gives no Power to Bishops to let Houses, otherwise than according to 1 *Eliz.* *Comp. In. umb. 423.*

*Note also,* That this Statute need not be found by Verdict, being a general Law. *Cro. Eliz. 561.*

By this Statute it is expressly provided, that no Lease shall be made of such Houses in Reversion ; but by 13 *Eliz.* no Restraint being made of such Leases, it was found necessary to provide against them by another Statute, *viz.* the 18 *Eliz.*

Which reciting, that since the making of the 13 *Eliz.* divers Ecclesiastical and Spiritual Persons, and others having Spiritual or Ecclesiastical Livings, have from Time to Time made Leases for Term of twenty-one Years, or three Lives, long before the Expiration of the former Years, contrary to the true Intent and Meaning of the said Statute ; ‘ Be it therefore Enacted, That all Leases to be made by any of the said Ecclesiastical, Spiritual, or Collegiate Persons, or others, of any of the said Ecclesiastical, Spiritual, or Collegiate Lands, Tenements, or Hereditaments whereof any former Lease for Years is in Being, not to be expired, surrendered, or ended within three Years next after the making of any such new Lease, shall be void, frustrate, and of none Effect, and that all and every Bond and Covenant for renewing or making of any Lease or Leases contrary to the true Intent of this Act, or of the said Act made in the said 13th Year, shall be utterly void ; any Law, Statute, &c. Provided, that this Act, nor any Thing therein contained, shall extend or be prejudicial to make frustrate or void any Lease or Leases heretofore made by any of the said Spiritual or Ecclesiastical Persons, or any of them ; but that the same, and every of them, are of the like Force and Effect, as they, or any of them, were before the making of this present Statute.’

18 *Eliz. cap.*  
11. continued  
by 43 *Eliz.*  
*Note ;* This  
Statute is a  
general Law.  
4 *Co.* 76, 120.  
2 *Roll. Abr.*  
465.

The Statute of 18 *Eliz.* has Relation only to the Statute 13 *Eliz.* to restrain Leases in Reversion where above three Years of the first Lease is then to come, but leaves the Statute of 14 *Eliz.* perfectly at large as to Houses in Cities, without making void such Leases, or any Bonds or Covenants concerning them ; for as to such Houses the Statute of 14 *Eliz.*

*H. L.* 260.  
*Crown and*  
*Taylor.*

is a new Law, and sets loose the 13 *Eliz.* therefore where an Action of Covenant was brought against the Dean of *Lincoln* and one of the Prebendaries, upon a Covenant made by the Dean and Chapter, by their special Names jointly and severally, to make a Lease of a House in *London*, tho' it was argued to be void upon the Statute 18 *Eliz.* that Statute extending only to 13 *Eliz.* and not to the 14 *Eliz.* which, as to Houses in Cities, repealed 13 *Eliz.* and makes all Leases thereof good, so they do not exceed forty Years, &c. and are not made in Reversion, which was not prohibited by 13 *Eliz.* Also the Statute 14 *Eliz.* forbids Alienations of such Houses, except there be full Recompence given to the Church at the same Time, so as with such Recompence they may alien such Houses in Fee, which was not permitted by 13 *Eliz.* and it was adjudged accordingly; and it is (a) said, the Reason of repealing 13 *Eliz.* as to Houses in Market-Towns, was to make those Places more populous.

10. Vent.  
15.

Mor 739.  
Dean and  
Canons of  
*Windsor* ver.  
Sir Gilbert  
Peregrin.

But to avoid the Force of those Statutes of 13 *Eliz.* and 18 *Eliz.* and the Clause making void Bonds and Covenants against them, a Contrivance was set on foot to this Effect; the Dean and Chapter of *Windsor*, in the 35th Year of *Eliz.* made an Agreement amongst themselves by Lots to have an Assurance of a Lease to each of them, of certain Part of the Possessions of their Church, which, after the Lots cast, whereby every one knew his own Lease, they executed the Assurance in this Manner; the Corporation enters into an Obligation of 500 *l.* to every Canon that was to have a Lease, and the Payment limited to be within a short Time before the Expiration of the old Lease in Being, and the Canon the same Day entered into an Obligation to pay the College 510 *l.* at the same Time, if they did make a Lease according to a Schedule annexed, which Schedule was *Verbatim* the Demise agreed to be made; and it was farther proved, that the Intent and Agreement betwixt them was, that the one 500 *l.* should be stopped for the other 500 *l.* and that the Corporation should have only the 10 *l.* for the Lease; which Matter being disclosed in Chancery, the Lord Keeper *Egerton* made a Decree, that the Obligation of 500 *l.* made by the Dean and Canons to each Canon was void by 18 *Eliz.* and in the same Case a Precedent was shewn between *Fry* and the Dean and Canons of *Wells*, decreed 44 *Eliz.* in Chancery, which was thus; *Fry* gave to the Dean and Canons of *Wells* 1000 *l.* and took an Obligation of 2000 *l.* with Condition to repay the 1000 *l.* and for Non-payment brought an Action of Debt against the Dean and Prebends, and obtained a Judgment, and made a Defeazance thereof, that if they make a Lease to him of Land then in Lease to Sir *Amias Pawlett* for fifteen Years to come, then the Judgment should be void; and the Truth of the Case was, that the 1000 *l.* was paid, and 600 *l.* thereof employed in Payment of Tenths due by the Church; yet by the Opinion of *Popham*, *Anderson* and *Periam* it was decreed in Chancery, that the Judgment was void by 18 *Eliz.* which makes void Bonds and Covenants for making Leases against that Statute or 13 *Eliz. cap. 10.* but by Way of Arbitrament they awarded to *Fry* the 600 *l.* that was paid and employed in the Affairs of the Church, and after the 43 *Eliz.* was made to extend to Judgments in such Cases.

Another Statute concerning Leases made by Colleges in the two Universities, and the Colleges of *Winchester* and *Eaton*, is 18 *Eliz.* which adds one Thing more, as followeth: 'That no Master, Provost, President, Warden, Dean, Governor, Rector, or chief Ruler of any College, Cathedral Church, Hall or House of Learning in any of the Universities of *Cambridge* and *Oxford*, nor any Provost, Warden, or other Head Officer of the Colleges of *Winchester* or *Eaton*, nor the Corporation of any of the same, by what Title, Stile, or Name soever they now be, shall, or may be called, after the End of this present Session of Parliament shall make any Lease for Life, Lives or Years, of any Farm, or any their Lands, Tenements, or other Hereditaments, to the which

any Tythes, Arable Land, Meadow, or Pasture doth or shall appertain, except that the one Third Part at least of the old Rent be reserved in Corn for the said Colleges, Cathedral Churches, Halls and Houses, that is to say, in good Wheat after the Rate of 6 s. and 8 d. the Quarter, or under, and good Malt at 5 s. the Quarter, or under, to be delivered yearly upon a Day prefixed at the said Colleges, Cathedral Church, Halls or Houses; and for Default thereof to pay to the said Colleges, Cathedral Church, Halls or Houses in ready Money, at the Election of the said Lessees, their Executors, Administrators, and Assigns, after the Rate of the best Wheat and Malt in the Market of *Cambridge*, for the Rents that are to be paid to the Use of the House or Houses there, (and so for *Oxford* and *Winchester*, in *totidem Verbis*,) and in the Market of *Windsor* for the Rents that are to be paid to the Use of the House or Houses at *Eaton*, is or shall be due, without Fraud or Deceit; and that all Leases otherwise hereafter to be made, and all collateral Bonds or Assurances to the contrary by any of the said Corporations shall be void in Law to all Intents and Purposes; the same Wheat, Malt, or Money coming of the same, to be expended to the Use of the Relief of the Commons and Diet of the said Colleges, Cathedral Church, Halls and Houses only, and by no Fraud or Colour let or sold away from the Profit of the said Colleges, Cathedral Church, Halls and Houses; and the Fellows and Scholars in the same, and the Use aforesaid, upon Pain of Deprivation of the Governor and chief Rulers of the said Colleges, Cathedral Church, Halls and Houses, and all other thereunto consenting: But this Act, or any Thing therein contained, shall not extend or be in any wise prejudicial to any Lease to be made of a Barn called *Muncken Barn*, with a certain Portion of Tithes rising, growing, and being in the Parish of *Southwerk* in the County of *Suffex*, being Parcel of the Possessions of *Maudlin College* in *Oxford*, so that the Term demised in and by the said Lease exceed not the Number of ten Years from and after the Feast of *St. Michael the Archangel* next coming, neither shall this Act extend to any Lease to be made by the President and Scholars of the College of *St. John Baptist* in *Oxford* to any Heir Male of *Sir Thomas White*, Founder of the said College, which Lease shall be made according to the Meaning of the Foundation and Statutes of the said College, of the Manor of *Fifield*, and no other Hereditaments.

In the Construction of this Statute it hath been holden, that it is a private Act, because it concerns only those particular Places; and therefore must be pleaded or given in Evidence, or found by a Jury, otherwise the Court is not bound to take Notice of it. 1 Leon. 306.  
Sav. 129.

Also it is said, that in a Declaration upon a Lease made by any of these Colleges it ought to be shewed, that the Corn was reserved according to the Statute, otherwise this may be good Cause to move in Arrest of Judgment; but of this it may be doubted; for in the Case itself, cited in *Leon.* for that Purpose, it appears that that Exception was disallowed; for tho' it does not appear in the Declaration that Corn was reserved, yet it may be that it was reserved in the Lease; and if not, yet the other Party ought to shew it; and therefore the Exception to the Declaration for not shewing it was disallowed. 1 Leon. 306,  
335.  
Sav. 129.

By the Statute 22 Car. 2. it is Enacted, ' That for ever hereafter the Mayor, Commonalty, and Citizens of *London* may and shall have a Market, to be kept three or four Days in the Week, as to them shall seem convenient, upon the Ground now set out by the Assent of the Dean and Chapter of the Cathedral Church of *St. Paul, London*, for a Market-place within *Newgate*, and that the said Dean and Chapter shall make and give one or more Lease or Leases of the said Ground to the said Mayor, Commonalty, and Citizens, and also of the Wall of the said Church-yard, abutting severally upon *Pater-noster-Row* and the



‘ *Old Change*, for the Term of forty Years, reserving the yearly Rent of  
 ‘ four Pounds for the Ground of the said Market-place, and Two-pence  
 ‘ for every superficial Foot of the Ground or Soil of the said Wall, as it  
 ‘ is now set out by the Surveyors of the City and of the said Dean and  
 ‘ Chapter, and so from forty Years to forty Years for ever, at the like  
 ‘ yearly Rent, and one Year’s Rent, after the Rates aforesaid, to be paid  
 ‘ by way of Fine for each of the said Grounds respectively, upon the  
 ‘ making every new Lease thereof; which said Lease and Leases shall  
 ‘ be good and effectual in the Law, as against the Dean and Chapter, and  
 ‘ their Successors, and all Persons claiming by, from, or under them,  
 ‘ and that no House, Shed, or other Building, shall stand, or hereafter  
 ‘ be erected and fixed upon the said Market-place, other than the Market-  
 ‘ House already built with the Consent of the said Dean and Chapter;  
 ‘ any thing in this or any other Act to the contrary notwithstanding:  
 ‘ And whereas the said Parsons or Vicars, or some of them, (within the  
 ‘ said City of *London*) are interested in several Glebe-Lands or Grounds,  
 ‘ the which they cannot rebuild themselves, nor let such Lease or Leases  
 ‘ as may be an Encouragement to others to rebuild the same; Be it  
 ‘ Enacted, That the said Parsons and Vicars, and every of them respec-  
 ‘ tively, be impowered, and are hereby impowered to let such Lease or  
 ‘ Leases of their said Glebe-Lands or Grounds, with the Consent and  
 ‘ Approbation of the Patron or Patrons, and Ordinary, for any Term  
 ‘ not exceeding forty Years, and at such yearly Rents, without Fine, as  
 ‘ can be obtained for the same.’

*Fyer* 69. 4.  
*Hob.* 7.  
*1 Rol. Rep.*  
 443.

Before we mention any Cases, or make any Observations on the fore-  
 going Statute, it may be necessary to take Notice, That at Common Law  
 if a Parson had made a Lease for Years of his Glebe-Land, to begin  
 after his Death, or granted a Rent-Charge in that Manner, and such  
 Lease or Grant were confirmed by the Patron and Ordinary, this would  
 have bound the Successor of the Parson; because here was the Consent  
 and Concurrence of all Persons interested, and the Lease or Charge  
 bound immediately from the perfecting of the Deed by the Parson, Pa-  
 tron, and Ordinary, tho’ it was not to take Effect in Possession till after  
 the Parson’s Death; but now no Confirmation whatever will make such  
 Lease or Grant good against the Successor, by reason of the Statutes  
 made to avoid them.

*3 H. 11.* 57.  
*Mayor and*  
*Commonal-*  
*ty of Win-*  
*chester’s Case.*

If a Person obtain a Grant to build Houses on Church or College  
 Lands, this is confirmed, (in Case where Confirmation is necessary,) yet  
 this Grant is no Alienation against the Statutes, but is only a Covenant  
 or Licence, and nothing else; for the Soil remains in the Grantor, and  
 by Consequence the Houses built thereon are in him.

*Comp. Incumb.*  
 334

If a Parish be upon the Design of inclosing Lands, and a Parson hath  
 Tithes in Kind, and Common for Beasts thereout, the Chancery may  
 decree him to take a Quantity of Ground elsewhere, in Lieu thereof.

*Comp. Incumb.*  
 334.

So where one had a Lease of Tithes in Kind, it was ordered in Chan-  
 cery, that a Commission should go forth to set out other Meadow and  
 Ground in Lieu thereof; the Reason of which Cases seems to be, either  
 for the Prejudice the Publick might suffer, if such Recompence in no  
 Case should be allowed, or for that the Successor of the Parson have no  
 Injury thereby, being recompenced in other Lands; *sed quere* why an  
 Act of Parliament in such Cases ought not to be procured; for it should  
 seem the Chancery, as well as the other Courts, are bound by all Acts  
 of Parliament, which are positive Laws, and have no Liberty of breaking  
 thro’ them, upon any Pretence of Convenience or Necessity, more than  
 other Courts.

*Hob.* 269.  
*Noy* 5.

By the Statute of 14 *Eliz.* as appears before, all those who were  
 restrained by 13 *Eliz.* have Liberty given them to alien Houses in Cities  
 absolutely, so as at the Time of such Alienation there be a Recompence  
 in Lands given to them, and their Successors, of as great Value as the  
 Houses



Houses aliened are; but this Liberty of aliening, upon such Recompence to be given, extends only to Houses; for as to Lands they have no such Power, nor can they exchange them, to bind their Successors, upon any Recompence whatsoever; and *quære* whether such House may be exchanged for Lands of greater Value, without Licence, against the Statutes of *Mortmain*.

It is agreed, that Corporations of Mayor and Commonalty, Bailiffs and Burgesses, and such other Lay Corporations, are out of all the before-mentioned Statutes, and may make Leases, and other Estates, as they might ever have done.

It hath been adjudged, that a Spiritual Person not Beneficed is not within the 21 H. 8. cap. 13. which prohibits Spiritual Persons from taking Leases to Farm, &c. for Life, Years, or at Will, in their own Name, or in the Name of any other Person or Persons to his Use, &c.

A Lease being made to a Spiritual Person against 21 H. 8. and a Bond or Obligation taken for Performance of Covenants, the Obligee brought an Action of Debt upon this Bond, and had Judgment; which proves that the Lease was not absolutely void between the Lessor and Lessee, as the Words of the Statute are; and tho' in *Dyer*, where this Case is reported, this is not mentioned to be any Cause of the Judgment, yet *Periam* in 1 Leon. held it to be the greatest Cause of the Judgment; and so it appears to have been adjudged in another Place; for the Statute inflicts a Penalty of 10*l.* for every Month that the Clerk shall occupy such Farm, and therefore it cannot be void; but the Leases made void by that Statute are only those which Spiritual Persons before that Act, or after, had, and before *Michaelmas* then next following were not bargained, sold, or granted away.

In an Action upon 21 H. 8. cap. 13. against a Parson for taking of Farms, it is a good Plea to say, *Non habuit seu tenuit ad firman contra Formam Statuti*; and the Defendant may give in Evidence, that the Farm was for the Maintenance of his House, &c. according to the Proviso in the Statute for that Purpose.

Also the Writ grounded on this Statute ought to be *Qui tam* for the King and Party; and therefore a Writ, which demanded the Whole, was ruled not to be good; but that Statute need not be mentioned in the Writ.

By another Act, intituled, *An Act for erecting of Hospitals, or Abiding or Working-Houses for the Poor*, it is (amongst other Things) provided, That all Leases, Grants, Conveyances, or Estates to be made by any Corporation so to be founded exceeding the Number of twenty-one Years, and that in Possession, and whereupon the accustomed yearly Rent, or more, by the greater Part of twenty Years next before the taking of such Lease, shall not be reserved, and yearly payable, shall be void.

As to the Persons who may be said to be seised in Right of their Churches, so as to be empowered by the Statute of 32 H. 8. to make Leases for three Lives, or twenty-one Years, to bind their Successors, it appears to have been adjudged, tho' he be seised in Right of his Prebendary, and not in Right of his Church, may yet within the Equity of that Act make Leases for three Lives, or twenty-one Years, to bind his Successor, observing the several Qualifications required by the Act; for the Words of the Act being general, all Persons having an Estate of Inheritance in Right of their Church, with a special Exception of Parsons and Vicars only, shew the Intent of the Act to include and take in all but those so excepted; and *Popham* said, that in *Dr. Dale's Case*, for an House near *St. Paul's*, it was so adjudged, and so had been twice adjudged in his Experience; and *Fenner* said, it was so adjudged in the Case of a Treasurer of a Church, and Prebendaries are Ecclesiastical Persons, for they are admitted and instituted, and have *Locum in Choro*, & *Locum in Capella*.

1 Sid. 161.

Degr. 135.  
Mik 4 Car. 1.  
in Scaccar.  
Clare and  
Lamprey.

Dyer 27. 28.  
338. a

1 Leon. 308.  
5 Keb. 4, 6.

Bro. Tre.  
Action sur le  
Stat. 2.

Bro. Action  
sur le Stat. 4.

35 Eliz. cap.  
5. sect. 2.

4 Leon. 51.  
Action and  
Prit ver.  
Cro. Eliz. 350  
Watkinson  
and Man.  
Co. Lit. 44 b.  
3 Bulf. 290.  
Bro. Tre.  
Leases 9  
Palm. 105.  
Comp. In. ar.  
325.

1 Lev. 112.  
1 Sid. 158.  
1 Keb. 576.  
Bis ver. Holt.  
Palm. 105.  
Eusden ver.  
Dennis.

So likewise it hath been adjudged, that a Chancellor of a Cathedral Church may make Leases for twenty-one Years, or three Lives, within this Statute, to bind his Successor; so of a Treasurer, Archdeacon, and Precentor; for they are Prebendaries, and more, for they are generally chosen out of the Prebendaries, and have those Dignities superadded or annexed; and tho' Chancellors and Treasurers are in some sort Ministerial, yet are they not *inter minores Ordines*, as the *Ostiarii* and *Vergers* are, who are only Servants to carry Candles and Wax, keep the Doors, &c. but the others are seised in Fee in Right of their Church, &c. and have moreover these Dignities superadded; but a Case was cited to have been adjudged in the Exchequer, that Leases made by the Chanters of St. Paul's must be confirmed; for it was said, they are not properly Chanters, but Singing-Men only, and *minoris Ordinis*; but Chanters, properly so called, Precentors, &c. are *majoris Ordinis*; as the Bishop of Sarum, in Right of his Bishoprick, is *Præcentor Angliæ*; which shews it to be Honorary, and a Spiritual Dignity.

Bvo. Tit. Age  
04, 80.

If a Parson, Prebend, Mayor, Dean, Abbot, &c. or any other sole Corporation make a Lease for Years, either upon these Statutes, or at Common Law, tho' the Lessor be under the Age of twenty-one Years, yet he shall not avoid such Lease for that Cause; for since they are admitted to exercise such Offices or Functions, tho' within Age, they are likewise by Law supposed capable of doing all Things belonging thereto, as other Persons of full Age may do; and therefore such Acts as are done by them in their Politick Capacity, which is subject to no Age or Infirmary, as the Body natural is, are valid and effectual, notwithstanding their Minority, which in such Case is not material.

## 2. Of the Rules to be observed and Qualifications requisite to the Perfection of Leases by Ecclesiastical Persons: And therein,

### Rule 1. Where an Indenture or Deed is necessary.

Co. Lit. 44. b.  
3 Keb. 379.

The first Thing to be observed upon the several Statutes before-mentioned concerning Leases is, that as well upon the Statutes of the 1 & 13 Eliz. as upon 38 H. 8. the Leases to be made by Virtue thereof must be by Indenture; for tho' the Statutes 1 & 13 Eliz. do not require it, yet in that and all other Qualities and Properties required by the 32 H. 8. (except concurrent Leases only) they must follow the Pattern thereof; and (a) if the Deed be indented, whether it begin *This Indenture* or not, is not material; for notwithstanding that, it is an Indenture; on the contrary, if it be not indented, the calling it an Indenture will not make it so.

a) 5 Co. 25.  
Stile's Case.  
Co. Lit. 143. a.  
229. a.  
Cro. Eliz. 472.  
2 Inst. 672.  
2 Rol. Abr. 22.

Comp. Incumb.  
347, &c.

But the most observable Thing under this Head is, how far a Parol Lease or Agreement by the Parson with his Parishioner or a Stranger for his Tithes shall be good, and how far and in what Cases not; concerning which there are various Cases and Opinions in the Books, many of which have no Foundation from the Statute, but stand intirely on their own Bottom.

Godh. 273

2 Rol. Abr. 63.

13 Eliz. 188,

249.

Perk. fol. 62.

Co. Jac. 317,

012.

10 Co. 92.

1 Leon. 23.

And herein all the Books agree, that if a Parson lease or grant over his Tithes to a Stranger for Life or Years, or even for a Year, that such Lease or Grant must be in Writing; and if it be not, it will be absolutely void; the Reason whereof is, because Tithes are Things which he micerly in Grant, and whereof no manual Occupation can be; till they are actually collected, they are not Things substantive, whereof the Pro-

2 Brownl. 11, 17. 2 Keb. 376.

perty can be changed by the Notoriety of Livery and Seisin, or any actual taking of Possession; but their whole Essence before they are severed and divided consists only in Notion and Idea; therefore without Deed the Grantee or Lessee can make no manner of Title to them; for without that, there is nothing can be done to invest him with the Property thereof, but the Essence and Substance of his Title is to be derived from the Deed, granting or leasing them to him; and for this Reason it is that he must not only have a Deed thereof, but must also in pleading shew it with a *Profert hic in Curia*; for otherwise the Court, which is to judge *secundum allegata & probata*, can no more adjudge his Title good, than if he had no Deed at all; but yet (a) if such Grant or Lease be made of Tithes without Deed, and the Grantee or Lessee sues for them in the Spiritual Court, the Defendant must plead that all the Title that the Plaintiff has is by Lease without Deed; nor can he suggest this Matter to ground a Prohibition on; but he ought either to set out his Tithes without who hath the Title to them, which will discharge him, or he ought to prescribe *in modo Decimandi*, and surmise, that the Tithes belong to J. S. with whom he hath compounded to pay such a Sum for all Tithes.

(a) 1 Leon. 23.  
Whitby ver.  
Sanders.

But if a Parson lease his Rectory or Parsonage for Years, in this Case the Tithes and Offerings will pass as incident to the Rectory, tho' there be no Deed, because the Rectory is the Principal, and the Lease of that being good without Deed, the Tithes and Offerings, which are but as Part of, or accessory to the Rectory, must pass likewise, tho' they are not named; and some hold, that by such Parol Lease of the Rectory the Tithes will pass, tho' there be no House, but only the Church and Church-yard.

2 Rol. Abr. 63.  
Latch 177.  
Bro. Tit. Incidents 7.  
Tit. Leases 15, 20.  
Tit. Grants 44, 59.

If a Portion of Tithes hath been long used with a Chapel, by Grant or Lease of the Chapel, with all the Tithes thereunto belonging, this is a sufficient Description to pass the Tithes, tho' generally a Portion of Tithes ought to be so named; but it does not appear whether in this Case the Grant or Lease of the Chapel were by Deed or not.

Clayton, sect. 25. Bradford's Case. Comp. Incumb. 338.

As concerning Leases of Tithes to the Parishioner himself, who ought to pay them, there are Variety of Opinions in the Books, how far such Leases or Agreements shall be good without Writing, if they are made for the Life of the Parson, or for Years, or for one Year only, and how far, and in what Cases, the Assignee of the Parishioner shall take Advantage of, or be bound by such Leases or Agreements.

First then, most of the Books agree, that if the Parson, in Consideration of such a Sum then paid, or so much annually to be paid, by the Parishioner, do contract or agree by Parol with him, that he shall retain his Tithes, or shall be discharged of the Payment of his Tithes during the Life of the Parson, or for so many Years as he shall be Incumbent, that is void; and the Reason given is, because as a Lease this cannot be good without Writing, and as a Composition or Agreement it cannot be good, because it is uncertain at the making of it.

Cro. Jac. 137.  
Cro. Eliz. 188, 249.  
Noy 121.  
Yelv. 94.  
2 Leon. 29.  
3 Leon. 357.  
Godb. 333.  
Palm. 377.  
2 Brownl. 17.  
1 Lev. 24.

But yet some Books hold such Parol Agreement for the Life or Incumbency of the Parson to be good, and that if he demands Tithes against it in the Spiritual Court, a Prohibition shall be awarded to stay his Suit.

2 Rol. Abr. 63.  
Godb. 333.  
Palm. 377.

It is held in several Books, that tho' such Parol Agreement with the Parishioner for the Life or Incumbency of the Parson be not good, yet if it be for so many Years certain, that this is good, tho' it be not by Deed or Writing; because it is in Nature of a Composition or Agreement with the Parishioner himself, who ought to pay them; and that therefore if he sues in the Spiritual Court for Tithes, against such Agreement, that a Prohibition shall be awarded to stay his Proceeding.

Hetley 31, 107, 122.  
Yelv. 94.  
Noy 121.  
3 Leon. 257.  
2 Brownl. 11.  
2 Rol. Abr. 63.  
Godb. 354, 374.  
Cro. Jac. 668.

Hetley 31.

So it is likewise held, in Pursuance of that Opinion, that if the Parishioner, after such Agreement to retain his Tithes for Years, makes a Lease of those Lands to another, that the Lessee also shall be discharged of the Payment of Tithes, because the Discharge runs along with the Land; but others held the contrary; and that if the Assignee be sued in the Spiritual Court he shall have no Prohibition, because by such Parol Contract no Interest was transferred to the Parishioner, but it was only a Personal Agreement between the Parties themselves, and cannot extend to Strangers.

Yelv. 94.  
Hawkes and  
Brothwath.

2 Rol. Abr. 63.  
Cro. Jac. 668.  
Godb. 333.  
Palm. 377.

But all, that hold such Parol Agreement for Years to be good, hold likewise, that if the Agreement were with the Parishioner, his Executors and Assigns, that there the Executors or Assigns of the Parishioner, or even their Lessee at Will, shall take Advantage thereof; and if they are sued in the Spiritual Court shall have a Prohibition, and compel the Parson to take his Remedy upon the Contract; and that if the Executors of the Parishioner has made a Lease over at Will, they shall have their Remedy over against the Tenant at Will, who came in under the Benefit of such a Discharge, and therefore ought to be contributory to the Charge of it, and that granting such Prohibition is a Means to compel the Parson to seek his true Remedy.

Palm. 36.  
Aldridge's  
Case.  
Palm. 377.  
2 Leon. 73.  
Wellcock's  
Case.

And yet we find some Cases, where such Agreement was by Deed with the Parishioner and his Assigns, that the Parishioner, or Assignee, being sued in the Spiritual Court, would have no Prohibition, because as they held, the Covenant or Agreement passed no Interest in the Tithes; and therefore for Breach of such Covenant, the Assignee had no Remedy but by Action of Covenant on the Deed.

2 Leon. 29.  
Popl. 140.  
Fullcher ver.  
Giffin.  
Go b. 333.  
Palm. 377.  
1 Rol. Abr. 43.

Accordingly also several Books held, that tho' such Parol Agreement for Life, or Years, be not sufficient Foundation for granting a Prohibition, yet such Suit in the Spiritual Court is a Breach of the Contract or Agreement, for which the Party may have Remedy by Action upon the Case, upon the *Assumpsit* that he should hold discharged.

*Brown ver. Kinnan.*

1 Lev. 24.  
Raym. 14.  
1 Keb. 5, 21.  
2 Keb. 34.  
3 Keb. 24.

So likewise it is held in several Books, that tho' such Parol Agreement to retain for Life, or Years, be not good by way of passing an Interest; yet if an Action of Debt be brought upon the Statute 2 E. 6. and the Agreement be pleaded and found for the Defendant, that this shall be sufficient to bar the Plaintiff of the treble Damages given by that Statute; so if *Nihil debet* be pleaded, and such Agreement be given in Evidence, it is sufficient to excuse the Defendant from the Penalty of treble Damages.

2 Brereton. 17.  
Cro. Jac. 137.  
Hob. 176.  
Cro. Eliz. 188,  
249.  
2 Leon. 29.  
3 Leon. 257.  
Cro. Jac. 103.  
Lev. 24.  
Raym. 14.  
1 Keb. 5.  
Godb. 333,  
384.  
East. 176.  
Nov. 59.  
Corp. Incumb.  
240.

But the best Opinion seems to be, that such Parol Agreement with the Parishioner himself for more than one Year is void; and even to make good this, it ought not to be entered into till after the Corn sown, because when once the Corn is sown, then it is supposed to be in *esse*, and growing all that Year; and then such Agreement is in the Nature of a Sale of a Thing or Chattel actually in *esse*, which, like Sales of other Goods and Chattels, needs no Writing; but if it be for more than one Year, then it is in the Nature of a Lease or Grant of the Parson's Right or Interest in the Tithes, which before they are in *esse* consist only in Notion; and therefore to bind the Parson, there ought to be a Deed or Writing; and if there be not, he may sue for them in the Spiritual Court, and shall not be tied up by a Prohibition; and such Parol Grant or Agreement, for more Years than one, is not only void for all the Years after the first, but in the whole; for the Contract being intire, must be void in all, or good in all, and shall not be good and void by Parcels.

Corp. Incumb.  
338

But a Diversity seems to be taken in four Books between the Parson or Vicar and the Impropiator; the Parson or Vicar, they say, may lease his

his Tithes for one Year without Deed, but the Impropriator cannot, but it will be absolutely void; and it is said to be so ruled in *Bennet* and *Snell's Case*, and in the Case of *Bellamy* and *Baltbore*, it appearing that the Lease for one Year by the Impropriator, which was held void, being to a Stranger, of the Tithes of the whole Parish, by the Opposition that follows in saying otherwise it is, if it be a Lease of the Tithes for a Year, by the Parson himself, it must also be meant of a Lease to a Stranger, and not to the Parishioner himself, who ought to pay them; and then it follows, that a Parson, or Vicar, may lease the Tithes of their whole Parish for one Year to a Stranger without Deed, which, it seems, they may do notwithstanding the Books above-mentioned, as is proved by constant Practice; for perhaps it would be difficult and troublesome for the Parson himself to collect all the Tithes in *Specie*, and it may be several of the Parishioners will not take Leases, or agree or compound for their own Tithes; and therefore if the Parson can find one who will take all that Trouble off his Hands, and leave him more at Liberty to attend his Cure, it seems reasonable he should be at Liberty to set his Tithes (as they call it) to such Person for that Year; and it would be too troublesome and unreasonable to expect, that upon every such yearly Setting of his Tithes, he should be forced to be at the Expence of a new and formal Lease in Writing, especially since such Setting or Leasing is generally made about *Easter*, when the Corn is actually growing and in a good Forwardness; and therefore such Setting or Leasing is rather a Sale of a Chattel in *esse*, than a leasing or making over of a Thing only in Potentiality or Idea, and then such Sale may be good without Deed, as it would be of any other Goods or Chattels; and why the Impropriator himself, in the like Case, should not have the same Power, seems hard to be accounted for; tho' perhaps in the Case where this Difference is taken, the Vendee, or Lessee, strictly speaking, could not justify in Trover against the Owner, as by Virtue of the Lease *qua* Lease without Deed. But *Quere*, if he had pleaded it as a Sale for a valuable Consideration, if that would not have altered the Case, and made good his Justification in taking them after they were severed.

A Parson by Parol leased his Tithe Hay to the Vicar, and the Vicar paid the Rent for the first Year, but finding that the Rent was more than the Tithe was worth, refused to hold the Bargain any longer; and being sued in the Court of Requests, (which was a Court of Equity) and then not Pleading there any Notice of his Refusal, and Sentence and Decree being given for the Parson, the Vicar prayed a Prohibition; and it was agreed by the Court, that if the Vicar had received the Profits, he was suable in the Court of Requests for the Rent; and that if he had given Notice of the Refusal of the Bargain, he had been discharged of the Rent from the Time of the Notice given, because he had no Remedy for the Tithes, for that it was a void Contract in Law; and by *Dodderidge* and *Jones* the Case is the same, tho' he hath not given Notice.

By all the Cases before-mentioned, it appears how unsettled a Point this is; and it is said now to be the constant Practice of the Courts at *Westminster* not to grant Prohibitions upon the Suggestions of such Agreements, but to leave it to the Spiritual Court to determine; and if the Party thinks himself there aggrieved, he may appeal; and this seems to hold still, as to such Parol Leases under the Term of three Years; for if they be above three Years, then by the Statute of Frauds and Perjuries they are made to have the Force only of Leases at Will; and if under three Years, yet by that Statute there must be yearly reserved two Thirds, at least, of the full improved Value of the Thing demised.

*Lath* 176.  
*Noy* 89.  
*Godb.* 374

*Lath* 115.  
Vicar of *Ang-*  
*ford's Case.*  
*Palm.* 423.  
S. C. by the  
Name of  
*Harris* and  
*Dilworth.*

*Comp. In. unib.*  
339, 340.

## Rule 2. When such Leases are to begin.

Co. Lit. 45. a. And herein the Statute of 32 H. 8. is different from the Statutes of  
 5 Co. 6. 1 & 13 Eliz. for the 32 H. 8. requires such Leases to begin from the  
 Mountjoy's Case. Day of the making, but by the Exceptions in 1 & 13 Eliz. they are to  
 3 Keb. 379 begin from the making thereof; and the Diversity between these Ex-  
 pressions will appear more fully by the following Case, which we will  
 reduce under the following Heads.

## 1. When such Leases as have no Date at all, or a void or impossible Date are to begin.

Co. Lit. 46. b. As to such Leases as have no Date at all, or a void or impossible Date,  
 2 Co. 5. as the 30th Day of February, or the 40th of March, these must begin  
 2 Inst. 674. from the Delivery, for there is no other certain *Judicium* of the Time  
 Telv. 194. of their taking Effect; and therefore the Delivery, which is solemn and  
 Hob. 140. notorious, gives them from thenceforth a Sanction, and binds the Parties  
 2 Rol. Abr. 21. thereto.  
 Plow. 402.  
 1 Rol. Abr. 848.  
 Lat. b 61.

## 2. Such Leases as have a good Date, and are delivered on the same Day; in what Cases the Day of the Date or Delivery is to be taken inclusive, and in what Cases exclusive.

Co. Lit. 46. Where Leases have a good Date, and are delivered on the same Day,  
 Comp. Incumb. *Habendum* for Twenty-one Years, without saying from what Time or  
 340. when they shall begin; the Leases in this Case shall begin from the Deli-  
 1 Rol. Abr. very, for the Delivery makes it presently to be the Deed of the Lessor,  
 849. and when nothing appears to the contrary, the Lands contained in such  
 Deed shall pass to the Lessee at the same Time; for otherwise it would  
 be the Deed of the Lessor to no manner of Purpose; and there can be  
 no Reason to affix the Time when the Lands shall pass after to one Day  
 more than to another, therefore the Delivery, which in this Case makes  
 it the Deed of the Lessor, shall likewise fix the *Terminus a quo* the Con-  
 tract or Lease shall begin.

Hob. 140. So if a Lease be made for Twenty-one Years, *Habendum* from the  
 5 Co. 1. Making, or from the Sealing and Delivery, or from henceforth, this  
 2 Co. 5. a. shall take Effect from the Delivery, whether there be a Date or not, for  
 2 Inst. 674. the Delivery gives Sanction to the Deed, and before Delivery it is no  
 Moor 879. Deed at all; and by Consequence from henceforth, or from the Making,  
 Cro. Jac. 264. must relate to the Time of its taking Effect as a Deed, and not from any  
 Cro. Car. 263. other Time; and in such Case the Day of the Delivery is taken inclu-  
 Dyer 286, sive; so that if such a Lease be delivered the 20th Day of June, the  
 307. Lease shall determine on the 19th Day of June inclusive; and tho' the  
 Hob. 73. Lease was delivered at four of the Clock in the Afternoon, or at any  
 2 Rol. Abr. Time after on the said 20th Day of June, yet that whole Day shall be  
 520. taken inclusive to prevent Clamour and Uncertainty, by making Fractions  
 (a) Latch 157. and Divisions in a Day; and yet in (a) Latch, where one declared of  
 Alfop's Case. a Lease of 25 March, *Habendum abinde* for a Year, rendring Rent at  
*Michaelmas* and the *Annunciation*; and objected that the last *Annunciation*  
 was not within the Year; *sed non allocatur*; for *abinde* shall be taken a *Con-*  
*fessione*, and exclusive of the Day.

But if a Lease be made to begin *a Die consecutionis*, or *a Die Datus*, there the Day of the Delivery, or the Day of the Date, is to be taken exclusive, because the Preposition *a* is Privative of the whole Day before which it is prefixed; and therefore if the Lessee in such Case should declare of an Ejectment the Day of the Delivery or Date, it would be against him, because that was before his Title began.

So if a Lease be dated and delivered the same Day, and the *Habend'* be *a Datu*, or from the Date hereof, it has been held, that the whole Day of the Date is to be taken exclusive; and by Consequence, that from the Date, and from the Day of the Date, are all one, if there be a Date; but if there be none, then the Date shall be taken for the Day of the Delivery, and that whole Day be excluded.

But yet the contrary to this has been adjudged in one Case where an Ejectment was brought on a Lease made 1 January 3 Jac. *Habend'* *a Datu Indenture prædict'*, and the Ejectment was the same Day, and after Verdict for the Plaintiff it was moved in Arrest, &c. that this Lease being made *Habend'* *a Datu Indenture prædict'*, was as much as from the Day of the Date, as in 5 Co. 1. and then the Ejectment being alledged the same Day, is ill; but all the Court resolved that the Date is the Time of the Delivery, and it differs from the Time or Day of the Date, and therefore the Ejectment being alledged *Postea* the same Day was good enough, and the Plaintiff had Judgment.

So where the Archbishop of York 6 Novem. 18 Eliz. by Indenture, made a Lease for Twenty-one Years *Habend'* *a Datu Indenture*, no Exception was taken to it, which proves that *a Datu Indenture* is the same as from the making, and that the Day of the Date, or Day of the making, is not to be taken exclusive in such Case, because then the Lease would not be warranted by the Exception in 1 Eliz. which says other than for three Lives, or Twenty-one Years from the making, which is inclusive of the Day of the making.

Ejectment by the Successor of a Prebend upon a Lease made for Life *Habend'* *a Datu*; and if this should bind the Successor was thrice argued, and for the Plaintiff urged, that it should not; that *a Datu* is all one with *a Die Datus*, and then Livery being made the same Day that the Indenture bears Date was void, because it cannot expect. 2. That this was a Lease in Reversion, not being to begin in Point of Interest till the Day after the making or Date, which is not good by 13 Eliz. cap. 10. for here the Day of the Date is excluded; but it was answered and resolved, that in Propriety of Speech *Datus*, or dated in *English*, is the very Act of the Delivery of the Deed; for *Datus* in *Latin*, being taken Participly, is given or delivered in *English*; and *Datus* Substantively taken in *Latin* is the Date or Delivery in *English*, which signifies all one; and in Clayton's Case, the six Months were taken the most extensively to make good the Deed by Inrolment, but to make a Word of an equivocal Sense as this is, (which may be taken either inclusive or exclusive of the Day of the Delivery or Date of it) to make the Lease void is unreasonable, therefore it shall rather be taken in such Sense as may make it good, *ut res magis valeat quam pereat*; and therefore it was adjudged good by the three puisne Judges, the Chief Justice Treby dissenting, tho' he was at first of the same Opinion, and so also was Powell, but afterwards changed it for the Defendant; which shews the Nicety of these Distinctions.



3. Such Leases as have a good Date, but are not delivered till a Week or Month, &c. after, when they are to begin, and how the Declaration on such Leases is to be framed.

<sup>2 Inst. 674.</sup> And it is to be observed, that every Deed shall be intended to be delivered on the same Day it bears Date, unless the contrary be proved; and it is the best Course (as the Law intends) to deliver it on the same Day that it bears Date; therefore where in an Ejectment the Plaintiff declares of a Lease dated 1 Novem. *Habend' a Confectione*, or a *Die Datus, Sigillationis & Delibrationis Indenturæ prædictæ*, and lays the Ejectment 2 Novem. tho' it was objected that the Declaration was not good, because it did not appear when the Lease was sealed and delivered, and it might be delivered long after the Date; and the Course is to say, that such a Day and Year *dimisit per Indenturam*, bearing Date the same Day and Year; yet it was adjudged, that the Declaration was good, because when he declares that he let by Indenture of such a Date, it shall be intended to be delivered on the same Day, unless it be shewn with a *Primo Deliberatum* at another Day; and he, who pleads a Deed of such a Date, cannot by Replication, or other Pleading, maintain it to be delivered at another Time, for that would be a Departure.

<sup>Cro. Jac. 264.</sup> But if the Truth be that the Lease was sealed and delivered at another Time than it bears Date, then the Plaintiff ought to shew it in his Declaration; or the Defendant, if it be material for him, may shew in his Plea the Delivery at another Time than the Date, and traverse, that it was delivered on the Day it bears Date.

<sup>Cro. Jac. 258.</sup> Accordingly an Ejectment was brought of a Lease made 12 December <sup>*Lewellyn and Williams.*</sup> *Habend' a Primo Die*, and upon Not guilty, the Jury found the Lease dated 1 December, *Habend'* from henceforth, but delivered 12 December, which proves, that where the Date and Delivery were at several Times, they ought to be distinguished in the Declaration; but the Question there was, whether this Lease was the same whereof the Plaintiff declared, that is, whether being limited to take Effect from henceforth, the Day of the Date should be taken exclusive, so as to warrant the Declaring of a Lease *a Primo Die*; for it was objected, that this did not warrant the Declaration, because from henceforth, and from the Day of the Date, are several Commencements, the one beginning on the Day it is sealed and delivered, the other the Day after; but it was resolved *per Curiam*, that they are both one, being a Computation up to a Time past; and when the Lease is sealed at a Day after the Date, whether it be limited to begin from henceforth, or from the Day of the Date, yet in Pleading it shall be alledged to begin from the Day on which it is dated; and Serjeant Moor took this Diversity in another Case, that if one leases Land in Interest, *Habend' a Datu*, there the Day of the Date shall be taken inclusive, the Date and Delivery being both on the same Day; but where it does not begin in Interest at the Time it is dated, as where the Date and Delivery are several, and the *Habend'* is *a Datu*, there the Day of the Date shall be taken exclusive, because it is to commence from the Date, that is, from the Day of the Date, for the Date in that Case can mean nothing else, since it is not delivered till after; and therefore the Computation of its Commencement being from a Day backwards, that whole Day shall be excluded; and perhaps this Diversity may reconcile the Cases of *Clayton, 5 Co.* and *Osburn and Rider, Cro. Jac. 135.* before put; for in *Osburn's* Case the Lease was made the same Day it was dated, and so began then in Interest; but the Case cited in *Clayton's* Case, is to prove the Date and the Day of the Date to be all one, was



from a Computation backwards upon the Statute of Inrolments, which appoints them to be inrolled within six Months after the Date; and there it was adjudged that a Deed inrolled upon the last Day of the six Months, accounting the Day of the Date exclusive, was yet well inrolled within the Statute; but this, as has been observed, was a Computation backwards, and that from the Date, and from the Day of the Date, is all one, is only an *Unde sequitur* of my Lord Coke's own, from the Case of the Inrolment; and in his 1 *Inst.* 46. where he mentions it again, yet he cites for it *Clayton's Case* and *Dyer*, where that Case of the Inrolment is reported: And tho' the Case of *Bacon and Waller*, 3 *Bulf.* was adjudged according to *Clayton's Case*, that the Date and Day of the Date were all one, and the Day to be taken exclusive; so that a Lease there dated and delivered 26 *May*, *Habend'* from the Date, did not begin till 27 *May*; yet it appears both by (a) *Bulf.* and *Rolls*, that the Judgment therein given was founded on the Case of *Lewellin and Williams*, where the Date and Day of the Date were held all one; yet as it appears, the Reason of that Case was upon a Computation from a Time past, and that the Lease therein did not begin in Point of Interest upon the Day it bore Date, and by Consequence was no Warrant for the Judgment that was given in *Bacon and Waller's Case*; and then that Judgment being founded on the Authority of the former Case, can be of Authority no farther than as it agrees with that former Case, and then it is of none at all, because, as appears before, it varied materially from it; and so the Diversity taken by Serjeant *Moor*, which is likewise warranted by the Case of (b) *Osburn and Rider*, seems to remain unshaken, and to be the true Distinction for settling the Books.

(a) 3 *Bulf.* 203.  
1 *Roll. Rep.*  
387. *Bacon*  
and *Waller*.

(b) *Cro. Jac.*  
135.

In Ejectment the Plaintiff declares of a Lease 7 *Jan.* by Indenture dated 6 *Decemb.* *Habend' a Die Datus Indenturæ prædictæ*, and gave in Evidence a Lease dated 6 *Decemb.* *Habend' a tempore confectionis Indenturæ*, and it was held not the same Lease whereof the Plaintiff declares, because, says the Book, *a Die Datus* excludes the Day; but a better Reason seems to be, because it does not agree in Point of Description with the Lease whereof he declares; for if the Declaration had been of a Lease 7 *Jan.* *Habend' a 6 Die Decembris*, then by the Authority of *Lewellin's Case* this had been good, yet being upon a Computation from a Time past, the Day of the Date must be pleaded exclusively; but when he declares of a Lease 7 *Jan.* by Indenture dated 6 *Decemb.* *Habend' a Die Datus*, this must be intended a Description of the Lease as it is comprised in the Indenture; and when he afterwards shews an Indenture, containing a Lease *Habend' a tempore confectionis*, this is a Description of another Lease, and not of that which was to begin *a Die Datus*; and this likewise seems to be the Reason, that in another Case, where the Plaintiff, in Bar of an Avowry, pleads a Lease 30 *March*, *Habend'* from the Feast of the *Annunciation* next before, and upon Traverse of the Lease *modo & forma*, the Jury found a Lease to the Plaintiff on the 25th Day of *March* for one Year from thence next ensuing, and tho' held not to be the same Lease the Plaintiff pleaded, because this begins on the 25th of *March* inclusive, and the Lease pleaded from the 25th of *March* exclusive; yet Plaintiff had Judgment, being found in Substance that Plaintiff had such a Lease as by Force thereof he might have Common the 11th of *April* following, &c. but agreed clearly, that if he had declared so in Ejectment, it would have been against him, because there he demands and recovers the Term, and therefore must set out his Title truly, which appears to have been by a Lease dated and executed the 25th of *March*, *Habend'* from thenceforth; and therefore a Lease executed but the 30th of *March*, and dated the 25th of *March*, *Habend'* from thenceforth, could not be the same, not agreeing in Point of Description; but if the Truth had been that the Lease had been executed but the 30th of *March*, then, it seems, he might have declared of a Lease

*Cro. Jac.* 647.  
*Scavage and*  
*Parker*.

*Hob.* 73.  
*Moor, pl.* 1188.  
*Pope ver.*  
*Skinner*.

then

then made, *Habend'* from the 25th Day of *March*, being a Computation from a Time past, tho' the Lease were dated 25 *March*, *Habend'* from thenceforth, because it did not then begin in Interest: But *Quere* if the better Way in all these Cases, to prevent any Mistakes, be not to declare of a Lease dated such a Day, *Habend'* from thenceforth, or from the making, or from the Day of the Date, or Day of the making, &c. exactly as it is in the Lease, with a *Primo deliberat'* such a Day, if the Truth be so, rather than to take upon him to judge when the Day shall be taken inclusive, and when exclusive, and so as in this Case to declare of the *Habend' a 25 Die Martii*, when in Truth the *Habend'* was worded from henceforth; tho' if the Lease had been executed but 30 *March*, it seems that if he had declared of a Lease 30 *March*, *Habend' a 25 March*, this had been good, for the Reasons before-mentioned.

*Cro. Car.* 502.  
*Loyd versus*  
*Gregory.*

A Lease in Reversion was made to commence *ad Festum Annunciationis* after the former Lease should be determined; and it was objected, that it ought to be *a Festo Annunciationis*; yet the Court held it to be all one; for that there shall be no Fraction of a Day: But *Quere* how this would have made a Fraction of a Day; for there seems to be a whole Day's Difference, *ad* including the Feast-day, and *a* excluding it.

*Yelv.* 131.  
*Edmonds ver.*  
*Boothe.*

A Parson leases by Indenture the Tithes of 200 Acres of Land to the Owner of the Land, of which he, and his Wife, and his Heirs were seised, *Habend'* from *Mich.* next following to him and his Heirs, during the Life of the Parson, the Lessee dies, and his Wife had the 200 Acres for her Jointure, and married *B.* who let the 200 Acres to the Plaintiff; the Heir of the first Husband grants also to the Plaintiff the Tithes of those Lands at Will, and he being sued for Tithes by the Parson against his own Lease brought a Prohibition; but a Consultation was after granted; for by *Fleming, Fenner, and Williams*, the Lease being for Life, and to begin at a Day to come, was void; for tho' Tithes are spiritual, and are not extinct in the Land, yet in the Conveyance of them they ought to follow the Nature of Land, Rent, or other Hereditaments in *Esse*, which cannot be granted for Life at a Day to come; but *Telverton* and *Croke* thought, that this Lease being to the Owner of the Land did not enure by way of Interest, but by way of Discharge; for the Plaintiff hath pleaded, by Force of which the Lessee was seised of the Tithes to him and his Heirs for the Life of the Parson; they, as Judges, could not intend it to be otherwise; and besides, it cannot be intended by way of Discharge, because there are no such Words in the Lease, and it was more for the Lessee's Benefit to have it by way of Interest than by way of Discharge; for then this would be such a Privilege annexed to the Land as could not be granted over; whereas here the Wife was Owner of the Land, but the Son and Heir of the Lessee took upon him to be Owner of the Tithes; and *Telverton* inclined, that the pleading of the Lease, and of the Seisin by Force of it, was not good.

*Pop.* 9.  
*Thompson ver.*  
*Trafford.*

A Lease of Houses within the 14 *Eliz. cap. 11.* may be made for Years from a Time to come; for that Statute does not require them to begin from the making, or Day of the making, but only that they do not exceed forty Years from the making.

*Comp. Incumb.*  
341.

And it is said, that a Lease for Lives being avoided at Common Law, for that it was made to commence from a Time to come, an Injunction was granted out of Chancery to continue Possession.

*Moor* 637,  
759.

A Lease to three for their Lives, *Habend' a Die Datus*, is good, if Livery be made after the Day of the Date, because till Livery nothing passes, and being made after the Day of the Date, it may then operate presently; *secus* if Livery had been made on the Day of the Date, because then the Operation of it must have been suspended till the next Day, which the Law will not allow.

Rule 3. Within what Time the old Lease is to be surrendered; and therein of concurrent Leases.

Another Rule to be observed in making of Leases upon these Statutes is, that if there be an old Lease in Being, it must be surrendered, expired, or ended within a certain Time after the making of the new Lease; and such Surrender must be absolute, and not conditional; for then the Intent of the Statute might be easily evaded, by setting up such old Leases again, upon Breach of the Condition.

And such Surrender may be safely made either to a Corporation Sole or Aggregate, upon their Promise to make a new Lease; for if any single Person, or sole Corporation makes such Promise, and refuses after to make the Lease, an Action on the Case will lie against them; and if such Promise be made by a Corporation Aggregate, tho' no Action will lie against them, because being a Corporation they cannot be bound without Deed, yet the Person who surrendered may sue in Equity, and compel them to a specifick Performance of their Promise, and to make a new Lease; but such Suit must be against some of them by Name, as the Dean in particular, and the Chapter of the same Place generally; and such Suit in Equity seems the best Way in case the Surrender were made to a sole Corporation or single Person, because in the Action at Common Law Damages are to be recovered only, but no new Lease made, as they will decree in Equity; but now since the Statute of Frauds and Perjuries, which requires all Surrenders to be in Writing, it is usual to have a Covenant from the Person or Corporation, to whom the Surrender is made, that they will within such a Time make a new Lease under such and such Terms; but, as it seems, that Statute does not extend to Surrenders in Law, by taking of a new Lease in Writing.

The Statute of 32 H. 8. provides, that such old Lease shall be expired, surrendered, or ended within one Year next after the making the new Lease; and the Statute 18 Eliz. enacts, that all Leases to be made by any of the Ecclesiastical, Spiritual, or Collegiate Persons, or others, within 13 Eliz. cap. 10. of any Lands, &c. whereof any former Lease, &c. for Years is in Being, and not to be expired, surrendered, or ended within three Years next after the making of any such new Lease, shall be void, and of none Effect.

And a Surrender in Law by taking of a new Lease, either to begin presently, or at a Day to come, seems a good Surrender within these Statutes; for by taking such new Lease, tho' it be to commence at a future Day, the first Lease is presently surrendered and gone, and shall not continue good till the Day on which the second Lease is to commence; but by Acceptance of such second Lease the first is immediately determined; because both Leases cannot consist together, and the first cannot be dissolved or surrendered in Part, and therefore must be surrendered for the Whole.

One *Small* being possessed of the Manor of *Paddington* by a Lease for Years from a Bishop, the Bishop made a Lease to another for three Lives, and before Livery the Tenant surrendered his former Term; and it was held, that this Surrender was made in Time, and the second Lease good, because it was no complete Lease till Livery, and before that, the first Lease was surrendered and gone.

And this Rule, that if there be any old Lease in Being, it must be surrendered, expired, or ended within the Times before mentioned, is necessary not only when Bishops, and other sole Corporations, mentioned in 32 H. 8. make Leases by Authority of that Statute for twenty-one Years, or three Lives, without the Assent or Confirmation of others,

Co. Lit. 44 b.  
5 Co. 2.  
Moor, pl. 1084.  
1 Rol. Rep. 82.  
Sir George  
Frevil versus  
Ewebank.  
Comp. Incumb.  
346.

29 Car. 2.  
cap. 5.

Pop. 9.  
Plow. 106.  
Comp. Incumb.  
345 6.

Degg 132.  
Small's Case

Comp. Incumb.  
345

but also when any Spiritual or Ecclesiastical Corporation Sole (other than Bishops) do make such Leases, tho' with the Consent and Confirmation of those who by Law are to confirm the same, and also when any Spiritual, Ecclesiastical, or Collegiate Corporation Aggregate make such Leases whereto no Confirmation of others was ever requisite: For the better Understanding whereof, it will be necessary to consider the Learning of concurrent Leases, and what Persons, upon the several Statutes before mentioned are capable of making them, and in what Manner.

*Moor* 107.  
1 *And.* 65.  
*Fox* and  
*Collier.*  
1 *Leon.* 36.  
3 *Leon.* 131.  
*Palm.* 464,  
466, 467.  
*Latch* 241.  
1 *Leon.* 59.  
*Co. Lit.* 45.  
*Ley* 78.

To begin then with Bishops; it is to be observed, that at Common Law Bishops, with the Confirmation of their Dean and Chapter, might have aliened the Possessions of their Church for ever, or have made Leases for what Term of Years they thought fit; and this would have bound their Successors, tho' it were for 5000 Years; but a Bishop without such Confirmation could not have made a Lease to bind his Successors, tho' but for one Year; both of which being great Mischiefs, were remedied by 32 *H. 8.* and 1 *Eliz.* for whereas before 32 *H. 8.* Bishops could not make any Lease at all to bind their Successors, unless it were confirmed by the Dean and Chapter; now that Statute enables the Bishops alone, without such Confirmation, to make Leases of all or any of their Possessions, so they do not exceed three Lives, or twenty-one Years; but if Bishops had a Mind to make Leases or Grants for any longer Term, or in any other Manner, than this Statute warranted, then such Leases or Grants were out of the Protection of this Act, and remained perfectly at Common Law, as they were before, and by Consequence must have the like Confirmation of the Dean and Chapter, in order to bind the Successor, as they must have in all Cases at Common Law; and because it was found by Experience, that many Bishops made an ill Use of this Power, and chose to make Leases for long Terms of Years, rather than keep within the Bounds this Statute had prescribed them, and sometimes to make absolute Alienations of their Possessions, and then get the Dean and Chapter to confirm such Leases and Alienations, whereby the Successor was oftentimes left without sufficient to keep up Hospitality, or sustain their Dignity; therefore to remedy this Mischief was the Statute of 1 *Eliz.* made, which makes void all Gifts, Grants, &c. or Estates of any Honours, Castles, Manors, Lands, Tenements, or Hereditaments, being Parcel of the Possession of the Bishoprick, (other than for twenty-one Years, or three Lives,) so that now, after this Statute, no Confirmation whatever will make good any Bishop's Lease, if it exceed that Term, because then the Statute makes it void, and by Consequence not capable of receiving any Sanction from a Confirmation: But upon these Statutes was the concurrent Lease invented, which has generally obtained, and been held good, and is in this Manner:

*Moor* 107.  
1 *And.* 65.  
1 *Leon.* 36.  
3 *Leon.* 131.  
*Palm.* 464,  
&c.  
*Latch* 241.

If a Bishop solely makes a Lease for twenty-one Years according to the Statute of 32 *H. 8.* and within four or five Years, or more, before the End of that Lease makes a new Lease to another for twenty-one Years, to begin from the making, &c. this second Lease, if it be confirmed by the Dean and Chapter, and be in every Thing else pursuant to the Exception in the 1 *Eliz.* is good as a concurrent Lease, for these Reasons: 1. Because such Lease, tho' it be not good within the 32 *H. 8.* by reason the first Lease is not surrendered or expired within a Year after the making thereof; yet being confirmed by the Dean and Chapter, it remains a good Lease at Common Law, and then if it be not void within the Exception of 1 *Eliz.* the Successor shall be bound; and that it is not void within that Statute, appears both from the Letter and Meaning of the Exception; for the Words are, *other than for twenty-one Years, or three Lives, from such Time as any such Lease shall begin*; now this second Lease does not exceed twenty-one Years from the Time it begins, being for twenty-one Years only from the making, and so within the express Words of the Exception. 2. This is not void within the Meaning of the

the Exception, because for so many Years as were to come of the first Lease this is good only by Estoppel, and not in Interest; for the second Lessee can have no Benefit of it so long as the first Lease endures, and then against the Successor there is in Effect no more than a Lease for twenty-one Years in Being, since the second Lease being in Effect void for all the Years that are to come of the first Lease, those Years that are to come of the first Lease and those that will then remain of the second Lease make in all no more than twenty-one Years at one Time, and so not against the Meaning of that Exception. 3. Such second Lease is so far from being prejudicial to the Successor, that it is rather for his Benefit; for now he will have the Rent reserved on the first Lease during the Residue of that Term, and may also at the same Time recover the Rent reserved upon the second Lease, being only for Years, because the Lessee is estopped to say he did not take such Lease under such Reservation; and so the Successor will have two Rents instead of one; tho' if the second Lessee should enter, and be evicted by the first Lessee, this would cause a Suspension of the Rent reserved on the second Lease; but however, the Successor suffers no Prejudice, because tho' he cannot distrain for the second Rent during the Continuance of the first Lease, and tho' the Re-entry of the first Lessee should amount to an Attornment, and give the Rent thereon reserved to the second Lessee, yet the Bishop, or his Successor, may always maintain an Action of Debt against the second Lessee for the Rent, and so will in all Events be sure of one Rent.

But this Lease, tho' it be not either against the Letter or Meaning of the Exception in 1 Eliz. yet since it is not warranted by 32 H. 8. it must be confirmed by the Dean and Chapter, as before the 1 Eliz. all Leases not pursuant to 32 H. 8. must have been, to bind the Successor, and such Confirmation must be in the (a) Life of the Bishop who makes it.

mation of such concurrent Lease in the Vacation of the Bishoprick, is good enough. 4 Leon. 78. *Quare.*

But after such Lease for Years the Bishop cannot make a Lease for three Lives to be good by way of concurrent Lease, tho' it be confirmed by the Dean and Chapter; but such second Lease, whether it be made to begin presently, or by Way of Lease or Grant in Reversion, and Attornment upon it, is against the Exception in the 1 Eliz. and by Consequence shall not bind the Successor; for the Words of the Exception are, *other than Leases for three Lives, or twenty-one Years*, in the Disjunctive; so that there ought to be only one, or only the other in Being at a Time against the Successor, and not both together; for which Reason also, after a Lease for three Lives, the Bishop cannot make a Lease for twenty-one Years to bind the Successor, tho' with the Confirmation of the Dean and Chapter, because then there would be both a Lease for three Lives and twenty-one Years in Being at a Time, which that Statute does not allow of; and if the Lease in Reversion for three Lives should be good as a concurrent Lease, then would the Successor have no Remedy for the Rent thereon reserved during the first Lease; not by Distress, because the Possession was only a Pledge for the Rent reserved on the first Lease; not by Action of Debt, because that does not lie for Rent reserved on an Estate of Freehold during the Continuance thereof; nor by Assise, because he had no Seisin of it; and tho' *ex Vi Termini* the Rent is payable, because after the Lease for Years determined the Lessor may distrain for all Arrears; yet that is only a Possibility or Contingency; for the Lease for Years may outlast the three Lives, and then they, by reason of their Reversionary Interest, having the present Rent of the Lessee for Years, if they all die before the Determination of the Lease for Years, the Bishop and his Successors will lose all that Rent, and so have nothing to maintain Hospitality, or sustain the

10 Co. 60. b.  
Moor 109.  
Co. Lit. 45.

(a) But one  
Book says,  
that Confir-

Co. Lit. 44. b.  
Palm. 466.  
Etc.  
5 Co. 2.  
Moor 253.  
1 Leon. 59.  
Litch 241.  
2 Brownl 162.  
Cro. Eliz. 141.  
1 And. 193.  
Ley 78.  
Cro. Eliz. 111.

Vide Tit.  
Rents.

the Dignity of their Sees, which this Statute of 1 *Eliz.* intended chiefly to provide for ; and tho' the first Lease were for three Lives, and the second only for twenty-one Years, yet that will not bind the Successor ; because tho' an Action of Debt might be maintained against the Lessee for Years for the Rent reserved on his Lease during the Lease for Lives, yet such Lease for Lives and Years at the same Time is against the Words of the Exception of 1 *Eliz.* which are in the Disjunctive ; and also it may happen that the Lessee for Years is worth nothing, and then if the three Lives should outlive such subsequent Lease for Years, the Successor of the Bishop would lose all that Rent, and so suffer in his Revenues, against the Design and Meaning of the Act ; which proves, that the concurrent Lease holds Place only where both are for Years ; so that the certain Determination of the first, and Commencement of the second are known immediately upon the making thereof, and that the Successor will in all Events be sure of a Remedy by way of Distress, for the one Rent and the other, as they respectively commence ; and also by Action of Debt or Covenant upon the Contract in the mean Time, if such concurrent Lease should be construed to pass a Reversionary Interest, and intitle him to the Rent reserved upon the first Lease by an unwary or wilful Attornment of the first Lessee. And this concurrent Lease for Years has not escaped the Censure of some learned Men, tho' being adjudged at first in the *Exchequer Chamber*, by a Majority of ten Judges, it has been ever since allowed for Law ; but my Lord Chief Justice *Vaughan* says, that this concurrent Lease is neither within the Letter or Meaning of the Statute 1 *Eliz.* the Words of which are, *other than for twenty-one Years, or three Lives*, and in that Case there is another Lease in *Esse* than for twenty-one Years, or three Lives ; for there are two Leases in *Esse*, and so more than the Statute warrants ; and that the Statute intended, when the first Lease expired, the Bishop who should then be should have the Advantage to make a new Lease, which by allowing such concurrent Lease may be prevented perpetually, except by way of Remainder ; and as for the Intent of the Statute, he said, tho' the Party is estopped in pleading, yet the Jury are not, but may find the Truth of the Case ; and if the Party dies to whom such concurrent Lease is made, neither his Executors nor Administrators are estopped ; for otherwise they would pay a Rent for nothing, which would be in their own Wrong, and against the Right of the Testator.

3 *Keb.* 578.  
Degg 111.

*Comp. In unib.*  
243.

It appears by the Cases before-mentioned, how and in what Manner Bishops may make concurrent Leases, not being restrained therefrom by the 1 *Eliz.* In the same Manner likewise might Deans and Chapters, Master and Fellows of any College, and other Persons mentioned in the 13 *Eliz. cap. 10.* not being restrained therefrom by that Statute ; but that being found a great Mischief, was remedied and qualified by 18 *Eliz. cap. 11.* which makes all Leases by any of the said Ecclesiastical, Spiritual, or Collegiate Persons, or others, of any of their Ecclesiastical, Spiritual, or Collegiate Lands, Tenements, or Hereditaments, whereof any former Lease for Years is in Being, not to be expired, surrendered, or ended within three Years after the making of any such new Lease, to be void, and of none Effect ; so that within these Bounds they may likewise make concurrent Leases for Years.

2 *Browl.* 154,  
158, 164.  
*Moor* 875.  
*Co. Lit.* 45. b.

The Dean and Chapter of *Norwich*, 8 *Eliz.* made a Lease to *A.* for ninety-nine Years, to begin after the End of a former Lease then in Being, and which happened 35 *Eliz.* afterwards in 42 *Eliz.* the Dean and Chapter made a Lease to the Plaintiff for three Lives, rendering the antient Rent Quarterly, and covenanted to acquit and save harmless the Plaintiff and the Lands demised to him, during the Lease, by reason of any Lease made by them, or any of their Predecessors ; and Livery was made upon it ; but it did not appear whether it was the same Dean that made the Lease to *A.* nor that *A.* had then entered ; and now the

Plaintiff being evicted by the Assignee of *A.* brought his Action of Covenant against the Dean and Chapter, and had Judgment by reason of the express Covenant; and also, because it did not appear that the Dean, who was Party to the Plaintiff's Lease, was dead; for it was agreed, that the Lease to the Plaintiff would be void against the succeeding Dean by the 18 *Eliz.* because there were then above three Years of the first to come; but *Coke* held, that tho' there were four or five, or more, Years of a former Lease to come, yet if that former Lease were surrendered within three Years after the making of a second Lease for Years, such Surrender would make good the second Lease; but if the first Lease were for Years, and the second for Lives, then tho' there were but two Years to come of the first Lease, yet the second would be void, which perhaps may be for the Reasons mentioned in the concurrent Leases by Bishops; but if so, then what my Lord *Coke* says in the same Case must be a Mistake, that if the Plaintiff (whose Lease was for three Lives) had procured *A.* within three Years to have surrendered his Lease to him, that this would have made good his own Lease, which cannot be if what he said before be true; *ideo Q.*

But for such Houses, and so much Land, as by 14 *Eliz.* they may let for forty Years, they cannot make Leases in Reversion or concurrent Leases, because that Statute expressly forbids Leases in Reversion thereof; and the 18 *Eliz.* relates only to the 13 *Eliz.* as appears by the following Case.

In Trespass upon Special Verdict it was found, that the Dean and Chapter of *Paul's* made a Lease for forty Years, of a House in *London*, to begin presently, there being then ten Years of a former Lease to a Stranger to come; and the Court held this second Lease meerly void by 13 *Eliz.* and not warranted by 14 *Eliz.* which makes good Leases of Houses in Market-Towns for forty Years, so they be not made in Reversion; and this Lease, tho' it be made to begin presently, yet there being another Lease in *esse*, is a Lease in Reversion for so much as remains of the former Lease; and so it was resolved in *C. B.* 14 *Car. 2.* in the Case of *Wynn and Wild*, of a Lease of the Dean and Chapter of *Westminster*; and tho' this was properly a concurrent Lease, yet being a Lease in Reversion, it is forbidden within the express Words of the 14 *Eliz.* and so void against the Successor.

A Vicar having made a Lease for Years of a House in a Market-Town, and of Lands thereunto appertaining, *Anno* 1672, when there were but two Years of that Lease to come, let it to another for Twenty-one Years from *Michaelmas* then next, reserving the antient Rent during the Term, payable at the four most usual Feasts, or within ten Days after, and this Lease was confirmed by the Archbishop, (Patron of the Vicaridge) and the Dean and Chapter of *Canterbury*; and if the succeeding Vicar was bound by this Lease, was the Question; and adjudged by all the Court, that he was not. 1. It was adjudged that the Death of the Vicar, by eighty Days, did not make such Non-residence as would avoid the Lease within the Statute of Non-residence. 2. That tho' the Rent were reserved at the usual Feasts, or within ten Days after; and therefore, as it was urged, the Term ending at *Michaelmas* would be expired before the last Day of Payment, tho' for the other Days it was agreed to be for the Successor's Advantage, because the Predecessor might die within the ten Days, and then the Successor would have that whole Quarter's Rent; yet the Court resolved that the Reservation was good in the Whole, and that being reserved during the Term, there should be no ten Days given to the Lessee for the last Payment, according to *Barwick and Esler's Case*, *Cro. Jac.* 227, 233. 3. It was adjudged that this was a Lease in Reversion, and so not warranted by 14 *Eliz.* which, as to Houses in Market-Towns, repeals the 13 *Eliz.* but excepts Leases in Reversion; and this Lease being to commence at *Michaelmas* next

*Comp. Incumb.*

344.

*Cro. Eliz.* 564.*Hunt and Singleton.*1 *Vent.* 246.*Carter* 9.1 *Vent.* 244.2 *Lev.* 61.3 *Keb.* 46.

107, 193.

*Bayly ver**Martin.*



was properly a Lease in Reversion, and differs from a Grant of a Reversion; and also they all but *Hale* held, that if this Lease, in this Case, had been made to commence presently, yet it would have been void, there being another Lease in Being, so that for so many Years as were to come of the former Lease, it would be a Lease in Reversion; and they held, that the 18 *Eliz.* which permits concurrent Leases, so that there be not above three Years of the former Lease, &c. extends only to 13 *Eliz.* and recites that, but not the 14 *Eliz.* nor makes any Alteration thereof; but *Hale* doubted of this, and inclined rather contrary, that if the Lease had been made to commence presently it had been good, because there was not then three Years of the former Lease to come, and he thought the 18 *Eliz.* was as a Qualification as well of Leases upon the 14 *Eliz.* as upon 13 *Eliz.* 1. Because the 14 *Eliz.* is as an Appendix to 13 *Eliz.* and only enlarges it as to Houses in Cities and Market-Towns; and therefore the 18 *Eliz.* reciting the 13 *Eliz.* does by Consequence recite also the 14 *Eliz.* 2. Because there is such a Connexion between all the Statutes concerning Ecclesiastical Persons, that they have been generally taken in the Construction of one another; and that tho' 32 *H. 8.* is not recited either in the 1 or 13 *Eliz.* yet a Lease is not warranted by those Statutes, unless it hath the Qualifications required by 32 *H. 8.* 3. From the great Rummage it would make in Leases, if they should be void, when there was ever so little of a former Lease unexpired.

*Poph. 8.*

(a) 1 *Vent.*  
246.  
3 *Kebl. 107.*  
*Carter 12, 15.*

The President and Scholars of *Magdalen College in Oxford* made a Lease of a House, &c. for twenty Years, and ten Years before the Expiration thereof made a Lease to another for twenty Years, to begin after the Expiration of the first Lease; tho' this be in strict Propriety a Lease in Reversion, yet it was said to be good and to stand well with 14 *Eliz.* because these Contracts or Leases do not intermix, but the one stands well with the other, and both together do not exceed the forty Years comprised in the Statute, which do not hinder Leases to be made from a Day to come; but this Opinion is (a) denied to be Law, and seems also to be expressly against the foregoing Cases, where such Lease to begin at a Day to come, there being then another Lease in *esse*, is condemned, tho' both did not exceed the Term of forty Years in the Whole.

#### Rule 4. That such Leases are not to exceed three Lives or Twenty-one Years.

1 *Co. 61. b.*  
62 *a.*

A fourth Rule to be observed for making these Leases good in Law is, that they do not exceed three Lives, or Twenty-one Years, from the making thereof; therefore if a Bishop makes a Lease for four Lives, and one of them dies in the Life of the Bishop, so that at his Death there are but three Lives in Being, yet the Lease is void against the Successor, because being void by 1 *Eliz.* at the Time when it was made, no subsequent Accident can make it good.

*Tro. Car. 95.*  
*Owen and*  
*Al. vice.*  
*Hetley 22.*

So if a Lease be made for three Lives in this Manner, *viz.* to one for Life, Remainder to a second for Life, Remainder to a third for Life, this Lease is void against the Successor, because otherwise the two first would be punishable of Waste during their Lives, by reason of the intermediate Remainder, and so Dilapidations, and other Mischief, which the Statutes intended to provide against, would be let in.

*Ley 74.*  
*Bishop of*  
*Heresford's*  
*Case.*  
5 *Co. 15. a.*

So if an Archdeacon makes a Lease for three Lives according to the Statutes, and the Lessees make a Lease for 100 Years, which is confirmed by the Archdeacon, Bishop, Dean and Chapter, yet such Lease shall not bind the Successor; or if a Bishop makes a Lease for three

Lives,



Lives, reserving the antient Rent, and they make a Lease for 100 Years, if three Men so long live, which is confirmed by the Bishop and Chapter; yet may the Successor avoid this Lease, and yet these are out of the Words of the Statutes; but if they are not to be construed to be within the Meaning thereof, the Statutes would signify nothing, and all Ecclesiastical Persons, by such Evasions, might get out of the Acts, and make what Alienations they pleased.

If a Lease be made to *A.* for the Lives of *B. C. and D.* this is a good Lease, for a Lease to one for the Lives of three others, and a Lease to three for their Lives is all one within the Intent of these Statutes; for three Lives are the Measure of the Estate, which is all the Statutes require; but a Lease for Ninety-nine Years, determinable on three Lives, seems not good within the Statute of the 1 & 13 *Eliz.* which make void all Estates, Gifts, Grants, &c. (other than for three Lives or Twenty-one Years) so that a Lease for Ninety-nine Years, determinable on three Lives, being neither of those, falls within the Disability and Voidance of the first Part of those Acts.

But a Lease by Husband seised of Lands in Right of his Wife, or jointly with his Wife, of an Estate of Inheritance for sixty Years, if they should so long live, was held sufficient to bind the Wife surviving within the 32 *H. 8.* and no Question made of it; the only Dispute there being, whether the Wife ought not to have joined in the Indenture of Lease; and that such Leases for Ninety-nine Years, determinable on three Lives, are good within that Statute, appears from the Reasoning in *(a) Whitlock's Case*; where it is adjudged, that if a Man has Power to make Leases absolutely or generally (as the several Persons comprised in the Statute of 32 *H. 8.* have) and a Proviso or Restraint comes after, (as in that Act it does) that such Leases shall not exceed the Number of Twenty-one Years, or three Lives, at the most; there a Lease for Ninety-nine Years, determinable on two or three Lives, is good within the first Part of the Act, and not made void by the last Part thereof, because it does not exceed the three Lives thereby allowed, tho' it be not directly for three Lives; but now a Lease for Ninety-nine Years, determinable on three Lives, upon the Statutes of 1 & 13 *Eliz.* is just the reverse of this; for the first Part of these Acts makes void all Estates, Gifts, Grants, &c. by the Persons therein mentioned, and the last Part saves only Leases for Twenty-one Years, or three Lives, &c. so that this Lease being void by the first Part of these Acts, and not within the Saving of the last Part, being neither for Twenty-one Years, or three Lives, shall not bind the Successor within these Acts; *sed Quære de hoc.*

But tho' these Statutes provide that these Leases shall not exceed Twenty-one Years, or three Lives, yet such Leases for fewer Years, or Lives, are good; for the Intent of the Statute was only to abridge the Power of making long and unreasonable Leases, by reducing them to such a determinate Number of Years or Lives, which they should not exceed, but might be made as much under as the Parties pleased.

### Rule 5. Of what Things Leases may be made to bind the Successor.

A fifth Rule to be observed in making of Leases upon these Statutes to bind the Successor is, that they must be made of Lands or Tenements Corporeal and Manurable, whereto Resort may be had for the Rent reserved thereout by way of Distress; for otherwise the Successor may be without any Remedy for the Rent, and so Dilapidations, Poverty, and all the other Mischiefs, the Statutes intended to provide against, be let in; therefore Leases of Fairs, Markets, Liberties, Franchises, Advow-

*Co. Jac. 76.  
Bough ver.  
Lanes.*

*Co. Car. 22.  
Smith ver.  
Tinsler.*

*(a) 8 Co. 72.  
& vide 3  
Keb. 595.*

*1 Leon. 306.  
5 Co. 6. b.  
8 Co. 70. b.*

*Co. Lit 44 b.  
47. a. 142. a.  
144. a.  
7 Co. 51.  
1 Leon. 355.  
Bro. Tir.  
Leases 17, 21  
Tit. Curat  
44, 59.*

sons,

fons, Commons, Piscaries, Offices, Hundreds, Tithes, or any other incorporeal Inheritance, tho' with Confirmation of the Dean and Chapter, or other Persons required by Law to confirm the same, will not bind the Successor.

But for the better Understanding of this Rule, it will be necessary to take Notice of some Distinctions which plainly arise out of the Books.

1. All the Books agree that a Lease for three Lives of Tithes, or other incorporeal Inheritances before-mentioned, will not bind the Successor, tho' the antient Rent be reserved, and the Lease or Grant confirmed; the Reason whereof is, that if such Lease or Grant should be good against the Successor, he would then be without the Tithes, &c. and have no Remedy for the Rent thereon reserved; for distrain he could not; because there would be no Place wherein to take any Distress, the Things leased or granted being perfectly incorporeal and invisible; an Assise he could not have, because either he had not Seisin, or if he had, yet there would be nothing to put in View of the Recognitors; and an Action of Debt he could not maintain during the Lease, because, being for three Lives, that is an Estate of Freehold, which will endure no Action of Debt so long as it continues; and so the Successor would in such Case have no Manner of Remedy for the Rent reserved, which would be against the express Provision and Intent of the several Acts.

2. It is held likewise in some Books, that a Lease for Twenty-one Years of such incorporeal Inheritances, tho' they have been usually demised, and the ancient Rent be thereout reserved, that yet this is voidable by the Successor within these Statutes; because tho' the Rent reserved be good by way of Contract between the Lessor and Lessee, and that Debt may be maintained for Recovery thereof; yet, they say, it is not such a Rent as is incident to the Reversion, nor shall pass with it to the Successor; and therefore the Successor having no Remedy for the Rent, shall not be bound by the Lease.

But this Point seems to have been shaken by contrary Resolutions since *Fewel's Case*, for some Books expressly hold such Lease for Years to be good against the Successor, because, they say, he has Remedy for the Rent by Action of Debt, and say it has been so adjudged, and take the Diversity between such Lease for Years and a Lease for Life; also they say, that the Rent issues out of the Tithes in Point of Render, tho' not in Point of Remedy, because no Distress can be taken for it; but that is supplied by the Action of Debt which lies for such Rent, and shall devolve on the Successor; and that such Rent does not lie only in Privy of Contract, as a Sum in Gross, but is incident to the Reversion, otherwise the Successor could not have it, being only privy to the Estate, not to the Personal Contracts of his Predecessor; and to this Opinion the Court inclined, but thought it a Point of great Consequence, and therefore to avoid it, gave Judgment on another Point which was clear.

3. All the Books agree that a Lease for three Lives, or Twenty-one Years, of a Manor, with the Advowson Appendant, or of Lands or Houses, and of Tithes usually let therewith, reserving the antient Rent, &c. is good, and shall bind the Successor within these Statutes; for tho' the Rent does not issue out of the Advowson, Tithes, &c. in Point of Remedy, yet the Rent is greater in Respect thereof, and the Successor has his Remedy for the whole Rent upon the Lands or other Corporeal Inheritances let therewith; (*sed Quære*, if the Tithes should be worth 2 or 300*l. per Ann.* and the Lands not above 4 or 5*l. &c.*) and *Vaughan* proves this from the express Words of 13 *Eliz.* which are, That all Leases, by any Spiritual or Ecclesiastical Persons, having any Lands, Tenements, Tithes or Hereditaments, (other than for Twenty-one Years, or three Lives, &c.) shall be void; so that the Statute plainly

plainly shews, that some Way or other Tithes may be leased for twenty-one Years, or three Lives; and if they cannot be leased singly, it must be with Lands usually letten therewith.

Therefore where the Dean and Chapter of *Norwich* leased a Parsonage and Common of Pasture, rendering Rent, and 1 *E. 6.* surrendered their Possessions to the King, and afterwards the King granted the Parsonage, without speaking of the Common of Pasture; and it was held, that the Parentee of the Parsonage should have all the Rent, and no Apportionment should be in Respect of the Common; because all the Rent issued out of the Parsonage, and nothing out of the Common.

A Bishop, having an Advowson appendant to a Manor in Right of his Bishoprick, grants the Advowson for twenty-one Years, and this was confirmed by the Dean and Chapter, yet held within the Restraint of 1 *Eliz.* and void against the Successor; because, as was said, it was not such an Hereditament whereout a Rent could be reserved; but a better Reason seems to be, because no Rent was at all reserved, and then, to be sure, neither the Predecessor nor Successor could have any Benefit thereof by way of Contract, or otherwise; nor did it appear to have been usually letten.

The Bishop of *Oxford*, having *primam Vesturam sive Tonsuram* of certain Lands, after 1 *Eliz.* lets it to the Plaintiff for three Lives, rendering the antient Rent, and dies, and his Successor, the now Defendant, enters upon him, and takes the Hay; and it was urged, that this was not like the Lease of a Fair, because this concerned Land, and was to be taken upon the Land, and so the Successor was not without Remedy, because he might distrain the Grass when it was cut; but *per Curiam* it was held, that if the Bishop had had *Vesturam*, or *primam Vesturam*, or *Tonsuram*, from such a Day to such a Day, this had been such an Hereditament as might have been leased; for there the Bishop, or his Lessee, might have mowed, and after fed it, during that Time, and then the Successor might have distrained the Cattle; but here the Bishop had only *primam Vesturam*, viz. only the cutting of the Grass once within such a Time, and then his Interest is at an End, and he cannot after feed it; so that it is no Hereditament within the Statute, whereof any Lease can be made to bind the Successor.

If a Bishop, Dean and Chapter, or any other Persons restrained by these Statutes, grant the next Avoidance of any Church which they have in Right of their Bishoprick, Deanry, &c. tho' with Confirmation of all Persons interested therein, yet the Successor shall avoid it; for this is such an Hereditament as the Statutes intended to restrain them from binding their Successors by, and no Rent can be reserved out of it; for such Grant of the next Avoidance can bring no manner of Benefit to the Successor.

It has been several Times held, that Bishops, or other Ecclesiastical Persons, are not restrained either by the 1 or 13 *Eliz.* from making Grants of Copyhold Lands in Fee, in Tail, or for Lives, or for any Number of Years, according to the Custom of the Manor, and that no Confirmation is necessary to make such Grants good, tho' they are made by a sole Corporation, as by a Bishop, Prebendary, &c.

The Bishop of *Winchester*, 5 *Eliz.* with Confirmation of the Dean and Chapter, granted an Annuity or annual Rent out of Lands, Parcel of the Possessions of his Bishoprick, with Clause of Distress to it, *pro Consilio impenso & impendendo pro Termino Vitæ suæ*, and dies; the Grantee brought Debt against the Executors of the Bishop for Arrears incurred in his Life-time; and the only Question was, whether upon the 1 *Eliz.* this Grant was void against the Successor, so that the Grantee could not maintain a Writ of Annuity against him; but only an Action of Debt

1 *Lev. 333.*  
*Corbet and*  
*Cleer, cited.*

*Cro. Eliz. 690.*  
*Armiger ver.*  
*Bishop of Nor-*  
*wich and*  
*Holland.*

*Palm. 174.*  
*Bishop of Ox-*  
*ford's Case.*  
*Co. Lit. 47. a.*  
*142. a. 186 b.*

5 *Co. 15. a.*  
10 *Co. 60. b.*  
*Cro. Eliz. 207.*  
*440.*  
1 *And. 241.*  
1 *Mod. 204.*  
2 *Mod. 56.*

4 *Co. 24.*  
*Ley 80.*  
*Comp. Incumb.*  
*253. & vide*  
3 *Co. 7.*  
*Moor, pl. 276.*  
*Sav. 66.*  
1 *Leon. 4.*

4 *Leon. 117.* *Heydon's Case.*

*Dyer 370. b.*  
10 *Co. 61.*  
5 *Co. 15.*  
*Hob. 97.*  
1 *Roll. Rep.*  
*164, 171.*  
*Cro. Car. 49.*  
11 *Co. 59.*

against the Executors of the Grantor; the Case does not appear to be adjudged, but it is cited in several Books, that the Annuity was determined by the Death of the Grantor; for tho' this was not Parcel of the Possessions of the Bishoprick, but only issuing out of them, yet if the Successor should be charged with it, this would tend to his Prejudice and Impoverishment, which the Statutes intended to prevent.

12 Co. 61.  
Bishop of  
Chester's Case,  
cited 30 Eliz.  
Rot. 346.  
Ley 72.  
Bridg. 30.  
S.C. cited.

So where a Writ of Annuity was brought against the Successor upon a Grant made by his Predecessor, and Confirmation by the Dean and Chapter, yet it was adjudged that it would not lie, because it was not averred that it had been usually granted, tho' it was averred to be reasonable; and it appears by these Cases, that if to avoid this Act a Writ of Annuity were brought against a Parson or Vicar, who prayed in Aid of the Patron and Ordinary, and upon Default Judgment is given for Plaintiff, this likewise is within the Equity of the said Act, and void against the Successor; so if a Writ of Annuity were brought against a Bishop upon Title of Prescription, or otherwise, and Judgment given against him by Verdict or Confession, yet this is restrained by 1 Eliz. because the Bishop is charged with the Annuity in respect of the Bishoprick; and therefore the Successor would be charged with the Arrears incurred in the Life of the Predecessor, as it is held 48 E. 3. c. 26. and so tend to the Diminution of the Revenues, and Impoverishing of the Church.

5 Co. 15 a.  
1 Rol Rep.  
171.

So if a Rent-charge be granted by any Corporation restrained by these Statutes, tho' this Rent-charge be not Parcel of their Possessions, yet it is against the Equity of the Statutes, and void against the Successor; for if Bishops, and other Ecclesiastical Persons, were at Liberty to grant what Rent-charges they thought fit, and that these should be good and binding upon the Successor, he might have his Possessions so clogged and incumbered as not to be able to keep up Hospitality, or sustain the Dignity of his Function, and so the good Design of these Acts be wholly eluded.

1 Vent. 223.  
2 Lev. 68.  
3 Keb. 69.  
Davenant  
ver Bishop  
of Salisbury.

In Covenant Plaintiff declared of a Lease by the Predecessor of the Defendant, in which was a Covenant, that he and his Successors would pay all Taxes during the Term, and assigns for Breach, that such a Tax was made by Parliament for the Royal Aid, and that the Plaintiff was forced to pay it, the Defendant refusing to discharge it, *unde Actio accrevit*, &c. and the only Question was, whether this were such a Covenant as should bind the Successor as incident to the Lease by 32 H. 8. for it is clear, if a Bishop had made a Covenant or Warranty, this had not bound the Successor at the Common Law, without the Consent of the Dean and Chapter; and if it should now be taken that every Covenant would bind the Successor, the Statute of 1 Eliz. would be of no Effect: But it was held, this Covenant would not bind the Successor; 1. Because it is not averred that such Covenants had been used in former Leases, as it ought to have been, to prove it an antient Covenant. 2. If this Covenant had been in former Leases, yet it could not bind to pay this new Tax by Parliament; but it must have been intended only of such as were then in Use, *viz.* Synodals, Pensions, Tenths granted by the Clergy, Procurations, &c. but it was held however, that this Covenant would not avoid the Lease.

Of Grants of Offices by Bishops, &c. within these Statutes, *vide* Tit. Offices.

# Rule 6. What shall be said a usual letting to Farm upon the several Statutes, and by what Persons.

A sixth Rule to be observed in the Construction of Leases upon these Statutes arises upon the Words of 32 H. 8. that *that Act shall not extend to any Lease of any Manors, Lands, Tenements, or Hereditaments which have not most commonly been letten to Farm, or occupied by the Farmers for the Space of twenty Years next before such Lease thereof made.* The first Construction that prevailed was, that this letting to Farm within the twenty Years ought to be by some Person who had an Estate of Inheritance therein; and therefore if the Heir in Tail were in Ward of the King for twenty Years, and during that Term the King, or his Grantee, made Leases of Lands of the Ward which had not been usually letten or occupied in Farm for twenty Years before, this letting them to Farm by the King, or his Grantee, during the twenty Years Wardship, is not such a letting to Farm within the Intent of the Statute, as will enable the Heir in Tail, when he comes of Age, to make a Lease for twenty-one Years, or three Lives, of those Lands, to bind his Issue, so if such Lease were made by Tenant by the Curtesy, Tenant in Dower, or the like, of Lands which before that Time had not been most usually letten to Farm for twenty Years, their letting to Farm of such Lands for the greater Part of twenty Years will not impower the Issue in Tail, when he comes into Possession, to make a binding Lease of such Lands within the Intent of the Statute; for the Intent of the Statute was only to make good Leases of such Parts of the Land as had been before usually letten by those who were Owners of the Inheritance, and best knew what was most proper to be let out, and what not, and therefore did not intend to establish Leases made of any other Possessions than those, which the Owners of an Estate of Inheritance therein had, for the greater Part of twenty Years, thought fit to lease to Farm; for if the Leases of Tenant in Dower, Tenant by the Curtesy, Guardian by Knight's Service, or such like, who, having only a particular Estate therein, would be for making Money of it all, and letting out the whole for Rent; if Leases made by such for eleven or twelve Years, or more, according to the Time they lived or had Interest therein, should be a letting to Farm within this Statute; then might the Issue in Tail, when he came into Possession, make a Lease for twenty-one Years, or three Lives, of the Capital Messuage or Mansion-House, or, perhaps, of the whole Estate, because those particular Tenants had so done for eleven or twelve Years, or more; and then if such Tenant in Tail should die the next Day, his Issue would not have a House to put his Head in; which never was the Intent of the Statute.

Co. Lit. 44. b.  
Dyer 271.  
Legg 106

So where the Temporalties of a Bishoprick come into the Hands of the King, and he keeps them twenty Years, or more, and during that Time lets to Farm for eleven Years, or more, Lands which had not been before accustomedly letten, and then appoints a Successor, and restores him the Temporalties, he cannot by any Lease bind his Successor, for those Lands, which had no other Warrant for his leasing thereof, than only that the King, whilst the Temporalties were in his Hands, had let them to Farm for eleven Years, or more; and he might have let the Bishop's Palace, or the Demesnes about it; and then if the Successor might likewise make a binding Lease thereof for twenty-one Years, or three Lives, and should die, or be removed soon, the Mischief intended to be remedied by the Statute, in giving the Farmers a secure and lasting Possession during their Leases, would introduce a much greater upon the Successor, by shutting him out of all the Houses and Lands belonging to the Bishoprick for twenty-

Palm. 175. 6.  
Bishop of  
Oxford's Case.

twenty-one Years, or three Lives; and so, instead of maintaining Hospitality, as the Books speak, would occasion nothing but Quarrels and Contentions; so for the same Reason, a letting to Farm by a Disseisor, or any other who has not a rightful Estate of Inheritance, tho' it be for the greater Part of twenty Years, is not a letting to Farm by such a Person as will enable the Tenant in Tail, Bishop, or other Person intended to be provided for by this Statute, to make any binding Lease of Lands which were not accustomably letten to Farm for the greater Part of twenty Years, by those who had a rightful Estate of Inheritance therein.

Co. Lit. 44. b.  
Cro. Eliz. 708.  
Mallet and  
Mallet.  
Sir John  
Mervyn's  
Case.

But as the Mischief would be great, on the one Hand, to construe the Statute in such a Manner, as would empower the Persons before-mentioned to determine of what Parts and Possessions Leases might be made good and binding against the Successors, Issues in Tail, and other Persons intended to be bound by the Act; so, on the other Hand, a Construction not less hurtful to them seems to have obtained upon the same Words of the Statute; which provides, *That it shall not extend to any Lease of any Manors, Lands, Tenements, or Hereditaments which have not most commonly been letten to Farm, or occupied by the Farmers for the Space of twenty Years next before such Lease thereof made*; upon which Words it is held, that the Lands to be leased within that Statute must be such, and such only, as have been letten to Farm, or occupied for eleven Years, or more, at one or several Times within the twenty Years next before the Lease for twenty-one Years, or three Lives, to be made; so that if Lands have been formerly let to Farm never so long, or often, yet if the Tenant in Tail, or Bishop, should keep them in his own Hands fifteen or twenty Years, these Lands cannot be leased for twenty-one Years, or three Lives, to bind the Issue or Successor, till they have undergone a Probation of twenty Years longer, and within that Time have been letten to Farm, or occupied by Farmers for eleven Years, or more; so if the Temporalities come to the Hands of the King, and he should keep the Lands usually letten in his own Hands forty or fifty Years, more or less, and then restore the Temporalities to the Successor, he must then begin to let them to Farm, till they have run out in Farmers Hands eleven Years at least, otherwise he can make no Lease for twenty-one Years, or three Lives, within this Statute. So if a Disseisor after a Lease for twenty-one Years, or three Lives, expired, enter upon the Bishop, or Tenant in Tail, and hold the Lands twenty Years, or more, and then the Bishop, or Tenant in Tail, or their Issue or Successor, enter, tho' these Lands were demisable, and actually demised, within the Statute, but just before the Disseisor entered, yet now they cannot be again leased for twenty-one Years, or three Lives, till they have been in Farmers Hands for eleven Years at least; and so it is in the Power of the King, the Disseisor, nay of the Bishop, or Tenant in Tail himself, to evade and elude the Intent of the Act, by keeping the Lands ten or twelve Years in their Hands; and tho' they die, or are removed presently, yet the Successor or Issue can have no Benefit of the Statute till after eleven Years at least.

(a) Where the Case was, that the Archbishop of York in 1604. made

These Reasonings and Instances were pressed and urged in (a) a Case by *Twisden* and Chief Justice *Keeling*, against *Windham* and *Moreton*, and they thought them so considerable, that it put them upon finding out a more easy and natural Construction.

a Lease for three Lives, rendering the antient Rent, in 1630. this Lease was surrendered, and the Lands remained unlet till 1662. when the Archbishop made a Lease thereof to the Plaintiff's Lessor, rendering the same Rent as was reserved in 1604. and died, and the then Archbishop entered, and let to the Defendant; and whether these Lands, not having been let since 1630. could be leased again, was the Question; and *Twisden* and *Keeling*, for the Reasons herein mentioned, held they might.

1 Lev. 212. 1 Sid. 316, 416. Raym. 165. 2 Keb. 213. *Pemle* versus *Stern*.

For they held, that the Clause consisted of two Parts in the Disjunctive, and if either of them were observed, it was sufficient to warrant the Leasing for three Lives, or twenty-one Years, within the Intent of the Statute; the Words are, that *that Act shall not extend to any Lease of any Manors, Lands, &c. which have not most commonly been letten to Farm*; this is the first Part of the Disjunctive, and is general; the other Part is, *or occupied by the Farmers thereof by the Space of twenty Years, &c.* and they thought this the most natural and genuine Meaning of the Words, that the Lands to be leased must either be such as have been most commonly letten, that is, such as are not reputed Part of the Demesnes of the Bishoprick, or such as have been occupied by the Farmers thereof by the Space of twenty Years, &c. that is, if the Bishop has let out Part of his Demesnes to Farm, and the Occupation of the Farmer has been approved for twenty Years together, as not any ways inconvenient to the Bishop, the Statute will presume that they are Lands fit to be let; and for the Authorities against this Opinion, *Twisden* said, in *Mallet's Case*, that Point came in unnecessarily; and *Keeling*, that it came in on a foolish Argument, and therefore was of no great Weight; and so in *Sir John Mervin's Case*, the Point never came in Question, but only *dictum fuit pro Lege*; and for my Lord *Coke*, (tho' he were a grave and learned Man,) yet he was not infallible, nor did he desire to be accounted so, and this Opinion of his was not Judicial, that if it had come to an Argument he might possibly have thought otherwise; for *Keeling* said himself was of that Opinion, till he came to consider the Case, and weigh the Inconveniencies of that Construction; and it was said, that Queen *Elizabeth* kept the Temporalities of the Bishop of *Ely* above twenty Years in her Hands, and yet no Question of his Leases after; and they said likewise, that the Lord *Coke's* Inference was false, and not warranted by the Statute, *viz.* that if it had been leased for eleven Years it would be sufficient; for the first Part of the Statute, as to leasing, seems to refer to a more antient Time; also it was held, that if the other Construction prevailed, these Lands, or any other which continued unlet for eleven Years, could never after be let again for twenty-one Years, or three Lives, because they were not most accustomedly letten, &c. by the Space of twenty Years, which makes it the more reasonable to reject such Construction; *sed Quære* if by letting them again to Farm for eleven Years, or more, the Power given by the Statute to lease for twenty-one Years, or three Lives, be not set up again; but *Quære* whether since as it appears before, the letting to Farm by the King, or a Disseisor, &c. is not sufficient within this Statute, whether likewise their keeping it in their Hands for eleven Years, or more, be of any Prejudice to the Bishop, or his Successors, or to the Tenant in Tail, or his Issue; for if the Statute only intended letting to Farm by the Bishop, or Tenant in Tail himself, then all the Objections before-mentioned seem to lose their Force, unless where the Bishop, or Tenant in Tail, keep the Lands undemised in their own Hands for eleven Years, or more.

A Lease made by the Predecessor of the Plaintiff for three Lives, rendering Rent, and confirmed by the Dean and Chapter, and the Defendant claiming under it avers, that it was the usual and antient Rent, and the Land usually demised; the Plaintiff replies, that it was usually before that Lease retained in the Hands of his Predecessors for Hospitality, and traverses *absque hoc, quod fuit magis usualiter dimissa*, &c. and it was held a good Traverse; for since 32 H. 8. appoints that the antient Rent shall be reserved, it is thereby implied that the Land should have been usually demised, otherwise the antient Rent cannot be reserved.

Another Thing required by the Statute is, that these Leases be made of Lands usually letten to Farm, &c. upon which Words it hath been

*Cro. Eliz.* 874.  
Bishop of  
Hereford and  
Scory.

*Co. Lit.* 44. b.  
6 Co. 37. b.  
*Cro. Jac.* 76.

2 Jon. 29. Moor 759. Raym 167. Stat. 66. 1 Leon. 4. 4 Leon 117;  
4 Y adjudged,



adjudged, that a Demise by Copy of Court-Roll is sufficient; for that is in Judgment of Law but an Estate at Will; and, without Question, Lands demised at Will by those who have the Inheritance, rendering Rent, are Lands accustomably letten to Farm within the said Act, and so it was ruled 7 *Eliz.* in Sir *James Mervin's* Case, where Tenant in Tail let a Copyhold by Indenture, rendering the same Rent as before, and held a good Lease within 32 *H. 8.* and *Williams* said, he had known it thrice so adjudged in his Time, in the Case of Tenant in Tail.

*Moor* 199.  
5 *Co.* 5. *b.*  
Lord *Mont-joy's* Case.

But where Tenant in Tail had Power, by a particular Act of Parliament, to make Leases for Life, Lives, Years, or at Will after the Custom of the Manor, yielding the true and antient Rent, &c. and he made a Lease both of Freehold and Copyhold by a Deed at Common Law, reserving such a Rent, this was held not to be warranted by the Statute as to the Copyholds, because the Statute speaks of Leases at Will by the Custom of the Manor; which imports, that the Statute did not intend that Copyholds should be demised otherwise than they were before the Statute, and that was by Copy of Court-Roll, not by a Lease for Years, and the Rent to be reserved thereon was customary Rent, not Rent upon a Lease for Years at Common Law.

### Rule 7. What Rent is to be reserved: And herein,

#### 1. That there must be a Rent reserved.

*Moor* 593.  
1 *Leam.* 306.  
*Carter* versus  
*Claypole.*  
*Sau.* 128.

As to this the Statute is exprefs, that a Rent must be reserved; and therefore where the College of *All Souls* in *Oxford* made a Lease without Reservation of any Rent, tho' it was but to try a Title, yet it was held void, the Statute being exprefs and positive; and therefore no Construction or Pretence can be urged to avoid the Statute; but in that Case it did not appear that no Rent was reserved, but only the Plaintiff had not shewn that there was any reserved, and yet there might be, in the Lease; and if not, the Defendant ought to shew it; and so the Exception disallowed.

#### 2 That this Rent must continue due, and be payable to the Lessors and their Successors.

5 *Co.* 6. *a.*

This also is so strictly required by the Statute, that it hath been held, that if a Bishop, Tenant in Tail, &c. make a Lease of Land, the antient Rent whereof was 10 *l.* and reserve but 5 *l. per Annum* during his Life, and 10 *l. per Annum* after his Death, to the Issue or Successor, yet this Lease shall not bind, because the Rent originally reserved was not pursuant to the Statutes; tho' there can be no Pretence of Prejudice to the Issue or Successor, more than if the Bishop, or Tenant in Tail, &c. should release the Rent, or any Part of it, during their own Lives, which surely they may do; *ideo Quare.*



3. That such Rent must be the same, or more in Quantity than hath been reserved within twenty Years next before such Lease made: And herein,

1. What shall be said to be the antient Rent where Variety of Rents have been reserved, or something formerly reserved now omitted or varied.

As to this, where Variety of Rents have been reserved, as formerly 10*l.* then 20*l.* then 30*l.* and lastly 40*l.* per Ann. or *contra* formerly 40*l.* then 30*l.* then 20*l.* and lastly 10*l.* per Ann. the 10*l.* in the one Case, and the 40*l.* per Ann. in the other Case, are the Rents to be reserved on any new Lease to be made; but with this Diversity between Leases made by Virtue of the several Statutes before-mentioned, and Leases by Virtue of Powers in private Conveyances and Settlements; for upon Leases made by Virtue of the several Statutes before-mentioned, this was the Measure immediately after these Acts passed, and must continue so still; because the same Acts being to warrant every successive Lease as well as the first, there can be no Variation of the Rent in any other Lease to be made from the Rent, that, upon Construction of those Statutes, was in the first Lease, made by Virtue thereof, settled to be the antient and accustomed Rent, and consequently the Variety of Rents in such Leases must have been only before the Statutes; but upon Leases made by Virtue of Powers in private Conveyances and Settlements at this Day, reserving the old and accustomed yearly Rent, or the most antient and accustomed yearly Rent, there the Rent reserved on any Lease then in Being, or upon the Lease made last before such Settlement or Conveyance, seems to be the Measure of the Reservation upon any Lease after to be made by Virtue thereof; for the Intent of such Power, as well in such Settlements as upon the several Acts before-mentioned, was only that they, who were to make Leases by Virtue thereof, should not put the Estate in any worse Condition, than it was the Time of such Settlement, or of those Acts made, but keep it in the same Plight and Condition as it then respectively was; and the Rent reserved last before the making of such Settlement, or of those Acts, may well be called old or ancient in respect of the new Rent to be reserved on such Lease, to be made after such Settlement, or after those Acts; but the Lord Cowper, in the Case of Lord (a) *Mobun* and *Orby*, seemed to make a Doubt of this Construction of the Words *antient and accustomed Rent*, and thought the last Rent no certain Rule to go by; for suppose it were leased once at a greater, and twice at a lesser Rent, he thought the antient Rent must be that reserved on the first Lease, for the two last might be made by a Tenant in Fee, who was not bound to reserve the antient Rent, but might let it for nothing, if he pleased; but upon the 32 *H. 8.* or the same Words in private Powers, *viz.* so much yearly Rent, or more, as hath been most accustomedly yielded or paid within twenty Years next before such Lease thereof made; if a greater Rent had been reserved before the twenty Years, yet the Reserved within the twenty Years, tho' it were less, must be the Measure of the Reservation upon Leases to be made by Virtue of that Statute, or of private Powers, worded in the same Manner; but if within the twenty Years it had been let once at a greater, and twice at a lesser Rent, then the Question will remain, which of the Reservations will be the Measure of the Rent to be reserved on any two new Leases to be made; and how far the Opinion of my Lord Chancellor Cowper will outweigh the Opinions of my Lord Ch. Just. Hale and

*Hard. 325, 326. Morice ver. Antrobus per Hale.*

(a) 2 *Vern.* 531, 542. *Preced. Chan.* 257. *S. C.*

and *Holt* is considerable, tho' their Opinions seem to fix a standing Rule to go by, whereas his leaves it at great Uncertainty, from which no Rule can be formed; for it may have been let twice formerly at a less Rent, and once, on the last Lease, at a greater; and if the first Reservation in this Case, being greater, shall be the Rule, why should not the two first, in this Case, tho' they are lesser; for his Reason seems to turn upon the Priority and Antiquity of the Rent, so that the first Rent, according to his Opinion, and the last Rent, according to their two Opinions, are to be the Measure of the Reservation.

6 Co. 37.  
Cro. Jac. 76.  
Co. Lit. 44. b.  
Moor 759.  
Dean and  
Chapter of  
Worcester's  
Case.

In some Cases Leases, by Virtue of these Statutes, will be good, tho' there be an Omission of Things formerly reserved, or a Variation in the Rent reserved in Point of Time; therefore where the Dean and Chapter of *Worcester* were seised of the Manor of *H.* in Fee, in Right of their Church, of which Manor one *G.* was Copyholder for Life, under the antient Rent of 8 s. and 8 d. payable at the four Quarter-Days of the Year, and Heriotable at the Death of the Tenant, and the Copyholds of that Manor were grantable by Custom for three Lives; the Dean and Chapter 24 *Eliz.* by Indenture, under their common Seal, demise the said Lands to *G.* and his Assigns for the Lives of *A. B.* and *C.* and the Survivor of them, rendring 8 s. and 8 d. Half-yearly, and without Reservation of any Heriot; and after this Lease made the Dean dies, and his Successor and the Chapter enter to avoid this Lease upon 13 *Eliz.* (amongst other Reasons,) 1. Because the antient Rent was not reserved by Reason of the Loss of the Heriot. 2. Because the Rent was not payable, as it used to be; for before it was payable Quarterly, and now it is reserved payable Half-yearly, which is not so beneficial to the Successor; but it was adjudged, that notwithstanding these Objections the Lease was good, and should bind the Successor; for the 13 *Eliz.* does not avoid any Lease, if the accustomed Rent, or more, be reserved; and here the accustomed Rent is reserved, and the Omission, or Loss of the Heriot, is not material, because that was not a Thing Annual or depending upon the Rent, but perfectly casual and accidental. 2. That tho' the Rent was formerly reserved Quarterly, and now Half-yearly, yet the Lease is good, and so would have been if it had been reserved only Yearly; for the Words of the Act are, *whereupon the accustomed yearly Rent, or more, shall be reserved*; so that if the Rent be reserved Yearly, the Words of this Act are satisfied, and this Word *Yearly*, not being in *Mountjoy's* Case, makes the Difference; and yet this Rent had not all the beneficial Qualities the other Rent had; for whilst it continued Copyhold, the Lord might have entered for a Forfeiture upon the Denial or Non-payment of the Rent, which now, upon this Lease thereof, at Common Law, he cannot do.

5 Co. 4. b. 5. b.

5 Co. 4. b. 5. b.

If the Rent was antiently payable in Gold, and it is now reserved payable in Silver, this Lease shall not bind the Successor; for the Variation may be prejudicial to the Heir or Successor, or by the Fall of Silver; and tho' the same may be said were it reserved in Gold, as it used to be, yet by continuing the Species of Reservation formerly made, they have used all the Precaution the Statute required, and the accidental Fall after can be no ways imputed.

5 Co. 4. b.

But if a Quarter of Corn was antiently reserved, and now a Lease is made, reserving eight Bushels of Corn, this is good; for the Reservation is the same both in Quality, Value and Nature, and differs only in Words.

Palm. 106.  
Eusden and  
Dennis.

A Precentor or Chanter of *St. Paul's*, being seised of the Parsonage of *S.* in *Jure Cantariæ*, leased a Portion of Tithes for two Years, rendring 8 l. *per Ann.* and reserving Pasturage for a Colt in the Land of the Lessee, and the Lease being expired, his Successor made a Lease for Twenty-one Years of the said Portion of Tithes, rendring 8 l. *per Ann.* but omitted the Running of the Colt; yet the Lease was held good, be-

cause

cause it was a Thing reserved out of the Lands of the first Lessee only, which the Successor could not reserve, such first Lessee not being his Tenant of the Tithes; otherwise perhaps if the Reservation had been general.

2. In what Manner such Reservation is to be made.

All that seems necessary here to be observed is, that there must be a particular Mention or Specification of the Sum intended to be reserved, as well upon Leases to be made by Virtue of these Statutes, as upon Leases by Virtue of Powers in private Conveyances and Settlements; for otherwise the Heir, or Successor, would be put to infinite Trouble, Vexation and Expence, if the Reservation might be allowed to be made in the same or as general Terms, as the Power itself was; and the Necessity of averring and proving what was the antient and accustomed Rent to lie upon them.

Therefore where a Bishop was seised, in Right of his Bishoprick, of three Manors which had been usually let together at the Rent of 32 *l. per Ann.* and made a Lease of the said three Manors, except such and such Parts thereof, rendring the antient usual accustomed yearly Rent, and the Rents and Services at the Days and Times usually accustomed, without specifying any Rent or Sum in particular; it was adjudged that this Lease should not bind the Successor, because the usual and accustomed Rent was 32 *l. per Ann.* where all the said three Manors had been let without any Exception; whereas now Part being excepted, that which was the usual and accustomed Rent for the Whole, cannot be said the usual and accustomed Rent for Part; or when Part is excepted, and then the Reference being general to the ancient and accustomed Rent, nothing at all is reserved, and by Consequence the Successor not bound by such Lease; this appears to be the Reason in the Book for the Avoidance of that Lease, and being sufficient for the Purpose, there needed no other: But it will appear by the following Case, that if the whole three Manors had been let without any Exception, yet the Reservation in such general Terms would have been sufficient to have avoided the Lease.

*Cro. Car. 95.  
Owen ver.  
Thomas.  
3 Keb. 380.*

*Fitton Gerard*, Tenant for Life, with Power to make Leases for Twenty-one Years, or three Lives, so as upon every Lease of such Lands as have been usually letten, and Fines taken for them, the old accustomed Rent, or more, be yearly reserved, and so as upon every Lease of other Lands not usually letten, nor Fines taken for them, there be reserved the best improved Rent that can be gotten for the same, and the Lessees to execute Counterparts thereof; *Fitton* by Indenture 21 Decemb. 1702, demises to the Defendants all such Lands as have been usually letten, and Fines taken for them for Ninety-nine Years, if three Persons should so long live, with a Reservation in these Words, *Yielding and Paying therefore the respective old and accustomed yearly Rents*; and if this Reservation was pursuant to the Power, was the Question; and my Lord Chancellor *Cowper*, being assisted with the two Chief Justices *Holt* and *Trevor*, decreed, that this Lease was not good to bind the Remainder Man; but my Lord Chief Justice *Holt* differed in Opinion, and held this Lease good. 1. Because the Reservation being in the very Words of the Power, if the Power was good, the Reservation must be so too, for the same Words must have the same Meaning in both; and if a Sum certain had been reserved, yet it must have been averred to have been the antient and accustomed Rent, or more; and therefore this Reservation, in the Words of the Power, may be helped by such an Averment, and consequently is good. 2. That if any of the Lands comprised in this Lease had not been antiently let, tho' the Reservation in such Manner,

*Trin. 1706.  
in Canc. Lord  
Mokun and  
Orby.*

as to them, would be void, yet the Lease would remain good as to the others. 3. Tho' all the Lands were comprised in this one Deed of Lease, yet the Remainder Man, who is to have all the Deeds in his Custody, might easily distinguish them as well as if they had been let by several Leases, as they were formerly; but my Lord Chancellor and *Trevor* held this Lease void against the Remainder Man, and not pursuant to the Power. 1. Because it was never intended that the Words of the Power should be turned *verbatim* into a Reservation in Leases; and to say, that if the Words in the Power are good, they cannot be had in the Reservation, is a strange Position. Suppose in the Power to make Leases it were provided, that in every such Lease there should be inserted such Covenants as are usual in Leases in that County, and a Lease were made in the very Words of the Power, would this be good? Certainly not; nor could it be aided by any Special Verdict, finding the Covenants usual in that County. 2. The Question in this Case is not between the Lessor and Lessee, (between whom perhaps the Lease may be good, and the Rent recoverable;) but the Question is, as to the Remainder Man, whose Remainder and Inheritance is to be charged by a Power which is to be taken strictly, and is not pursued; for the Intent thereof was, that a certain Rent might be reserved upon every Lease to be made, so that he in Remainder may know how to come at it, and form his Action for the Recovery thereof, which, as this Reservation is, he cannot do, but will be involved in perpetual Controversy and Uncertainty; for he must not only aver and avow that the Sum he distrains for is the antient Rent, but must also prove it; for if the Tenant can shew another more antient Rent, then he may nonsuit the Remainder Man, and so *toties quoties* he distrains or avows for any Rent, the Tenant, by shewing that another Rent has been reserved, may baffle him and keep the Land in spight of his Teeth, without any Rent at all, till he is so lucky as to hit upon the true Sum reserved upon every several Lease, which will be very difficult for him in Remainder to do, and is no ways agreeable to the Power; but if a certain Sum had been reserved, and the Counterpart shewn under the Tenant's Hand, he must either shew a more antient Rent, or it will be presumed for the Plaintiff; and if he should shew one more antient, the Consequence of that will be the Avoiding of his own Lease, which, to imagine he should attempt, is absurd; and without defeating of the Lease he can never avoid Payment of the Rent when it is reserved in Certainty; but as it is reserved here, it is wholly uncertain; and my Lord Chancellor said it was the first Attempt that ever was made to delegate the Power generally that was to have been executed particularly, and was a new Invention tending to introduce Perjury, Forgery and Frauds, and therefore was not to be countenanced.

Lord Mowbray  
ver. Orby.

So in the same Case, where Tenant for Life had made a Lease of the Lands not usually letten, reserving therefore the best and most improved Rents for the same, according to the Words of the Power; this was held so utterly uncertain, that nothing was offered to support it.

Lewson ver.  
Piggot.

But a Case was therein cited, where Mr. *Venables* of *Cheshire* had Power, by a Settlement, to make Leases of Lands antiently demised, reserving, at least, 12 *d.* for every *Cheshire* Acre; and he made a Lease of all the Lands antiently demised, *reserving all the Rent intended to be reserved*; and tho' these Words were very general and uncertain in themselves, the Reservation was held good, because it might easily be ascertained by the Reference of 12 *d.* at least, for every *Cheshire* Acre, because it is known what a *Cheshire* Acre is; and that may by Admeasurement be at all Times ascertained, and depends not upon uncertain Evidence.

Hard 325-6.  
Morris and  
Antrobus.

A Precentor of St. Paul's made a Lease of Lands, the antient Rent whereof was 40 *l.* and a couple of Capons, and he now reserves only the 40 *l.* and takes a Covenant from the Lessee to pay yearly, over and above the

the 40 *l.* a couple of Capons, or 6 *s.* and 8 *d.* yet this was held such a Covenant as amounted to a Reservation, and therefore the Lease good against the Successor; but the Truth was, the Lease there was made to Baron and Feme, and the Baron only covenanted in that Manner, which would not bind his Wife if she survived; and for that Reason neither would the Successor be bound.

3. Where the Addition of more Land, with or without the Addition of more Rent, shall abate such Leases.

Tenant in Tail, or any Spiritual Person, in Right of the Church, seised of a Manor whereof the Copyholds and Services have not usually been let, but only the Freehold Demesnes, and they make a Lease of the whole Manor, reserving such a Sum only as amounted to the antient Rent; this Lease shall not bind the Issue or Successor; but the Reservation in that Case was several, *viz.* reserving the antient Rent in Certainty for the Lands antiently let, and another distinct Rent for the Copyhold and Services, not usually before letten; and therefore the Lease was good as to the Lands antiently let, because for them the antient Rent was reserved.

*Ley 74. 77.  
Cro. Eliz. 342.  
341. Tanfield  
ver. Rogers.*

A Prebend usually let, with Exception of all Crab Trees, &c. at 17 *l. per Ann.* was now let for three Lives at that Rent, without the Exception, and adjudged that the Lease was void to bind the Successor, because there was more let than had been antiently; for by the Exception of the Trees, the Fruits and Boughs, and Soil itself, were excepted, which now by this Lease pass to the Lessee; and so more being let than formerly, it is not warranted by 32 *H. 8.* and then the Rent thereout reserved cannot be said to be the antient Rent, and by Consequence is made void against the Successor by 13 *Eliz.*

*Cro. Jac. 458.  
3 Bulf. 292.  
Smith ver.  
Bole.*

Tenant in Tail, by Special Act of Parliament having Authority to make Leases, &c. *Reddendo verum & antiquum Redditum*, makes a Lease of Lands antiently demised, and of an Acre of Waste not before demised, reserving the antient Rent, and so much more as the Acre of Waste was worth; and yet held, that this Addition of Acre of Waste spoiled the whole Lease, because the Rent being intire in the Reservation issued out of the Whole, and out of every Part thereof, and the Acre of Waste being never demised before, it could not be said *verum & antiquum Redditus*, which issued out of that which never before yielded any Rent at all.

*5 Co. 5.  
Moor 197.  
Lord Mount-  
joy's Case.  
Co. Lit. 44. b.*

If two Farms have usually been let severally, the one for 20 *l.* and the other for 10 *l.* and a Bishop, Tenant in Tail, &c. makes a Lease of both together, rendring 30 *l. per Ann.* and die, &c. this Lease shall not bind the Issue or Successor, for the antient Rent issuing formerly out of the two Farms severally, according to the aforesaid Proportion, now issues wholly out of each, and out of every Part of each; and where before the Rents were several, now are they entire; and it was said to be but Wantonness, to save Parchment and Paper, to join them together in one Lease, when they were usually, and ought to have been, let severally; and there was no Necessity or Colour of Convenience to join them in one Lease; and if he might join two, he might as well join twenty, which would be very prejudicial to the Successor, since it is a kind of Seigniorie and Prerogative to have several Tenants; therefore if 40 *l. per Ann.* had in that Case been reserved for the two Farms, which is 10 *l. per Ann.* more than the antient Rent of both; yet this shall not bind, not because more is reserved than the antient Rent, (for that the Statute allows,) but because by their being joined, if the Tenant should prove Insolvent, the Loss would be the greater upon the Issue or Successor.

*5 Co. 4. 5.  
1 Co. 139.  
Cro. Car. 23.  
3 Keb. 380.*

Devisee

1 Leon. 147,  
148.  
Read and  
Nasb.

Devisee for Life, with Power to make Leases, whereupon the old and accustomed yearly Rent shall be reserved, entered and built a new House upon the Land, and then made a Lease for twenty-one Years, reserving only the antient Rent, &c. and argued, that this could not be said to be the antient Rent, because Part of it is issuing out of the new House; but the Justices would not suffer it to be argued, but held the Rent to be well enough reserved.

4. Where a Reservation of the whole Rent, or only pro Rata on a Lease of Part, shall be good.

1 Mod. 203.  
2 Mod. 57.  
3 Keb. 192.  
372, 583, 595.  
Threadneedle  
ver. Lynam.

On a special Verdict the Case was in Substance no more than this; a Bishop seised of two Manors in Right of his Bishoprick, which had usually been let for 67 *l.* 1 *s.* 5 *d.* *per Annum*, now makes a Lease for twenty-one Years of one of those Manors only, reserving the whole Rent; and if this was a good Lease within the Statute 1 *Eliz.* was the Question: The Objections against it were; 1. That the Remedy for the Rent was not so ample and beneficial as it was before; for before the Rent issued out of both, now out of one only, and the Statute is to be taken strictly, to prevent Dilapidations and Decay of Spiritual Livings. 2. That this was not the old accustomed Rent, because it did not issue out of the same Lands, but out of less; and if that be allowed, you may leave but a Moiety or quarter Part, or but one or three Acres, to answer 100 *l.* *per Annum*. 3. It was objected, that now the Bishop could not lease the other Manor at all; for if for the antient Rent, perhaps it is not worth so much; if for less, it is not the antient Rent; or supposing he could lease the other Manor for less Rent, yet the antient Rent, which the Statute chiefly designed to provide for, will not be at all the better secured; for now, being reserved out of one Manor only, that will be the only Fund to answer it for the future; and if the Value of Lands should fall, as probably they may, there will be no sufficient Security or Distress for the old Rent, tho' perhaps the new Rent, being less, will be abundantly secured; and of this Opinion was *Vaughan* and *Ellis*; but *Atkins* and *Wyndham* held it a good Lease; and after the Death of *Vaughan*, *North* being of the same Opinion, it was adjudged a good Lease, and this Judgment affirmed in *B. R.* upon a Writ of Error; for the antient Rent being reserved, the Statute is satisfied, and what is not in Lease is in the Bishop's own Hands; and tho' the Distress for the antient Rent be not so large, yet the Bishop cannot complain, having the Residue of the Lands in his own Hands, or out upon another Lease; and by *Wyndham*, if a Bishop should enlarge a Garden or Orchard, it would be unreasonable so to tie him up, as to force him to hold the Residue of the Tenancy in his own Hands, and never suffer him to demise it again, because he cannot reserve the antient Rent, as that issued out of every Part of the old Land; but he agreed, that if the Bishop in this Case had made a Lease of both Manors, reserving the antient Rent out of one of them only, this would not have been good to bind the Successor, because he departed with the whole Land chargeable with the antient Rent, and yet confined the Successor's Remedy for such Rent to Part of the Lands only; but in this Case he having the Residue of the Lands in his own Hands, it is clearly out of the Mischief of the Statute.

5 Co. 5, 6.

If Lands usually let at such a Rent descend to two Coparceners in Tail, each may let her own Part, reserving Rent *pro Rata*; for it would be unreasonable that the Frowardness or Pervertness of one Sister, in not complying to join in a Lease with the other Sister, should hinder them both from making Leases at all; and the Descent, which caused the Coparceny, was an Act of Law, which they could not prevent or hinder,

hinder, and the Acts of Law do no Injury to any one. So if a Manor was usually let at 10 s. *per Annum* Rent, and a Tenancy escheats, and then a Lease is made of the whole Manor, reserving 10 s. *per Annum*, this is good, tho' the Rent issues also out of the Tenancy, and that never was in Lease before; but the Escheat was the Act of Law, and by that the Seignory being extinct ought not to turn to the Prejudice of the Lord; but if the Lord had purchased the Tenancy, he could never have leased it within 32 H. 8. or the other Statutes, because the Purchase was his own Act, and therefore the Tenancy having never been leased before, no antient Rent can be reserved thereout, no more than a Manor which had never been leased can now be leased by Virtue of any of those Statutes.

The Books are not agreed, whether a Bishop, Tenant in Tail, or any Spiritual Person, &c. of Lands usually let for a certain Rent, may make a Lease for Part thereof, reserving Rent *pro Rata*; but the better Opinion seems to allow of such Leasing, because this in Effect is the antient Rent; and otherwise, perhaps, they could not lease at all, if they had not a Power of dividing the great Farms; and *Mountjoy's Case*, which is contrary, they say, was adjudged upon a private Act of Parliament for enabling a particular Tenant in Tail to make Leases, which neither his Estate nor the Law would allow of, (as the Lease there was for 300 Years,) but upon the other Statutes, if all the Circumstances thereby required are observed, a Lease of Parr, rendering a proportionable Rent, seems to have no Inconvenience in it, or be any ways against the true Meaning of the Statutes.

*Co. Lit. 44. b.*  
*3 Keb. 519.*  
*380.*  
*5 Co. 4. 5.*

### Rule 8. That such Leases must not be made without Impeachment of Waste.

The last Rule to be observed in making of Leases upon these Statutes is, that they must not be made without Impeachment of Waste; and tho' this is expressly provided for in 32 H. 8. only, yet it hath been resolved upon the 13 Eliz. and held upon the 1 Eliz. that the several Persons therein respectively mentioned are by the Equity thereof restrained from making Leases dispunishable of Waste; for if, as the Preamble speaks, long and unreasonable Leases are the chiefest Causes of Dilapidations, and the Decay of all Spiritual Livings and Hospitality, much more would they be so if they were made dispunishable of Waste; and therefore those Statutes being made to prevent such unreasonable Leases for the future, must by Consequence prohibit their Power of committing or suffering Waste; but if Bishops should not be restrained by 1 Eliz. from making such Leases, yet they must at least be confirmed by the Dean and Chapter, otherwise they will be void by 32 H. 8.

*Co. Lit. 44. b.*  
*45. a.*  
*6 Co. 37. a.*  
Dean and  
Chapter of  
*Worcester's*  
*Case.*  
*Palm. 468.*  
*Comp. Incumb.*  
*357.*

And altho' they are confirmed, yet if the Lessee should go about to commit Waste, he may be stopped by Prohibition, and attached if he persist in it; for so may the Bishop himself, or any Ecclesiastical Person, if they commit Waste, either in cutting down the Timber Trees, or pulling down or defacing of the Houses or Possessions of the Church; and such Waste is also a good Cause of Deprivation; and as the Bishop, or other Ecclesiastical Person, cannot justify the doing of such Waste, other than for Reparations, Fuel, or such like Necessaries, no more can their Tenants or Lessees, who derive under them.

*11 Co. 49.*  
*98. b.*  
*3 Bulf. 91.*  
*Moor 917.*  
*Zaker's Case.*  
*2 Rol. Abr. 813.*  
*Hob. 36.*  
*Drury versus*  
*Kent.*  
*3 Inst. 304.*  
*Godb. 259.*  
*2 Bulf. 279.*

But where a Prohibition was moved for, to hinder a Parson from digging of Lead and Coal-Mines in his Glebe, the Court denied it, because he having the Fee in him in as high a Manner as ever any Body will have it, if he cannot open the Mines, they will never be opened at all; nor is

*1 Sid. 152.*  
*1 Lev. 107.*  
*1 Keb. 557.*  
Count of  
*Rutland's*  
this Case.



this opening of Mines any Cause of Deprivation by the Canon Law; and the Reason of prohibiting the cutting down of Trees in the Church-yard by 35 E. 1. is, because they were planted in Defence of the Church, and also because such cutting them down is Waste; and it is said in one Book, that the Parson hath such an Estate in him, that he may maintain an Action of Waste, for Waste in cutting down Trees by his Termors.

6 Co. 37.

Cro. Car. 95.

*Note*; Leases may be made without Impeachment of Waste two Ways; 1. Expressly by Words in the Lease, declaring the same: Or, 2. Impliedly by Construction of Law; as if a Lease be made for Life, the Remainder for Life, this is dispunishable of Waste, and so not warranted by the Statutes; because in Waste the Place wasted is to be recovered, as well as treble Damage, which the Reversioner in this Case cannot do, without destroying the intermediate Estate for Life.

6 Co. 37.

But if a Lease be made to one for three Lives, this Lease is good, because it is not dispunishable of Waste, and the Occupant, if any happen, shall be punished for Waste within the Statute of *Gloucester, cap. 5.* which gives an Action of Waste against any one that held in any Manor for Term of Life or Years; and an Occupant in this Case holds for Term of Life.

### (F) Of Leases by Parsons, Vicars and others, With respect to other Qualifications.

AS to Leases made by Parsons, Vicars and others, having Benefices or Promotions with Cure of Souls, as to which these Things are to be observed.

6. Lit. 42

Comp. Incumb.  
559.

1. That Parsons and Vicars are expressly excepted out of 32 H. 8. so that they are not, as other sole Corporations, enabled by that Statute to make any Leases to bind their Successors without the Confirmation of the Patron and Ordinary, but remain as they did perfectly at Common Law, for any Thing in that Statute. 2. That they are not restrained by 13 Eliz. from making Leases for twenty-one Years, or three Lives; but then such Leases must not only be confirmed by the Patron and Ordinary, but must also be made with Conformity to the eight Rules or Qualities mentioned, otherwise they will not bind the Successor. 3. They, as well as others, are restrained by 13 Eliz. from making Leases for any longer Time, notwithstanding any Confirmation, or Conformity to the Rules before-mentioned.

Auer, H. 856.

Cro. Eliz. 775.

1 Rd. Abr

476.

1 yer 292,

293.

But it is not necessary that the Lessor be a Priest; for if a meer Layman be instituted and inducted to a Benefice, and make a Lease for twenty-one Years, or three Lives, which is confirmed by the Patron and Ordinary, and then the Incumbent is deprived *quia mere Laicus*; yet the Lease remains good, and shall bind his Successor, because it was made by a *Parson de Facto pro Tempore*, whereof the Law takes Cognizance, by the Solemnity of his Institution and Induction; and People can take Notice of no other; so if the Parson were after deprived for contracting of Matrimony, when the Law was that Priests could not marry, or for not reading the Articles within two Months, &c. yet their Leases being confirmed by the Patron and Ordinary remain good against the Successor, as well since the Statutes before-mentioned, as they did at Common Law before the making thereof; because being made by a lawful Incumbent *pro Tempore existente*, they ought not to be impeached by any subsequent Act or Neglect of the Parson.



But if he who makes such Lease be but a supposed Incumbent, or be in a Church by a Super-Institution, or the like seeming Title, and so be reputed the legal Incumbent, he cannot make a Lease to bind after his Death, or the Death of the true Incumbent; therefore where *A.* was made lawfully Bishop of *Offery* in the Time of *Edw. 6.* and after, in the Time of *Queen Mary*, *B.* was consecrated Bishop of that Diocese, living *A.* who was not deprived, and then *B.* made a Lease of Parcel of the Possessions of the Bishoprick, and then *A.* died, and *B.* survived him about three Years; yet after his Death it was adjudged, that this Lease should not bind the Successor, because it was a voluntary Act, and tended to the Impoverishing of the Successor, and *A.* not being deprived, continued Bishop still; so that the Consecration of *B.* was a meer Nullity, and never made him Bishop of that Diocese; but yet they held, that all Judicial Acts done by *B.* as Institutions, Certificates, &c. were good, because they were necessary, and could then be performed by no other.

*Cro. Jac. 552.*  
*Palm. 22.*  
Bishop of  
*Offery*'s Case.

So if one were appointed Bishop of a Diocese, but never ordained or consecrated, (as, it is said, in the Time of *Ed. 6.* some were not,) then Leases made by such Bishops, tho' confirmed by the Dean and Chapter, will not bind their Successors; because for Want of Ordination and Consecration they are no Bishops at all, and consequently their Acts null and void in themselves; but if one were lawful Bishop at the Time of making such Lease, no Deprivation after will avoid the Lease, because there was nothing wanting when it was made, and the Deprivation after shall not impeach that which was good in itself before.

*Bro. Tit.*  
*Leases 68.*

If the Incumbent, be he Clerk or Layman, were under the Age of twenty-one Years at the Time of making a Lease, yet shall not his Successor avoid it for this Cause, if there was nothing else wanting; for tho' he ought not to have been admitted under Age, yet after such Admission he continues rightful Parson till deprived, and then all Acts done by him in the mean Time continue good and unavoidable; also in his Politick Capacity, as Parson, his Age is not material nor imputable.

*Bro. Tit. Age*  
*80.*

Tho' Leases made by Parsons or Vicars be in all Respects well made, yet by Non-residence they become void by Virtue of the Statute 13 *Eliz. cap. 20.* which is as followeth; *viz.* 'That the Livings appointed for Ecclesiastical Ministers may not by corrupt or indirect Dealings be transferred to other Uses, be it Enacted, That no Lease hereafter to be made of any Benefice or Ecclesiastical Promotion with Cure, or any Part thereof, and not being impropriated, shall endure any longer than while the Lessor shall be orderly resident, and serving the Cure of such Benefice, without Absence above eighty Days in any one Year, but that every such Lease immediately upon such Absence shall cease and be void, and the Incumbent so offending shall for the same lose one Year's Profit of his said Benefice, &c. and that all Chargings of such Benefices with Cure with any Pension or Profit out of the same to be yielded or taken, other than Rents upon Leases to be made according to the Meaning of this Act, shall be utterly void: Provided, That every Parson, by the Laws of this Realm allowed to have two Benefices, may demise the one of them, upon which he shall not be then most ordinarily resident, to his Curate only that shall there serve the Cure for him; but such Lease shall endure no longer than during such Curate's Residence without Absence above forty Days in any one Year.'

This Statute, tho' it extends only to those who have the Cure of Souls, yet by reason of the Multiplicity of Parsonages and Vicaridges in *England*, hath been held to be a general Law, whereof the Judges are bound to take Notice, without pleading of it.

*2 Kel. Abr. 467.*  
*Telv. 106.*  
*1 Broc. v. 203.*  
*4 Co. 120.*

Upon an Action of Trespafs brought, and Not guilty pleaded, the Jury found the Defendant Vicar of *D.* and that he such a Day leased his Vicaridge to *J. S.* for three Years, rendering Rent, which *J. S.* assigned one Acre, Parcel thereof, to the Plaintiff, and that the Defendant

*Telv. 106.*  
*1 Broc. v. 203.*  
*Jerning ver.*  
*Ha. th. wait.*

was absent several Quarters in one Year, viz. sixty Days in several Quarters; and it was adjudged for the Defendant, that this was such an Absence as avoided his own Lease within that Statute.

Noy 116.  
Sidner ver.  
Calvert.

So it is said to have been adjudged, that if a Parson be absent at several Times, viz. ten Days at one Time, and twenty Days at another, and so till eighty Days be fulfilled in one Year, that this is such a Non-residence within the Statute as shall avoid his Lease.

1 Bulf. 111.  
Sheppard ver.  
Twanlie.

And yet where it was found by Special Verdict, that a Parson made a Lease of his Glebe and Tithes, and was absent by the Space of eighty Days in a Year; yet because it was also found that he did upon all Occasions resort to his Parish, and performed Divine Service in the Church four Days in a Week, and duly served the Cure thereof, tho' he lived in another Parish, which was a Non-residence within the Statute II. 8. yet this was not such a Non-residence as should avoid his Lease within the Statute of 13 Eliz. for that they held must be a Non-residence for eighty Days together at one Time in the Year.

Degg 126.

By this it appears, the surest way to avoid the Lease (if the Case will bear it) is to alledge the Absence for eighty Days together, because then the Cure must most certainly be neglected; but since it also appears, that if the Cure were not neglected, tho' the Absence were for eighty Days in a Year at several Times, that this should be no Avoidance of the Lease; therefore the other Cases, which hold the Absence at several Times, till eighty Days be accomplished in a Year, sufficient to avoid the Lease, must be intended such an Absence as was accompanied with the Neglect of the Cure; otherwise the Cases will not be consistent and uniform.

Degg 126.

And note; Where any Lease becomes void for Absence above eighty Days, no Confirmation of the Patron and Ordinary can save it.

Cro. Eliz. 88.  
Gosnall and  
Kindlemarsh.  
Cro. Eliz. 490.  
Earl of Lin-  
coln ver. Hof-  
kins.

If an Information be brought on the Statute 13 Eliz. cap. 20. or if that Statute be pleaded to avoid a Lease, Bond or Covenant, for the Enjoyment thereof, it ought to be said, not that the Incumbent was absent, but also that he was absent eighty Days & *ultra*; for to say eighty Days, and nothing more, is not sufficient within this Statute, which says above eighty Days; for he may be absent eighty Days, and come again in the Night of the 80th Day; and if so, he is no Offender within this Statute, and therefore it ought to be expressly alledged, and not by Implication.

2 Bulf. 202.  
Rudge and  
Thomas.

So it must be also said, that he was absent eighty Days & *ultra* in a Year; otherwise it will not be good, for so is the Statute expressly.

Cro. Eliz. 590.  
Moor 540.  
510 21.  
Butler and  
Gosnall.  
Cro. Eliz. 100.  
Collins ver.  
Vaughan.  
Moor 448.

Also it must be shewed that the Incumbent was voluntarily absent; for if he were absent, or did not serve the Cure, by reason of Sickness, Suspension, or because he was inhibited by the Ordinary from serving the Cure, or was ejected by any out of the Parsonage House, or upon the Account of any other Restraint, this is no such Absence as will avoid any Leases, &c. within these Statutes.

Cro. Eliz. 125.  
Moor 270.  
Mott and  
Hales.

These last Cases prove the Unreasonableness of the Construction that has been made of this Statute in the following Case; where a Parson, after 13 Eliz. made a Lease to one, for Twenty-one Years *a die consecrationis*, of Lands usually letten, rendring the ancient Rent, and this was confirmed by the Patron and Ordinary; then the Parson died; and the Question was, if his Death was such a Non-residence as that eighty Days after being incurred should avoid the Lease; Moor reports this Case, that the Judges were divided in it, and that tho' Judgment was given against the Defendant, Under-Lessee of *A.* in an Action of Debt brought by *A.* for the Rent; yet the Reason of it was for his Misrecital of the Statute, whereby he would have avoided the Lease to *A.* and consequently the Under-Lease to himself; but Cro. reports the Case to be adjudged, that the

the Death of the Parson was a Non-residence within that Statute to avoid his Leases; for they said, the Intent of the Statute was to provide against Dilapidations, and for Maintenance of Hospitality, and therefore must be intended to avoid Leases, not only for Non-residence, but also by the Death or Resignation of the Parson, for otherwise Dilapidations would be in the Time of the Successor, and he could not maintain Hospitality; and *Hale* says, this was adjudged, as it is reported by *Cro.* by the Opinion of three Judges against one, but says it was a hard Opinion; and therefore (a) where the same Point came in Question, it was adjudged that the Death of the Parson was not such a Non-residence as should avoid a Lease duly made. 1. Because the Intent of the Statute was only to oblige the Parsons to Residence, by imposing a Forfeiture upon them of a Year's Value of their Benefices if they did not reside, which could not be, if Death were a Non-residence within that Statute; for immediately, upon the Death of the Incumbent, all the Profits of the Living, except for Supply of the Cure in the Vacation, belong to the Successor; how then could the Bishop sequester them for the Use of the Poor, for a whole Year, as the Statute directs. 2. It is plain the Statute meant a wilful Negligence, because it says, *the Party so offending*; but Death is involuntary, and cannot be punished; and a Person who is dead cannot be absent, for he is not in *esse*. 3. The Statute of 14 *Eliz.* which allows Leases of Houses in Market-Towns for forty Years, would be of no Effect, if Death should be interpreted a Non-residence to avoid them. 4. The Confirmation of the Patron and Ordinary would be to no Purpose, and their Permission to make Leases for Twenty-one Years, or three Lives, with such Confirmation, would be vain and idle, if such Leases should continue no longer than during the Parson's Life, for he might have made them good during his own Life, without any such Permission or Confirmation. 5. These Cases above cited prove that the Non-residence, within this Statute, must be such as is voluntary; and therefore Sickness, Inhibition by the Ordinary, &c. which are involuntary, are a good Excuse of Non-residence within this Statute, and so have been allowed.

But for as much as several Evasions were found out to frustrate and elude the true Intent of the said Statute of 13 *Eliz. cap. 20.* therefore by another (b) Act of Parliament it was provided as followeth, *viz.* (b) 14 *Eliz. cap. 11. sect. 15, 16.*

‘ That where sundry evil disposed Persons have defrauded the true Meaning of the last mentioned Statute, by Bonds and Covenants, of suffering other Persons to enjoy Ecclesiastical Livings, and the Fruits thereof, for that such Bonds and Covenants are not in Law taken to be Leases, altho’ indeed they amount to as much; be it therefore enacted, That all Bonds, Contracts, Promises and Covenants, hereafter to be made, for suffering or permitting any Person to enjoy any Benefice or Ecclesiastical Promotion, with Cure, or to take the Profits or Fruits thereof, (other than such Bonds and Covenants as shall be made for Assurance of any Lease heretofore made) shall, to all Intents and Purposes, be adjudged of such Force and Validity, and not otherwise, as Leases by the same Persons, made of such Benefices and Ecclesiastical Promotions, with Cure; and be it further declared and enacted, That all Leases, Bonds, Promises and Covenants, of and concerning Benefices and Ecclesiastical Livings, with Cure, to be made by any Curate, shall be of no other nor better Force, Validity or Continuance, than if the same had been made by the beneficed Person himself, that demised, or shall demise the same to any such Curate.

And by another (c) Act for Continuance of the said Statutes of (c) 43 *Eliz. 13 Eliz. cap. 20.* and 14 *Eliz. cap. 11.* there is another Clause, by way of Addition, ‘ That all Judgments to be had, for the Intent to have and enjoy any Lease contrary to the said Statutes, shall be deemed

void, in such Sort as Bonds and Covenants are appointed to be void for that Purpose.

The Statute of 13 *Eliz. cap. 20.* as appears by the express Words thereof, extends only to Leases to be made after that Statute; therefore where a Parson made a Lease for sixty Years before the 13 *Eliz.* which was confirmed by the Patron and Ordinary, and then the Parson died, and his Successor, after the Statute of 14 *Eliz. cap. 11.* gave a Bond that the Lessee should enjoy the Lease during the Term, and after became Non-resident for above eighty Days in one Year, and so would have avoided both the Lease and the Bond; yet in an Action of Debt brought thereupon, it was adjudged that neither of them were within either of those Statutes; for as to the Lease, that being made and duly confirmed before 13 *Eliz.* was good at Common Law; and then the Bond given for Enjoyment of such Lease, tho' it were given after 14 *Eliz.* yet it was neither within the Words nor Intent of that Statute, which extends only to Bonds given after that Statute, for Enjoyment of Leases, contrary to 13 *Eliz. cap. 20.* which this Lease, that was made before, cannot be said to be; nor could the Successor himself avoid this Lease, and then the Bond given for the Enjoyment thereof cannot be unlawful.

*Comp. Incumb.*  
361, 364.

Also the said Statute of 13 *Eliz. cap. 20.* extends only to avoid Leases for Non-residence or Absence for above eighty Days in one Year, and the Statutes of 14 *Eliz. cap. 11.* and 43 *Eliz. cap. 9.* avoid only Bonds, Covenants, Promises and Judgments, made or given for Enjoyment of Ecclesiastical Livings or Benefices, become void for such Non-residence or Absence, and not where the Living, &c. became void by Death, Resignation or Deprivation, &c. which are Voidances at Common Law.

3 *Bulf. 202.*  
1 *Rel. Rep.*  
403 *Thomas*  
*ver. Rudge.*

Therefore where a Parson covenanted with *A.* that he should have his Tithes for thirteen Years absolutely, without saying, if he should so long live, and continue Incumbent, and afterwards, before the Expiration of the Term, resigned his Benefice, and so became Absent or Non-resident for above eighty Days; and the Successor, after Induction, ousted *A.* of the Tithes, upon which he brought an Action of Covenant against the first Parson, who pleaded the Statute of 14 *Eliz.* in Bar; but it was adjudged by *Coke, Dodderidge* and *Haughton*, that tho' this Lease was void by the Resignation, yet the Action well lay upon the Covenants in the Lease, for the 13 *Eliz.* avoids Leases only where the Parson becomes Absent or Non-resident for above eighty Days in a Year; and the 14 *Eliz.* as appears by the Preamble, intended only to avoid Bonds, Covenants and Promises, made or given for the Enjoyment of Ecclesiastical Livings, or the Fruits thereof, upon Pretence that they were not Leases within the said Statute 13 *Eliz.* and enacts, that they shall be of such Force and Validity, and not otherwise, as Leases by the same Persons would have been, and so extends to Avoidance thereof for Absence, or Non-residence, for above eighty Days only, as the other Act did the Leases themselves; but this Resignation was an immediate Voidance of the Lease at Common Law, and an Action thereby attached in the Lessee, immediately for Breach of the Covenant, before the Avoidance, by Absence or Non-residence for above eighty Days, by Force of the Statute had incurred; and these Statutes did not intend to intermeddle with Avoidances at the Common Law, but left them as they were before, and by Consequence this Resignation, which defeated the Interest of the Lessee at Common Law, was a Breach of the Covenant, for which the Action well lay; so they held if the Parson had died, or been deprived, &c. which would also in Consequence have defeated the Interest of the Lessee; yet an Action of Covenant would have well lain against him or his Executors, because the Covenant was absolute, and this Avoidance of his Interest was an Avoidance at the Common Law, and not by Force of either of these Statutes; and then

at Common Law such Lease or Covenant is good, and the Parson, at his Peril, is to take care that the Lease or Covenant be made good according to his Agreement; as if Tenant for Life covenants that another shall enjoy his Lands for Twenty-one Years, and afterwards commits a Forfeiture, yet he shall be bound by his Covenant.

But if a Parson makes a Lease for thirty or forty Years, if he so long live, with Covenants for Enjoyment thereof accordingly, this so qualifies the Lease and Covenant, that tho' his Death will determine the Lease, yet it will be no Breach of the Covenant; but yet by such Lease and Covenant he takes upon him to do no other Act whereby to avoid the Lease; therefore if he resigns, or otherwise voids the Living, an Action of Covenant will lie against him; but if this Clause were added, *viz.* and shall so long continue Parson, then this Clause leaves him at Liberty to avoid it by Resignation, Non-residence, or otherwise, because it qualifies the Lease to continue no longer than whilst he continues Parson, and in the mean Time leaves it in his Election how long or short a while that shall be.

*1 Brownl 125.  
Wheeler and  
Heydon, per  
Haughton.*

A Clerk entered into an Obligation, the Condition of which was, that he being presented, instituted and inducted to a Benefice then void, should, upon Request of the Patron, resign; and he afterwards made a Lease to the Patron, and then became absent for above eighty Days together, whereby the Lease became void; and then being requested by the Patron to resign, which he refused, the Patron brought an Action of Debt upon the Bond, to which the Defendant pleaded the Statutes of 13 & 14 *Eliz.* and that after his Induction he let the Lease to his Patron the Plaintiff, and then was absent above eighty Days together, and averred that the Obligation was made for the enjoying of the Benefice let by the said Lease, and to the Intent to compel him not to avoid the Lease by Absence, for fear of being required to resign, and demanded Judgment, &c. upon which the Plaintiff demurred; and the whole Court held the Plea good, and the Averment to be very apt, because the Obligation being made generally to resign upon Request, might well be averred to be for this particular Purpose, and so void.

*Moor 641.  
Webb ver.  
Hargrave.*

This Case fully proves, that the Bonds which have been attempted and taken from Parsons upon making Leases, with Condition that they should duly serve the Cure, and not be absent from their Benefice by the Space of eighty Days, when they appear, or can be averred to be given for Security of Leases made by such Parsons, will be void within these Statutes, and no Recovery allowed thereupon; but Bonds, with Condition not to resign, or do any other Act which should cause an Avoidance at Common Law, tho' they are made for Security of such Leases, yet they will be good and binding, unless the Parson can shew an Avoidance by Absence for above eighty Days, and also aver that the Bond was given to prevent such Avoidance; for otherwise, if the Lease becomes void by Resignation, or other voluntary Act of the Parson, (except such Absence for above eighty Days) the Bond is presently forfeited at Common Law; and the Statutes will no more relieve upon Account of any Absence after, than they would against a Covenant for that Purpose; but if such Bonds were given, with a Condition in the Disjunctive, not to be absent above eighty Days, nor to resign or do any other Act, which should cause an Avoidance of the Lease at Common Law, *Quære*, whether the whole Bond be absolutely void, or if it shall be good or bad, according as the Avoidance first happens to be either upon these Statutes or at Common Law.

*Crc. Eliz. 8<sup>e</sup>,  
490.*

A Parson let his Rectory for three Years, and covenanted that the Lessee should have and enjoy it during the said Term, without Expulsion, or any Thing done or to be done by the Lessor, and was also bound in an Obligation to the Lessee for Performance of Covenants, and afterwards, for not reading the Articles, was *ipso facto* deprived by the Statute

*4 Leon. 38-9.  
pl. 104.  
Degg 128.  
Comp. Incumb.  
364.*

Statute 13 *Eliz.* whereby the Lease became void; yet it was the Opinion of all the Justices, that the Bond was not thereby forfeited, because the Lessee was not ousted by any Act done by the Lessor, but rather for a Nonfeasance, and so out of the Compass of such Covenant; as if one be bound not to do any Waste, permissive Waste is not within the Danger of it; but otherwise it would have been, if the Lessor had covenanted not to omit the doing of any Thing whereby the Lease should become void.

3 *Bulf.* 203.  
*Comp. Incumb.*  
364.

So if one be bound by Obligation to make such a Lease for Twenty-one Years, this is good, and shall bind him; but then it seems, that if this Lease becomes afterwards void for Non-residence, and the Bond be put in Suit, if it be averred that the Bond was given for Security of such Lease against Non-residence, this will avoid the Bond also.

1 *Bulf.* 111.  
*Comp. Incumb.*  
364

If the Parson's Lessee assigns over his Lease to another, and the Parson be absent above eighty Days in a Year, the Lessee may also plead the Statutes of 13 & 14 *Eliz.* for the Avoiding of his own Assignment and Agreement with the Assignee, because if he assigned over no more than what the Parson demised to him, such Assignment must be subject to the same Determination the original Lease itself was; and if that be determined, he, who claims under the Parson, may as well shew it in Avoidance of his Assignment, as the Parson might in Avoidance of his own Lease.

*Cro. Eliz.*  
529.30  
*Lee & Us'*  
*ver. Colehill.*

It hath been held, that if a Parson makes a Lease for Years, which after becomes void by the Statutes for Non-residence, and there is an Obligation for Performance of Covenants, altho' there be some Covenants which do not concern the Lease comprized in the Indenture, yet is the Bond intirely void; otherwise all the Meaning of the Statute would be defrauded by putting in a lawful Covenant into the Indenture.

*Comp. Incumb.*  
364.  
*Degg* 124.

Tho' the Statutes aforesaid make void Leases, Bonds, &c. where the Parson is Non-resident, and neglects to serve the Cure for above eighty Days together, yet such Leases or Bonds, &c. are not void *ab initio*, but only from the Time that such Absence of eighty Days shall be compleated; for the Words of the Statute are, *shall endure no longer but while the Lessor shall be ordinarily resident*, (therefore so long it shall endure) and *serve the Cure without Absence above eighty Days in one Year*, but that every such Lease, immediately upon such Absence, shall cease and be void; therefore till such Absence of above eighty Days be accomplished, the Lease is good and in Being.

*Cro. Eliz.* 78.  
*Wallis and*  
*Cox.*  
*Cro. Eliz.* 245

Accordingly it hath been adjudged, that if such Lease by Indenture be made, containing Covenants on the Lessor and Lessee's Part, and after by Absence for above eighty Days both the Lease and Covenants do become void; yet an Action of Covenant doth well lie for the Lessor or Lessee, for any Covenant broken before the End of the eighty Days Absence; but if he was absent for above eighty Days, tho' Part of the Time incurred pending the Action, and before Plea pleaded, yet it is a sufficient Absence, and may be pleaded in Avoidance of the Lease.

*Dyke* 372.a b.

Therefore if in such Case an Action of Covenant be brought, the Defendant must not only plead the Statutes, which make the Lease and Covenants void, but must also plead the Performance of Covenants to the Time of the eighty Days Absence expired.

*Cro. Eliz.* 495.  
*Earl of Lin-*  
*coln ver. Hof-*  
*kins.*

If those Statutes are pleaded to avoid any Action, Care must be taken not only to alledge the Absence or Non-residence fully, but also that the Statutes be truly recited; therefore where the Statute of *Eliz.* was recited with this Clause, *tam diu* (where the Words are *tam cito*) *quam, &c. aut aliqua pars inde venerit ad aliquam possessionem, vel usum inhibi-* *bitum, vel, &c.* (which Words, by 14 *Eliz. cap. 11.* are repealed and appointed to be omitted) Judgment was given against the Party for this Misrecital, without any Regard to the Matter in Law.

Tho' the Statute of 13 *Eliz. cap. 20.* doth allow a Parson or Vicar that hath Benefices to demise the one of them, upon which he shall not be ordinarily resident, to his Curate, yet it is thought from 14 *Eliz.* that if such Curate lease the same over to another, tho' he himself is not absent above forty Days in any one Year, if the Incumbent or Parson be absent above eighty Days in the same Year, that this shall avoid the Curate's Lease; because 14 *Eliz.* says, that all Leases, Bonds, &c. of Benefices and Ecclesiastical Livings with Cure to be made by any Curate shall be of no other nor better Force, Validity, or Continuance, than if the same had been made by the beneficed Person himself that demised or shall demise the same to any Curate; yet by *Tanfild*, when a Parson leaseth to his Curate, who leaseth over, the Statute doth not make the Lease void by any Absence of the Parson; but of the Curate only by forty Days; for otherwise, as he held, the Intent of the Statute might be easily frustrated, which was, that he that served the Cure should be the Occupier of the Glebe and Tithes belonging to the Church, and none other; but *Quere*.

But admitting that the Parson's Absence for above forty Days should not avoid the Curate's Lease, yet we must distinguish who shall be said a sufficient Curate for that Purpose; and that is only one who is legally admitted by the Ordinary of the Place, according to the Laws of the Land; for otherwise he is no Curate, altho' he serves the Cure, and is resident; so that if the Parson should make a Lease of the Glebe and Tithes to such a nominal Curate, yet by the Parson's Absence for above eighty Days the Lease will be avoided; and if they should be sequestered; in this Case, according to the Statute, the Parson cannot plead that they are let to his Curate, because he is no Curate in Law, and his having a Cure there is an Offence against the Law, of which it is not reasonable that either the Incumbent or Curate should take Advantage.

*Note*; It has been held, that a Parsonage may be a Manor; as if before the Statute *Quia Emptores Terrarum*, the Parson, with the Patron and Ordinary, had granted Parcel of the Glebe to divers Persons, to hold of the Parson by divers Services; this makes the Parsonage a Manor; and if the same be a Copyhold Manor, then, notwithstanding all the Statutes before rehearsed, Parsons and Vicars, as well as all other Ecclesiastical Persons, may grant Copies for Life, in Tail or in Fee, according to the Custom of the Manor: For the Copyholder doth not derive his Estate out of the Estate or Interest of the Lord only, but from the Custom, and is said to be in by Custom, without any Regard to the Person of the Grantor; and these Grants by Copy are good without the Confirmation of the Patron and Ordinary, and are not voided by Non-residence or Death, &c. of the Parson; neither do any of the Statutes aforesaid extend or relate to Rectories and Tithes that are impropriated and become Lay-Fee, and remain in the Hands of Laymen, but that they may do with them as with any other Inheritance whereof they are seised; but Appropriations in the Hands of Bishops, Colleges, or other Ecclesiastical Persons, are liable to the aforesaid Statutes and Rules, as other Inheritances whereof they are seised; and so are Impropriations, if by Presentation, &c. the Vicaridge be restored to the Church out of which it was endowed; for by such Presentation they are become for ever after presentable, and the Impropriation is destroyed.

In Debt upon Bond to perform Covenants in a Lease made by the Defendant, the Parson, to the Plaintiff, the Defendant pleads 14 *Eliz.* and Absence for above eighty Days, &c. and held a good Plea in Avoidance, &c. but then Exception was taken to the Pleading, because the Defendant says, that the said Church is a Parochial Church *cum Cura Animarum*, but does not say, that it was so at the Time of the Lease and Obligation made; for it may be, that at the Time of the Lease there was a

*Comp. Incumb.*  
362.  
1 *Leen. 100*  
*St. John ver*  
*Petta.*

*Comp. Incumb.*  
362.

*Comp. Incumb.*  
362.  
1 *Rel. Rep.*  
202, 203.  
4 *Co. 23, 24.*

3 *Leen. 102.*  
*Coxe's Case.*



Godb. 29.  
pl. 38.  
Marrew's  
Case.

Vicar, and then it was not *cum Cura Animarum*; and upon that Exception Judgment was given for the Plaintiff.

Debt upon a Bond with Condition to pay such a Sum, the Defendant pleads the Statute 13 *Eliz.* that all Covenants, Bonds, &c. made for the enjoying of Leases made of Spiritual Livings by Parsons, &c. should be void, and avers that this Bond was made for the enjoying of such a Lease; but because the Condition was expressly for Payment of Money, the Justices held it clear for Law, that the Bond was good, and out of the Statute; and so by this Case it appears, that such Averment will not hold good against an express Condition to another Purpose; and this differs from *Hargrave* and *Webb's* Case, which was only to resign generally on Request, and therefore might well and consistently be averred to be to the Intent to compel, not to avoid the Lease by Absence; for fear of being required to resign.

### (G) Of the Consent or Confirmation of others to Leases made by Ecclesiastical Persons : And herein,

1. Where Confirmation is necessary either in Respect of the Leases or Estates made, or of the Persons making the same.

Comp. Incumb.  
366.  
Co. Lit. 44, 45.

AS to this it is to be observed, that no Confirmation whatever of any Lease or Estate made by Ecclesiastical Persons, not conformable to the eight Rules or Qualities before-mentioned, will bind the Successor, except only in the Case of the concurrent Lease; for that not being construed to be within the Restraint either of the 1 or 13 *Eliz.* remains as it did before at Common Law; and as at Common Law Confirmation was necessary to make such Lease good against the Successor, not being warranted by 32 *H. 8.* (unless the old Lease were surrendered or expired within one Year after the making of the new Lease,) so it is still, and with Confirmation will bind the Successor; this seems to be the chief, if not the only Use of Confirmation, as to any Persons allowed to make Leases within 32 *H. 8.* But there appears this Difference between concurrent Leases made by Archbishops or Bishops upon the 1 *Eliz.* and concurrent Leases made by other Ecclesiastical Persons on the 13 *Eliz.* for upon the 1 *Eliz.* the concurrent Lease is not restrained to any certain Time before the Expiration of the first Lease, but may be made three, four, five Years, or more, before the Expiration thereof, so that both Leases in the whole do not exceed twenty-one Years, upon the Construction before taken Notice of; that the second Lease is void, or at least good by Estoppel only, for so many Years as are then to come of the first Lease; but concurrent Leases to be made by any of the Ecclesiastical Persons within the Restraint of 13 *Eliz.* will not be good to bind the Successor, unless the former Lease for Years be surrendered or expired within three Years next after the making of such new Lease; but this is expressly provided for, not by the 13 *Eliz.* but by the 18 *Eliz.* as has already been shewn.

3 Co. 75.  
10 Co. 60. a.

We are next to consider where Confirmation was necessary at the Common Law, and where it continues so at this Day, in respect of the Persons making any Leases or Grants of their Ecclesiastical Possessions: The Persons who were restrained by the Common Law from making any  
Leases,



Leases, Grants, or Estates to bind their Successors without Confirmation, were only Sole Corporations, as Bishops, Abbats, Deans, Parsons, Vicars, Prebends, and such like; for Corporations Aggregate might make what Leases they pleased, without Confirmation of any other Persons whatsoever; but the Prudence of the Common Law never thought fit to trust such Sole Corporations with any Alienation or Disposition of their Possessions to bind their Successors, without the Concurrence and Confirmation of other Persons; and tho' Bishops and Abbats were construed to have the whole Estate and Right of the Land in themselves, which Parsons, Vicars, Prebends, and such like, had not, yet as to the binding their Successors they had no more Power than the others, without the Concurrence and Confirmation of the Persons substituted and appointed by Law for that Purpose.

And where such Sole Corporations make any concurrent Lease upon the Statutes before-mentioned, the Law continues the same at this Day, and they must be confirmed in the same Manner as any other Leases or Estates made by the same Persons must have been at the Common Law. *Comp. Incumb. 366. Co. Lit. 44.*

So also Parsons, Vicars can make no Lease at this Day, tho' it be with Conformity to the eight Rules before-mentioned, to bind their Successors, without Confirmation of the same Persons who by Common Law were required to confirm all Leases, Grants, or Estates made by them; for they are expressly excepted out of 32 H. 8. and consequently continued as they were at Common Law till 13 Eliz. imposed a total Restraint on them, as well as all other Ecclesiastical Persons, to make Leases to bind their Successors for any longer Term than twenty-one Years, or three Lives, and tho' by that Statute they are left at Liberty, as well as other Ecclesiastical Persons, to make such Leases, yet having no Ability by 32 H. 8. to make them solely, as other Sole Corporations had, therefore to make good even such Leases against their Successors, they must have the Confirmation of the same Persons, and in the same Manner, as they must have had at the Common Law before the making of any of those Statutes. *Co. Lit. 44. b. Cro. Eliz. 18. Comp. Incumb. 367.*

The Grant of antient Offices belonging to Ecclesiastical Persons are not within any of the Statutes before-mentioned, but remain as they did at Common Law, and therefore may be granted with the antient Fee; but then all such Grants must be confirmed to bind the Successor, because they must have been so at the Common Law. *10 Co. 60. Vide Tit. Offices.*

## 2. What Persons are to confirm such Leases or Estates, and in what Manner.

As to the Persons who are to confirm such Leases or Estates, we must take Notice, that this varies according to the Nature of the Persons who make such Leases, and the Nature of the Title of the Persons who are to confirm the same.

Therefore if a Parson makes a Lease for three Lives, or twenty-one Years, or less, observing the Rule before-mentioned, this is to be confirmed only by the Patron and Ordinary, and no Confirmation of the Dean and Chapter is required thereto; for they have nothing to do with that which the Bishop doth, as Ordinary, in the Life-time of the Bishop. *Co. Lit. 300 b. Bro. Tit. Leases 64. 1 Co. 153. 11 Co. 19 b.*

But if the Bishop be Patron of the Church in Right of his Bishoprick, and also Ordinary, then the Dean and Chapter ought likewise to confirm all Leases made by the Parson, because in such Case the Advowson of the Church is Parcel of the Bishoprick, which he cannot charge to bind his Successor without the Concurrence and Confirmation of the Dean and *Bro. Tit. Leases 64. Co. Lit. 300 b.*

and Chapter ; and how far the Successor of the Parson will be bound in such Case, will appear hereafter.

*Dyer* 259.

*Bentl.* 80.

*Hodges* versus

*Tucker.*

So where a Priest in the Cathedral Church of *Wells* being Parson Imparsoned of the Church of *W.* made a Lease by Indenture for 100 Years before 13 *Eliz.* rendering Rent to him and his Successors ; and this was confirmed by the Dean and Chapter only, without any Confirmation of the Bishop, who was Patron and Ordinary ; then the Parson died, and his Successor accepted the Rent, and after, before 13 *Eliz.* made a Lease for forty Years, which was confirmed by the Bishop, Dean and Chapter ; and it was adjudged, that the first Lease was *ipso facto* void and determined by the Death of the Parson who made it, so that no Acceptance of the Rent by the Successor after could make it good, for Want of the Patron and Ordinary's Consent.

*Dyer* 61. b.

106. b. 240. a.

*Plow.* 529.

1 *Roll. Abr.*

481.

*Co. Lit.* 300. b.

So where a Prebendary in a Cathedral Church, or an Archdeacon, made a Lease for Years of Parcel of their Possessions, to which Confirmation was requisite, and this was confirmed only by the Dean and Chapter, without any Confirmation of the Bishop ; it was held, this Lease should not bind the succeeding Prebendary or Archdeacon ; because the Bishop is Patron and Ordinary of every Prebend, and may be so of an Archdeaconry ; and therefore to make good Leases by them against their Successors, the Bishop's Confirmation ought likewise to be had, as well as the Dean and Chapter's.

*Dyer* 356. a. b.

1 *Leon.* 235.

*Co. Lit.* 329.

1 *Roll. Abr.*

479.

2 *Bulf.* 290.

11 *H.* 6. 9.

But upon the Books there seems a manifest Diversity between the Confirmation of the Bishop, as Patron and Ordinary, without Confirmation likewise of the Dean and Chapter, and their Confirmation without the Bishop's ; as also between the Resignation, Deprivation, or Translation, and the Death of the Bishop, who so alone confirmed as Patron or Ordinary ; for if any Dean, Archdeacon, Prebendary, Parson, or Vicar had made any Lease for Years at the Common Law, or should make such Lease at this Day, whereto Confirmation is requisite, and the Bishop, as Patron and Ordinary, confirms such Lease, without any Confirmation of the Dean and Chapter, and then the Dean, Archdeacon, Prebendary, Parson, or Vicar dies, or is removed, and the Bishop collates another as Patron and Ordinary ; yet cannot such Incumbent avoid the first Lease, tho' it was not confirmed by the Dean and Chapter ; because he came in purely by the Collation of the Bishop, as Patron and Ordinary, without any Aid or Concurrence from the Dean and Chapter ; and therefore, as

*Lit. sect.* 648.

*Co. Lit.* 343. b.

*Littleton* says, ought to hold himself content, and agree to that which his Patron and Ordinary have done, for he comes in subsequent to such Charge : But, as appears by the Cases before put, the Confirmation of the Dean and Chapter alone, without the Bishop's Confirmation likewise, will not be effectual to bind the succeeding Archdeacon, Prebendary, Parson, Vicar, &c. because he derives no Title under them, nor comes in with their Assent or Concurrence ; for they have nothing to do with the Collation of any Person, but the Bishop does it absolutely, and in Virtue of his own Power as Patron and Ordinary ; and therefore if such Leases want his Confirmation, those who come under him may avoid them, notwithstanding any Confirmation of the Dean and Chapter, under whom they derive no Title ; but because such Advowson or Right of Collation is also Parcel of the Possessions of the Bishoprick, and to bind the succeeding Bishop, the Confirmation of the Dean and Chapter is requisite ; as in all other Cases where the Bishop, who is a Sole Corporation, makes any Disposition of the Possessions of his Bishoprick ; therefore, without such Confirmation of the Dean and Chapter, the succeeding Bishop ; or his Incumbent, shall avoid such Lease : But here another Diversity arises between the Translation, Resignation, or Deprivation of the Bishop, and his Death. In the first Case it is held, that the Leases confirmed by him alone, without the Confirmation of the Dean and Chapter, will bind the

succeeding

succeeding Bishop, and his Incumbent, during his Life; but in case of such Bishop's Death, such Leases so confirmed by him alone, as Patron and Ordinary, will not bind the succeeding Bishop, or his Incumbent; and a Diversity is taken where a Bishop, &c. makes any Estate, Lease, Grant of a Rent-charge, Warranty, or any other Act which may tend to the Diminution of the Revenues, which should maintain the Successor, there the Resignation, Deprivation, or Translation of the Bishop, &c. is all one with his Death; but where the Bishop is Patron and Ordinary, and confirmeth a Lease made by the Parson without the Dean and Chapter, and after the Parson dieth, and the Bishop collateth another, and then is deprived, translated, or resigns, yet his Confirmation remaineth good; for, says my Lord *Coke*, the Revenues that are to maintain the Successor are not thereby diminished; but this seems a very precarious Reason; and a better Reason of the Diversity seems to be this, that when the Bishop, as Patron and Ordinary, has by Deed under his Hand and Seal subscribed his Confirmation of the Lease, this ought to be binding upon him, at least during his own Life; and therefore tho' he be afterwards translated, deprived, or resigns, yet since these are either by his own immediate Acts, or occasioned by his Default, it is not reasonable they should be allowed to avoid or derogate from his own Acts, which otherwise would have bound during his Life; for the Law never permits any to avoid or derogate from his own Acts; but these Reasons have no Place after the Bishop's Death, for then his Confirmation is at an End, and can be no longer binding on his Successor, since he had no Power to charge the Possessions of the Bishoprick any longer than during his own Life, without Concurrence and Confirmation of the Dean and Chapter, who are by Law substituted and appointed to that Purpose.

But yet it is most adviseable to have the Confirmation likewise of the Dean and Chapter upon such Leases made, and in several Books their Confirmation is either pleaded or admitted, since without it the Lease cannot bind any longer than during the Bishop's Life, who so confirmed it.

*Dyer* 106. b.  
221. b.  
*Plow.* 528.  
*Bro. Tit.*  
*Leases* 64.  
*Tit. Confirmation* 21, 30.

In some Cases the Confirmation of the Patron is necessary, and in some not; wherein this Diversity is taken in the Books, that such Sole Corporations, who have not the absolute Fee and Inheritance in them, as Prebends, Parsons, Vicars, and such like, if they make any Leases or Estates there to bind their Successors, the Patron must confirm the same; but such Sole Corporations who have the whole Estate and Right in them, as Bishops, Abbats, &c. or such Corporations Aggregate who have the whole Fee and Inheritance in them, as Dean and Chapter, Master, Fellows, and Scholars of any College, Hospital, &c. these may make Leases to bind their Successors, without any Confirmation of the Patron or Founder, tho' the Bishop, Abbat, Dean, Master, &c. were presentable; and the Reason of this Diversity appears in the Nature of the Right with which each is invested.

But if a Parsonage or Vicaridge be a Donative, then the Confirmation of the Patron alone is sufficient to all Leases, &c. made by the Parson or Vicar, and shall bind the Successor without the Confirmation of any other.

*1 Rol. Abr.*  
481.  
*Dyer* 273.

If there be a Patron paramount, as well as an immediate Patron, Confirmation of the immediate Patron, without the other's Confirmation, is not good; as if a Parson be Patron of the Vicaridge of the same Church, and the Vicar makes a Lease, confirmed by the Parson and Ordinary, this is not good without the Confirmation of the Patron of the Rectory also, because both have an Interest in the Possessions of the Vicaridge.

*Co. Lit.* 300. b.  
*Comp. Incumb.*  
572.

If the Bishop of *A.* be Patron of the Church, Presentative of *B.* which lies within his Diocese, and this is the Corps of a Prebend in the Church

*1 Rol. Abr.*  
479.  
*Leigh* and  
*Gie and Rider.*

*Hallier. Cro Eliz.* 587. *Dr. Herbert and Munday.* *1 Sid.* 57. *1 Keb.* 280

of *A.* and the Bishop of *A.* is also Patron of the Church of *C.* which is also Presentative, and lies in the Diocese of the Church of *D.* and afterwards the Church of *C.* is lawfully annexed and united by the Assent of the Bishops, Deans and Chapters, of both Dioceses, to the said Prebend of *B.* and afterwards the Bishop of *A.* doth collate *J. S.* to the said Prebend, which now by the Union doth consist of both Churches, and doth instal him in the Cathedral Church of *A.* and then the Prebendary makes a Lease for Years, which is confirmed by the Bishop, Dean and Chapter of *A.* and not by the Bishop of *B.* yet this is a good Confirmation, for by the Union the Bishop of *D.* hath annexed the Church of *C.* to the Prebend of *B.* and so hath deprived himself of the Power of Confirmation as Ordinary; for after the Union, the Prebendary is invested in both Churches by his Instalment, without any other Presentment, Admission, Institution or Induction to the Church of *B.* or *C.*

*Comp. Incumb.*  
370.

*Dyer* 40. b.  
273. a. b.  
349. pl. 18.  
*Plow.* 538.  
1 *Rel. Abr.*  
478, 481.  
*Degg* 120.  
*F. N. B.* 194.

3 *Co.* 75. b.  
17 *E.* 3 40.  
*Regist. Orig.*  
230.

*Comp. Incumb.*  
371.

*Dyer* 373.  
*Wallround*  
and *Pallard.*  
1 *Rel. Abr.*  
478, 481.

If the Dean of any Cathedral Church makes a Lease or Grant of any of his Possessions, whereof he is sole seised, to bind his Successors, and Confirmation be necessary thereto, this must be confirmed by the Bishop and Chapter of the same Church, and not by the King, altho' he be the Patron of such Deanery; because, as hath been said, the Dean and Chapter have the whole Fee and Inheritance in themselves, and then the Patron's Concurrence or Confirmation is not necessary; but it seems to be a Doubt, whether the Confirmation of the Bishop be necessary to such Grant or Lease; and several Books seem to hold, that the Confirmation of the Chapter alone, without the Bishop, is sufficient to make good the Dean's Leases or Grants that need Confirmation; but yet it is laid down as a Rule in the *Parson's Counsellor*, that the Bishop's Confirmation, as well as the Chapter's, is necessary to all Leases and Grants made by the Dean; and what is said by *Fitz.* that the Bishop and Chapter are in Law looked upon but as one Body, seems also to Favour this Opinion; for it is reasonable that the whole Body should consent to the Granting of their Possessions, and not that the Bishop, who is the Head of the Body, should be unconcerned therein; also the Possessions of the Dean are said to be derived from and carved out of the Bishoprick, and the Bishop *de Jure* is said to be Patron of the Deanery, which are all strong Arguments to prove the Bishop's Confirmation necessary, tho' no Book Case can be found expressly to warrant it, but rather the contrary, as appears by the Cases first cited, wherein no Notice is taken of the Bishop's Confirmation, or that it was necessary; *ideo Quere.*

But if such Deanery be meerly Donative, then the King's Consent and Confirmation, as Patron, must be obtained, and that without the Bishop's Confirmation is sufficient, as in all other Donatives, wherewith the Bishop has nothing to do.

The Dean of *Wells* might antiently have passed his Possessions belonging to his Deanery, with the Assent of the Chapter, without the Bishop's Confirmation; and after this Deanery of *Wells* was surrendered by the Dean thereof, with all the Possessions thereunto belonging, and so dissolved by Act of Parliament; this Dissolution was confirmed and a new Deanery erected, and the Nomination of a new Dean, and his Successors, given to the King and his Successors; and it was thereby also enacted, that the Dean and his Successors might demise, grant or part with any of their Possessions, in the same Manner and Form as the antient Deans might and used to do; in this Case, if the new Dean made any Lease or Grant of any of his Possessions, the Bishop's Confirmation is not necessary thereto, but only the Chapter's, because that alone was sufficient before; neither is the Confirmation of the King requisite, because this is not a meer Donative of the King, tho' he hath the Nomination of the Dean; and by the Statute the new Deanery is made of the same Nature as the old one was, which could not be a Donative, because the

Dean

Dean and Chapter might, without the Consent or Confirmation of any others, have passed away their Possessions.

It has already been shewn, that all Leases or Grants made by Arch-  
bishops or Bishops, whereto Confirmation is necessary, are to be con-  
firmed by the Dean and Chapter; for the Law, not thinking fit to trust  
the Bishop alone with the Disposition of his Possessions to bind his Suc-  
cessors, did for that Reason (amongst others) constitute the Dean and  
Chapter to give their Consent and Confirmation to all Leases or Grants  
made by him to bind his Successors.

But if a Bishop hath two Chapters, and makes a Lease of any of the  
Possessions of his Bishoprick, whereto Confirmation is necessary, and this  
is confirmed only by one Dean and Chapter, this will not bind the  
Successor of the Bishop, for both are but one in respect of the Bishop, if  
the Bishop is chosen by both. So it is if a Bishop be Patron of an Ad-  
vowson in Right of his Bishoprick, and collates a Clerk, who makes a  
Lease for Years, and the Bishop and one Dean and Chapter only con-  
firms it, this will not bind the succeeding Clerk of the succeeding Bishop,  
for want of Confirmation by the other Dean and Chapter; but tho'  
both Deans and Chapters have used to confirm such Leases, yet if one  
Dean and Chapter have surrendered their Possessions to the King, and  
then the Bishop, or his Clerk, make a Lease, whereto Confirmation is  
necessary, and this is confirmed by the remaining Dean and Chapter  
only; yet this is good, and shall bind the Successor, because by the Sur-  
render the one Dean and Chapter is dissolved, and are as if they never  
had been; and altho' after such Surrender, the Dean and Chapter, who  
so surrendered, were again erected, yet Confirmation by the other would  
be sufficient; as was held by the greater Part of the Justices in *Ireland*,  
and by five Justices in *England*, who certified their Opinion to be so  
into *Ireland*.

If two Bishopricks, that were originally distinct, be by lawful Au-  
thority united, and the Usage hath been ever since the Union, that the  
several Deans and Chapters have made Confirmations severally, viz.  
each Dean and Chapter of the Leases or Grants of the Possessions of  
their respective Bishoprick, but the Charter of Union is not extant, or  
cannot be found; such several Confirmation is good, because it shall be  
intended, by reason of the Usage, that the Union was made Spiritually,  
and in such a Manner, that notwithstanding the same, that all Leases  
and Grants should severally be confirmed as they were before the Union;  
and this either to prevent Confusion, or by reason of the Remoteness of  
the several Deaneries; and then *Modus & conventio vincunt Legem*, and  
such Confirmation by one Dean and Chapter, of their own original Pos-  
sessions, is good; *secus* if the Union were made generally, for then both  
ought to confirm.

If a Bishop hath no Dean and Chapter, then his Grants are to be  
confirmed by the Clergy of his Diocese, where Confirmation is necessary;  
for the Law will not trust any sole Corporation with the Disposition  
of his Possessions, as hath been before observed.

Whenever a Dean and Chapter are to confirm any Lease or Grant,  
the Dean himself must join with the Chapter, and Confirmation by his  
Subdean, Deputy or Proctor, will not be sufficient; for they have no  
Power to charge the Possessions of the Church, neither is any Stranger  
capable of being a Dean, Substitute or Proctor, but only one of the  
Chapter.

Therefore, where upon a Composition for Tithes, a Parson granted  
an Annuity to the Abbey of *Battel*, and this Grant was confirmed by  
the Bishop, Dean and Chapter, being Patrons; but in the Deed of  
Confirmation it appeared that the Dean was absent, and did not put his  
Seal thereto, but that the Chanter, who was his Commissary, did it for  
him; and there it was held, that tho' the Dean might have a Commissary  
or

3 Co. 75.  
10 Co. 60. a.  
2 Co. 39.  
6 Co. 34. b.

Dyer 58. a. &  
282. b.  
Noy 94.  
Co. Lit. 301.  
1 Rol. Abr.  
477.  
1 Leon. 234.  
50 E. 3. Sta-  
tham Tir.  
Affise, Bishop  
of Litchfield  
and Coventry's  
Case.  
12 Co. 71.  
Latib 237.

12 Co. 71.

Dav. 1.  
1 Rol. Abr.  
477.

Comp. Incumb.  
367.

11 H. 4. 84.  
Bro. Tit. Cor-  
poration 17.  
Dav. 47.  
Palm. 461.  
Latib 237.

or Deputy to exercise his Spiritual Jurisdiction, yet that such Deputy or Commissary cannot charge the Possessions of the Church.

Dyer 233. b.  
Comp. Incumb.  
308.  
Litch 251.  
Palm. 480.

A Lease was made by the Free Chapel and College of *Windsor* under the common Seal, but the Dean or Warden himself was not Party to the Lease, but one who was his Deputy in his Absence; and upon a Suit in Chancery, to set aside the Lease, a Statute of the College was shewn for the Authority of the Deputy to exercise and perform the Office of Dean in all Things *in Person*, & *Collegium*, &c. yet the Judges held, that the Confirmation by the Deputy was not good, for that he had no Authority to confirm this Lease by the College Statute provided; for that by the Word *Collegium*, all the Possessions of the College were not to be understood, but only the Site and Circuit of the College, or Place of its Situation; which Case seems to prove, that if by the Statutes of a Church or College, the Deputy Dean may confirm Grants, and join in the making of Leases, as if the Dean himself was present, and joined therein, that then such Confirmation will be good; for the Founder or Patron may make what Laws he pleases for the Regulation of the Corporation, and when he has invested the Deputy-Dean with such Power, this has the same Sanction that any other Laws for the Regulation of that Corporation have.

Noy 94.  
Palm. 460,  
480.  
Litch 237,  
250.  
1 Jon. 158,  
&c.

As a Deputy-Dean, generally speaking, cannot confirm Leases, so neither can he who is but a meer Commendatory Dean, *viz.* a Dean by *Recipere in Commendam*; for tho' he may take the Profits, because that was one End of his having the Deanery *in Commendam*, and may, with the Chapter, chuse a Bishop, and also exercise Spiritual Jurisdiction, and sue or be sued by that Name, because those Acts are of Necessity, and for the Advantage of the Deanery; yet cannot he confirm Leases, for this is meerly a voluntary Act, and such Commendatory Dean is but *Depositarius*, and not a Dean compleat; but if a Dean be elected Bishop, and before his Consecration obtains a Dispensation to hold his Deanery *in Commendam*, such Dean may well confirm Leases, &c. and if he be translated to another Bishoprick, and after his Election, and before Consecration, obtains a Dispensation to hold the same Deanery *in Commendam* with his second Bishoprick, his old Title remains; and Confirmations, and other Acts done by him as Dean, are as good in Law as if he had never been made Bishop; for there is a great Difference between a *Recipere in Commendam*, and *Retinere in Commendam*; the one comes in purely by Virtue of the Dispensation, and has no other Title; the other comes in legally at first as Dean, and by Virtue of the Dispensation is only enabled to continue so still, for that gives him no original new Title, as in the other Case, and therefore he is as much Dean as he was before; and the same Distinction holds between *Recipere* and *Retinere in Commendam*, in Case of Bishops; for a meer Commendatory Bishop in the *Recipere* cannot confirm Leases, &c. but in such Case the Archbishop is to do it; also the Guardian of the Spiritualties cannot confirm Leases; for such Confirmation, being a meer voluntary Act, and being to transfer a Right to another, none are capable of it but those who have the Estate and Right in themselves, which such Commendators in the *Recipere*, Substitutes, Rectors, Deputies, and Guardians of the Spiritualties have not.

Where there is a meer Commendatory Dean in the *Recipere*; *Quere*, whether the Bishop's Leases and Grants are not to be confirmed by the Clergy of the Diocese, in Case where there is no Dean and Chapter, or by whom else.

Comp. Incumb.  
308.

All Leases or Grants, which need Confirmation of a Dean and Chapter, are to be confirmed by the Dean and major Part of the Corporation, and being so confirmed are good, tho' several of the particular Members dissent, or are not present; for the Dean and major Part of the Chapter make the Corporation, and the others have no Negative Voice to hinder

such

such Majority from doing any Corporate Act; for otherwise, by the Corruption or Perverseness of one or two Members, the whole Corporation might suffer; and that this was the Law, appears by the following Act of Parliament.

‘Albeit that by the Common Laws of this Realm of *England*, all 33 H. 8. cap. 27.  
‘Assents, Elections, Grants and Leases, had, made and granted, by the  
‘Dean, Warden, Provost, Master, President, or other Governor of any  
‘Cathedral Church, Hospital, College, or other Corporation, by what-  
‘soever Name they be incorporated or founded, with the Assent and  
‘Consent of the more or greater Part of their Chapter, Fellows or  
‘Brethren of such Corporation, having Voices of Assent thereunto, be  
‘as good and effectual in the Law, to the Grantees or Lessees of the  
‘same, as if the Residue of the whole Number of such Chapter, Fellows  
‘and Brethren of such Corporation, having Voices of Assent, had  
‘thereunto consented and agreed; yet the said Common Law, notwith-  
‘standing divers Founders of such Deaneries, Hospitals, Colleges and  
‘Corporations, within the said Realm, have, upon the Foundations  
‘and Establishment of the same Deaneries, Hospitals, Colleges, and  
‘other Corporations, established and made, amongst other their peculiar  
‘Acts, local Statutes and Ordinances, that if any one of such Corpora-  
‘tion, having Power and Authority to assent or dissent, should and  
‘would deny any such Grant or Grants, that then no such Lease, Elec-  
‘tion or Grant, should be had, or leased or granted; and for the Per-  
‘formance of the same have been, and be daily thereunto sworn; and  
‘so the Residue may not proceed to the Perfection of such Elections,  
‘Grants and Leases, according to the Course of the Common Laws of  
‘this Realm, unless they should incur the Danger of Perjury; for the  
‘avoiding whereof, and for the due Execution of the Common Law  
‘universally within this Realm, and every Place, in one Conformity of  
‘Reason to be used, be it Ordained, Established and Enacted, by the  
‘Authority of this present Parliament, That all and every particular Act,  
‘Order, Rule and Statute, heretofore made, or hereafter to be made,  
‘by any Founder or Founders of any Hospital, College, Deanery or  
‘Corporation, at or upon the Foundation of any such Hospital, College,  
‘Deanery or Corporation, whereby the Grant, Lease, Gift or Election,  
‘of the Governor or Ruler of such Hospital, College, Deanery or Cor-  
‘poration, as have or shall have Voice or Assent to the same, at the  
‘Time of such Grant, Lease, Gift or Election, hereafter to be made,  
‘should be in any wise hindered, or let by any one, or more, being the  
‘lesser Number of such Corporations, contrary to the Form, Order and  
‘Course of the Common Law of this Realm of *England*, shall be from  
‘henceforth clearly frustrate, void, and of none Effect, with an Abroga-  
‘tion of all Oaths heretofore taken to such Effect, and a Penalty of 5 l.  
‘on any Person who should for the future give such Oath.

When the Dean and Chapter are to confirm any Lease, there ought not only to be a Majority of them, but they ought also to be personally present, and *Capitulariter Congregati* in one Place; which, with other Circumstances relating to the Manner of their Confirmation, will appear by the following Case, which was thus:

The Bishop of *Fernes* makes a Lease for Years, the Chapter consisting of eleven Persons, viz. the Dean and ten Prebends, confirm it in this Manner, viz. the Dean makes one *ſ. S.* a meer Layman, his Proctor or Substitute, to give his Assent to all Leases and Grants; this Proctor, and three of the Prebends only meet together, and fix the Chapter-Seal to the Confirmation of this Lease, which Confirmation was made in the Name of the Dean and Chapter; after that three others of the Prebends, at several Days, by themselves, subscribe their Names to the said Confirmation; and after the Death of the Bishop, his Successor enters upon the Lessee; and it was adjudged lawful, for that the Lease was void



after the Death of the Bishop who made it, for want of Confirmation;  
 1. Because no Confirmation was made by the Dean himself, but only by the Proctor, which was not sufficient; for he was merely a Stranger to the Chapter, and not capable of such Procuration; and therefore all he did is void both by the Canon and Common Law; for in the Canon Law the Rule is, *Absens non potest demandare Votum suum, nisi uni de Capitulo*; and there is another Rule, *Oportet quod Procurator semper institutus sit de Collegio*; and another, *Votum dari non potest per Literas*; and agreeable to this is the Rule of the Common Law; for in the Parliament the Peers may give their Vote by Procurator or Proxy, but their Proctors must be Barons, and Members of the same House; and a Stranger is not capable of being a Proxy; and admitting he were, yet where a Corporation passes any Interest, the Members thereof cannot give their Assent by Proctors or Substitutes; and so the Doubt in *Dyer* seems to be resolved.

*Dyer* 145.

*Dav.* 47, 48,  
*Et.*

2 *Rol. Abr.* 23.  
*Show Par.*  
*Cases* 29.

2. It was adjudged, that tho' the Deed of a Corporation needs no Delivery, as the Deed of a natural Person does, but that the Fixing of the Corporation Seal gives Perfection to it, yet the major Part of the Corporation ought to be present when the Seal is so affixed; for the major Part of the Chapter make the Corporation, and their Act is the Act of the Corporation, tho' the others do not agree; but here was only the Proctor of the Dean and three of the Chapter present when the Seal was affixed, which is not sufficient; for there ought then to be a Majority present, otherwise it may be said to be *cum Assensu*, but not *Consensu*, and it ought to be *cum Assensu & Consensu* of the Dean and Chapter; for no more than a Body Natural can do any perfect Act, if it be dismembered, the Head in one Place, and the Hands in another, no more can a Body Politick; and therefore they ought to be *Capitulariter congregati* in a certain Place; tho' it was agreed, they are not confined to meet in their Chapter-House, but might meet at any other Place; but at such Meeting and Sealing there ought to be a Majority then present; for if they set their Names at several Times, and in several Places, after, this makes it not to be the Act of the Corporation, but *Factum Singulorum* in their singular and private Capacity, and so shall not bind; also it was held, that the major Part of the Members being assembled, ought to give their Voices and Consents singly and distinctly, and not in a confused and uncertain Manner, as in the Choice of Knights of the Shire; and when the major Part doth so consent, their Consent ought to be expressed by their fixing of the Seal to the Deed of Confirmation or other Grant.

*Dyer* 282. b.  
 in Margin.

The Corporation of the Mayor, Bailiffs, and Burgeffes of *Windfor* made a Lease for Years, one Bailiff only assenting; and this was held a void Lease, if there were two Bailiffs, because then one is not a Majority; but as to the Burgeffes, it was held, that if the greater Part of them assented, this would be sufficient, tho' they were not present at the Sealing, if their Assent was had before; but *Quere*; for the foregoing Case seems to be an Authority that there must be a Majority present at the Time of the Sealing; for that is the Act which expresses their Consent; and unless there be a Majority then present, no Assent at any other Time can make that good, which, for Want of a Majority, was void when it was done; but in that Case it appears, that the Consent of the Majority was not had till after the Sealing; whereas in this Case the Consent of the Majority was before the Sealing, tho' such Majority was not present at the Sealing; and therefore *Quere* if this makes any Difference.

*Dyer* 40.

*Chafin's Case.*

*Plow.* 199.

1 *Rol. Abr.*

478.

8 *H.* 7. 7, 8.

2 *Leon.* 176.

4 *Leon.* 11.

*Clerk's Case.*

But here a material Difference is to be observed between a real Interest and a bare Authority or Power only, as to the Manner of concurring in such Leases; for if a Dean be seised of Lands in Right of him and his Chapter, or a Master or Warden of an Hospital or College in Right of himself and the Brothers and Sisters or Fellows of the same College, or a Mayor in Right of himself and the Commonalty, and the Dean, Master,

*Bro. Tit. Confirmation* 30. *Tit. Fuits* (45.) *Co. Lit.* 300, 346. *Goib.* 210. *Ireland and Barker.*

Warden,



Warden, or Mayor make a Lease by Indenture between the Dean and Chapter, Master or Warden, and the Brothers and Sisters or Fellows of the same Hospital or College, or between the Mayor and Commonalty of the one Part, and *J. S.* of the other, whereby the Dean with the Assent and Consent of the Chapter, or the Master with the Assent of the Brothers and Sisters, or the Warden with the Assent of the Fellows and Scholars, or the Mayor with the Assent of the Commonalty, lease such Lands to *J. S.* and with such Assent or Consent put thereto their Common Seal, this is a void Lease; for the Chapter, Brothers and Sisters, Fellows and Scholars, or Commonalty are equally seised, and have an equal Right and Interest in the Lands with the Dean, Master, Warden, or Mayor, and therefore ought to join in the Leasing or Granting Part of the Deed, and not only to give their Assent; for they all make but one Person in Law; and a Body cannot be distinct, so as that one Part may assent to the Acts of the other; but if the Dean were sole seised of the Lands in Right of his Deanery, the Master or Warden in Right of their Master or Wardenship, or the Mayor in Right of his Mayoralty, then the Lease of the Dean, Master, Warden, or Mayor alone, with the Assent and Consent of the other Persons before-mentioned, is sufficient; because the Dean, Master, Warden, or Mayor only are seised and have a real Interest, and the other Persons before-mentioned have no Interest at all, but only a bare Right or Power of assenting to the Leases or Grants of their respective Heads, and therefore their Assent or Consent is sufficient, without joining in the Leasing or Granting Part; so if an Abbat or Prior be seised of Lands in Right of the Abby or Priory, yet because the Monks are all dead Persons in Law, and not capable of having any Lands, of being impleaded, and such like Acts, therefore tho' they, together with the Abbat or Prior, constitute and make up but one Body, yet the Abbat or Prior only have the Power of Leasing, and the Assent or Consent of the Convent must be had and expressed by affixing their Common Seal, in the same Manner as where the Chapter, having no Interest in their own Right, are to assent to the Leases of their Dean; so likewise where a Parson makes a Lease for Years, he only is to grant or lease the Lands, and the Patron and Ordinary are only to give their Consent by affixing their respective Seals, and expressing their Consent or Assent in the Body of the Deed; for the Parson is the principal Grantor, and the others have not any real Interest in the Lands, tho' the Law has thought fit to require their Assent to all Leases or Estates to be made by the Parson.

A Dean, seised of Lands in Right of him and his Chapter, made a Lease for Years, the Chapter confirmed this Lease by a distinct Deed, and it was held not good; because their Deeds being severed cannot operate at all, since they are but one intire Body, and therefore cannot sever in their Acts; but if after such Lease they had all joined in a Confirmation, this had amounted to a new Lease, and been good as to the joint Act of them all, as the original Lease itself would have been, if all had joined in the Leasing Part. *Dyer 40. b. in Margin.*

A Lease for Years was made in this Manner; *Præpositus, Socii, & Scholares Collegii Reginalis in Oxonia, Gardianus Hospitalis, &c.* and Exception taken that it ought to have been *Guardiani*, in the Plural Number, for the College consists of many Persons, and each of them is capable, and therefore not like an Abbat or Convent; but *per Curiam* it was held good, and the College is but one Body, and as one Person, and therefore *Guardianus* is sufficient to describe it by. *1 Leon. 134.  
4 Leon. 85.  
Provost of  
Queen's Col-  
lege, Oxon.*

As a Patron may confirm explicitly by his Deed or Writing, so may he also confirm by Consequence of Law; for if a Person makes a Lease for Years to the Patron, who grants or assigns it over to another, this amounts to a Confirmation in Law by the Patron; because a Confirmation *5 Co. 15.  
Newcomb's  
Case.  
Cro Car. 58.  
1 Rel. Rep.*

*561. Co. Lit. 301. 1 Rel. Abr. 481.*

tion

tion being nothing but an Assent under the Hand and Seal of the Party confirming, such Assent in this Case sufficiently appears by his assigning over the Lease to another; but without such Assignment, the Ordinary's Confirmation will not make good the Lease to the Patron to bind the Successor, because in the Acceptance of the Lease the Patron was only passive, and executed nothing under his Hand and Seal which could amount to a Confirmation, as in the other Case, where he makes an actual Assignment over; but in Case of such Confirmation in Law, the Patron ought to be absolutely seised of the Advowson; otherwise it will bind only according to the Estate he hath therein, as will appear hereafter; but *Quere*, if the Assignment in this Case were without Writing, if that would be good, or could amount to a Confirmation.

*Dyer* 52, 338.  
*Cro. Eliz.* 447,  
 472.  
 5 *Co.* 81.  
*Co. Lit.* 297.  
*Moor* 479,  
 481.  
*Co. Lit.* 300.  
*Bendl.* 238.  
 1 *And.* 47.  
*Hetley* 75.

Another Difference observable in the Manner of confirming such Leases as we are treating of, is, as to their Duration or Continuance; for if a Parson makes a Lease for twenty-one Years at this Day, and the Patron and Ordinary confirm his Estate therein for seven Years, or, reciting the Lease, confirm *Dimissionem prædictæ, & etiam Indenturam eidem scripto Confirmationis annexam, & omnia in eadem contenta, quoad septem Annos solummodo, & non ultra*, yet is the Estate or Lease well confirmed for the twenty-one Years; for when they confirm the Estate of the Lessee, that is intire, and cannot be divided: So where a Prebendary made a Lease of a Rectory, Parcel of his Prebend, for seventy Years before the Statutes, and the Bishop, reciting the Demise, confirmed the said Demise or Lease for fifty Years, and no more, and the Dean and Chapter likewise confirmed the same in the same Manner, it was held by all the Justices, that they might confirm severally, and that their Confirmation was extendible to the whole seventy Years; for when they confirm *Dimissionem prædictæ*, they confirm that Demise or Lease, which comprehends and includes the whole Term of seventy Years, and then the Words *pro Termino* fifty only, *& non ultra*, come too late, and are repugnant to the Confirmation of *Dimissionem prædictæ*, which included the whole Term of seventy Years; but it was agreed, that if after such Recital of the Demise they had confirmed the Land to the Lessee for fifty Years only, this had been a good Confirmation for fifty Years only, and no such Repugnancy in the Confirmation; and so if the Demise had been of thirty Acres, they might have confirmed the Lease as to one or more Acres, or might have confirmed all, or Part, on Condition; and a Diversity was taken between a bare Assent without any Right or Interest, and an Assent coupled with a Right or Interest; for the Termor, who is to perfect an Act by his Attornment, cannot assent for a Time, nor upon Condition, nor for Part of the Thing granted, but it shall enure absolutely to all; because he having but a bare Right cannot qualify or apportion it; but the Bishop, who is Patron, and the Dean and Chapter, have an Interest in the Parsonage or Prebend, and every Part of it; for the Patron hath *Jus conferendi*; and a Release to the Patron of an Annuity in the Time of Vacation is good, and the Patron and Ordinary may charge the Glebe in the Time of Vacation, and therefore having an Assent clothed with an Interest may qualify it as they please: Another Difference was taken in the Cases before-mentioned between a Lease for Years and an Estate of Freehold or Inheritance; for if a Parson or Prebendary make a Lease for Years, Confirmation may be made of the Land, as has been said, for a lesser Number of Years, or of the Lease for a lesser Number of Acres; for the Years or Acres are several, altho' the Lease or Term, or Land, are one; so that if a Lease be made for five Years, rendering 20 *l. per Annum* Rent, the Years are several, so that an Action of Debt will lie for the Rent every Year; but if a Parson or Prebendary before the Statutes had made a Lease for Life, a Gift in Tail, or a Feoffment in Fee, and Confirmation had been made of the Land to the Lessee, Donee, or Feoffee for an Hour, this is good for

*Cro. Eliz.* 79.  
 21 *H.* 7. 41.  
*E. N. B.* 49.  
*Co. Lit.* 543. b.

ever;

ever, for the Freehold or Inheritance passing by one and the same Livery is intire, and then the Confirmation, which is an Act of less Notoriety, cannot break or divide it; for such Confirmation being an Assent to an Act which passed the whole, must extend to the whole which passed by the Act.

### 3. What Estates they who make such Confirmations are to have.

As to the Estate they who make such Confirmation ought to have, to make the Lease effectually binding upon the Successors, this regards chiefly the Patron, whose Advowson or Right of Patronage being a temporal Inheritance, and considered as such, is to be governed by the same Rules as other temporal Inheritances are; and therefore his Confirmation, being in Nature of a Charge upon the Advowson, is to be directed by the Estate which he hath in the Advowson, and can continue no longer than that endures.

Therefore if the Patron be but Tenant in Tail, or Tenant for Life, his Confirmation shall bind only such Incumbents as come into the Church during his own Life; and accordingly it was agreed by *Coke* and *Doderidge*, that if a Parson makes a Lease for Years, which is confirmed by the Patron and Ordinary, the Patron being Tenant in Tail, and the Patron and Parson both die, and the Issue in Tail doth present another, his Presentee shall hold the Rectory discharged of such Lease; and also they agreed, that altho' the Issue in Tail after a Presentation levies a Fine, yet the Presentee of the Conuzee, when the Church becomes void again, shall hold it discharged; because the Confirmation was defeated by the Presentation of the Issue in Tail before the Fine levied; but if the Patron, Tenant in Tail, discontinues the Estate-Tail, the Lease confirmed by him shall stand good during the Discontinuance, or if the Estate-Tail be barred, it shall stand good for the whole Term; for now the Estate of the Patron, in respect whereof the Estate was only voidable by the Presentee of the Issue in Tail, is become an absolute and unavoidable Fee.

So if the Patron had a conditional Estate in the Advowson, and he confirms a Lease of the Parson's, and after the Condition is broken, this defeats also his Confirmation, so that the succeeding Incumbent shall not be bound by it; for his Confirmation, which was in Virtue of, and derived out of his Estate in the Advowson, could not be more lasting than that Estate itself was.

If the Chaplain of a Chantry or Free Chapel, that was a Donative, had made a Lease for Years before the Dissolution of Chantries, and the Patron of the Chapel, being seised of the Patronage in Tail, had confirmed it, this should not have bound the Chaplain of the Issue in Tail; because the Tenant in Tail could not, by any Act of his, bind the Issue in Tail after his Death; and in such Case, if the Patronage of the Donative came to the King, by the Statute of Chantries, neither the King, nor his Clerk, should be bound by the said Lease; but if the Donor had levied a Fine after the Confirmation, by which the Issue in Tail was bound from avoiding the Lease, the King also should be barred; and as the Issue in the other Case would not have been bound, no more would the King, who comes in subject to all the Advantages or Disadvantages the Issue in Tail was capable of, or liable to.

If Tenant in Tail of an Advowson, and his Son and Heir Apparent, join in a Grant of the next Avoidance, and after the Tenant in Tail dies, the Son shall avoid the Grant, because he had nothing in the Advowson at the Time of the Grant made.

Dyer 72. b.  
in Margin.  
1 Leon. 254.  
Lancaster ver.  
Lucas.

A Parson makes a Lease for Years, and there being three Coparceners or Tenants in common, who are Patrons, all ought to join in the Confirmation, else it will not bind the next Incumbent; because they are all but one Patron; *per Coke*: But if there be a Composition to present by Turns, *Quere* if a Lease confirmed by him, that hath the next Turn when the Church voids, shall not be good to bind his Presentee. But in the first Case it is held, that if one of the Patrons, and the Ordinary, confirm the Lease, and the Parson dies, and then the Ordinary collates by Lapse, this Confirmation by the one Patron is good, and that the Collatee shall not avoid it; and this said there to be adjudged upon long and good Argument, and the Case cited for it is *Lancaster* and *Lucas*; which does not appear to be adjudged in *Leonard*, but is there said to be adjourned; *ergo Quere Causam*; for the Ordinary hath no Interest, but presents in Right of the Patron, and therefore his Clerk shall be so far bound, and no farther, than the Clerk of him who suffered the Lapse should have been; but *Popham* argued, that this Title of Lapse was an Interest in the Ordinary, and not an Authority only, and then all who come in under that Interest shall be bound by the Ordinary's Confirmation of the first Lease; and he said, that at the Beginning the Patron was not restrained to any Time to present his Clerk, but the six Months was appointed, at the Instance and Suit of the Ordinaries, by a Canon confirmed in the Council of *Lateran*; before which Time the Ordinaries had not any Lapses; but after the said Canon they had an Interest, which the Civilians call *Interesse caducum & conditionale*; and it is such an Interest, that if the Bishop dieth before Collation or Presentment, so as the Temporalities come to the King, the King shall present. *Quere* of this.

Dyer 133. a.  
1 Rol. Abr.  
479.

If the Husband and Wife, Patrons of a Church in Right of the Wife, confirm a Lease made by the Patron, yet this shall not bind the Presentee of the Wife, if she survives her Husband, nor her Heirs, nor their Presentees after her Death, because the Deed was void *quoad* the Wife, being a Feme Covert, and the Husband had nothing but in her Right, which died with him.

Atter 67. 481.  
Dyer 72. b.  
133. a.  
Cro. Car. 582.  
1 Jon. 454.  
1 Rol. Abr.  
480.  
Co. Lit. 46. a.  
1 Co. 36.  
Hob. 7.

Tho' he who confirms as Patron hath the Fee-simple of the Advowson in him, yet if before he confirms he hath granted away the next Avoidance, his Confirmation of the Presentee's Lease will not be good to bind the Presentee of the Grantee of the next Avoidance, unless such Grantee doth also confirm; and if the Presentee of him who hath the next Turn doth enter and avoid such Lease, (as he well may,) and then dies, and the Patron of the Fee presents a new Incumbent, who is admitted, instituted, and inducted, this new Incumbent shall hold the Benefice discharged of the Lease, as his Predecessor should have done, tho' he came in by the Presentation and Admission of the Patron and Ordinary, who confirmed that Lease: So if the Bishop were Patron in Right of his Bishoprick, and after such Lease made by the Parson, the Bishop, Dean and Chapter had granted the next Avoidance to another, and then after they had all confirmed the Lease; yet upon the Incumbent's Death, if the Grantee of the next Avoidance presents, and his Clerk is admitted, instituted, and inducted, and avoids the Lease, it shall never after take Place against any subsequent Incumbent, tho' he come in by the same Patron who confirmed such Lease; the Reason of these Cases is, because the Grantee of the next Avoidance and his Presentee come in by Title paramount the making or perfecting of such Lease, and the Presentee or Parson having the whole Fee in him, when he has once defeated the Lease, it shall never after revive or take Place against any subsequent Incumbent; and tho' *Littleton* seems to be of Opinion, that the Parson hath not the Right of the Fee-simple in him, yet he explains himself to mean as to the bringing of a Writ of Right; for otherwise it is the Act of the Parson which chargeth or gives, and the Patron and Ordinary do only assent, and then the Lease being avoided by him who hath the Fee-

simple of that Land which was so leased, it can never after be set up again, being totally defeated by his Title Paramount. Another Reason may be, that having granted the next Avoidance before such Lease made or perfected, the Grantee is now become the present Patron, and ought to concur in all Acts whereby the Possession should be charged; for as before such Grant, the Patron's Confirmation, who had the whole Fee in him, would have been sufficient; so now having granted away Part of that Fee, the Grantee ought to join likewise, that to the Confirmation may be by all who have any Interest in the Parsonage, as well those who have the present and possessory Interest, as those who have the future and reversionary Interest, since otherwise the Confirmation is not compleat, and the Lease is then liable to Avoidance for want thereof.

If a Church be full of a Parson, and after another is made Parson and inducted, and he makes a Lease for Years, which is confirmed by the Patron and Ordinary, yet the Lease is void, because he who made it was not Parson, the Church being full before. 1 *Rel. Abr.*  
477.  
9 *H. 6.* 34

So if a Church be void, and one enters and occupies of his own Wrong, without any Presentation or Institution, and occupies as Parson, and makes a Lease for Years, which is confirmed by the Patron and Ordinary; yet this is void, because the Lessor was no Incumbent, for none can be Parson or Incumbent without Presentation or Collation, and so he had nothing in the Parsonage; so a Lease by a Parson, Vicar, Prebend, &c. before Induction or Instalment, tho' confirmed, shall not bind the Successor, because till then they have nothing in the Temporal Possessions. 1 *Rel. Abr.*  
477.  
9 *H. 6.* 34.  
10 *H. 6.* 11.  
2 *egg* 120

But if a Church be void, and one presents by Usurpation, and the Incumbent of the Usurper, after Admission, Institution and Induction, makes a Lease for Years, which is confirmed by the Usurper as Patron, and by the Ordinary, and after, in a *Quare Impedit*, the true Patron recovers, and removes the Incumbent; yet it seems the Lease shall stand, because there was a Patron *de facto*, who made and confirmed such Lease, and the Parson coming in by all the Solemnities of Law when the Church was void, the People could take Notice of no other, and therefore all Acts done by him, and legally confirmed, are good; but *Rolle* cites this Case, that the Successor of the rightful Patron after Recovery shall avoid such Lease, because it was not made or confirmed by a rightful Parson or Patron; *ideo Quere*. 9 *H. 6.* 33. 34.  
1 *Rel. Abr.*  
480.

King *Ed. 6.* being Patron of a Church full of an Incumbent, by his Letters Patents grants the Advowson to the Bishop of *Coventry and Litchfield* and his Successors, and grants, that after the Avoidance of the Church by Death, Resignation, or otherwise, that the said Bishop, and his Successors, should hold the said Church *in Proprios usus*; the Bishop after, by Indenture, makes a Lease for forty Years, to begin at such a Time as the said Parsonage should come to the Hands of him, or his Successors, by Death, Resignation, or otherwise; and this is confirmed by the Dean and Chapter; the Bishop dies, then the Incumbent dies, and the Successor of the Bishop enters and makes a Lease for Twenty-one Years, &c. and by all the Justices it was held, that the first Lease was absolutely void, for the Lessor had nothing in the Parsonage impropriate during the Life of the Incumbent, and he survived the Lessor, and therefore it could never take Effect; and it could not be good by Estoppel, because the Truth of the Case appeared in the Indenture of Lease itself, that he had nothing during the Incumbent's Life, which Case farther proves that the whole Fee is in the present Incumbent; and, as in the Cases before-mentioned, the Avoidance of a Lease by the present Incumbent shall be an Avoidance of it for ever; so in this Case, for want of the present Incumbent's joining, the Lease shall never arise. Dyer 244.  
Plow 400.  
Co. Lit 352.  
1 Co 155. a.  
10 Co. 48. a.

## 4. At what Time such Confirmation is to be made

*Co. Lit.* 300. b. As to the Time of Confirmation, generally speaking, it is not material, whether it be before or after the making of the Lease, which is to be so confirmed, so it be made in the Life-time of the Parties who make the Lease; for the Confirmation is but an Assent or Agreement by Deed to the making of such Lease or Grant, and not a Confirmation of the Estate itself, as will appear more fully by the following Cases and Diversities.

*Co. Lit.* 301. a. If a Disseisor makes a Charter of Feoffment to *A.* with a Letter of Attorney to deliver Seisin, and before Seisin given, the Disseisee confirms the Estate of *A.* or the Deed made to *A.* this is clearly void, tho' Livery be made after; for this must enure as a Confirmation of the Estate, which cannot be good before the Estate passed, which before Livery it did not; but if a Bishop had made a Charter of Feoffment before the Statutes, with a Letter of Attorney, and the Dean and Chapter before Livery confirm the Deed, this is a good Confirmation, and Livery made after is sufficient; so if the Bishop had granted a Reversion, the Dean and Chapter might confirm the Deed or Grant before Attornment.

*Co. Lit.* 301. a. So if a Bishop at the Common Law had granted Lands by Deed to the King, and before Inrolment the Dean and Chapter, by their Deed, confirm the Deed of the Bishop, and after the Deed of the Bishop is inrolled, this is a good Grant and Confirmation, because as to the Bishop it was a perfect Deed, and therefore capable of being confirmed; tho' to enable the King to take there wanted Inrolment, which might be at any Time after; the same Law, if the Bishop had made a Lease for Years to the King, Confirmation of the Lease before Inrolment would be good.

*Co. Lit.* 300. b. So if the Patron and Ordinary had by Deed given Licence to the Parson to grant a Rent-Charge out of the Glebe, and the Parson had granted it accordingly, this was good, and should bind the Successor, tho' this was not a Confirmation subsequent, but a Licence precedent.

*Owen* 33. So if a Bishop makes a Lease for Years at this Day, which needs Confirmation, and the Lease is made on the second of May, and confirmed on the first of May, this is a good Lease by *Catlin* and *Southcot*; but *Wray* objected, that a Lease cannot be confirmed before it be made; to which they replied, that the Assent before was a good Confirmation of the Lease made after.

So where a Bishop made a Lease the second of May, which was confirmed the third of May, and sealed the fourth of May, this was held a good Confirmation.

*H. 6. 8.* So where the Deed of Confirmation bore Date before the Deed confirmed, but by Agreement the Deed confirmed was first delivered, the Confirmation was held good; for a Confirmation is but a meer Assent by Deed to the Grant, and therefore may be either before or after the Grant or Lease itself, or at the Time of the Lease or Grant; as if a Parson makes a Lease with the Assent of the Patron and Ordinary, this is a good Confirmation; and so where the Dean and Chapter are to confirm likewise, if their respective Seals are affixed.

*H. 6. 8.* And yet it hath been holden on the contrary, that if a Confirmation be made and delivered before the Grant or Lease to be confirmed, that this is not a good Confirmation; and tho' after the Grant or Lease the Deed of Confirmation be delivered again, yet that will not make it good, for that it was a Deed by the first Delivery; and the second Delivery will not make it good as an Assent, because the Assent ought to be by Deed, and the first Delivery was void; but that Confirmation may be made

made before the Grant or Lease to be confirmed; the other Cases are express, and the Reason of the Thing seems likewise to make for it; for the Confirmation being nothing but an Assent or Agreement that the Bishop or Parson may make such Lease, &c. when this Assent appears under Seal, and a Lease, &c. made pursuant to it, there can be no Reason to impeach the Lease after, which has all the Sanction that the Law requires, viz. the Concurrence and Assent of the Persons appointed by Law to that Purpose, and before or after are only Circumstances of Time, which seem not material when the Assent, which is the Substance, sufficiently appears.

Therefore if a Bishop makes a Lease for Twenty-one Years according to the Statutes, and after makes a concurrent Lease for Years of the same Land to another, and after, before any Confirmation of the second Lease, the Bishop makes another concurrent Lease to a third Person, which is immediately confirmed, and after the second Lease is confirmed also; in this Case the second Lease shall be good and effectual by the Confirmation, altho' the last Lease was confirmed before it, because the Confirmation adds nothing to it, nor conveys any Interest, but only makes it more perdurable and effectual.

And upon this Reason it hath been adjudged, that Leases made before 13 Eliz. for more Years than are allowed thereby, being confirmed after the said Statute, are good, and shall bind the Successor; for the Confirmation is only an Assent, and when it is made relates to the making of the Lease, which being before the Statute, remains at Common Law, and by Consequence binds the Successor; also such Confirmations being only to perfect Leases made before that Statute; are not within the Intent thereof.

So where an Archdeacon, Impropiator of a Parsonage 12 Eliz. let Part of his Glebe for fifty Years, and the Bishop, Patron of the Archdeaconry, and the Dean and Chapter, 15 Eliz. confirmed that Lease, and then the Archdeacon died; and it was held, 1. That the Statute 1 Eliz. extended only to the immediate Possessions of the Bishoprick, and here the Land let was not any Part of the Possessions of the Bishoprick, but of the Archdeaconry, and the Confirmation, tho' it is necessary, yet at most it amounts only to an Assent, and the Interest passes from the Archdeacon, and not from the Bishop; but if the Bishop had been disseised of any of the Possessions of the Bishoprick, and after had confirmed the Land to the Disseisor, this would not bind his Successors, because here the Confirmation passed an Interest, and without such Confirmation the Bishop himself might have entered and restored the Possession, and no Act of his singly can bind his Successor. 2. It was adjudged that this Confirmation, tho' after 13 Eliz. should bind the Archdeacon's Successor, because the Lease to which it relates was made before the Statute, and that Statute restrains only from Alienating, not from Confirming.

But if a Bishop, Parson, or any other sole Ecclesiastical Corporation, makes a Lease for Years, which needs Confirmation; this Confirmation ought to be made in the Life and during the Incumbency of the Lessor, for after his Death, Resignation, Deprivation, or other Amotion, the Lease is become void for want of Confirmation; and then Confirmation made after cannot revive it, tho' it be made in the Vacation before any Successor comes in.

But if a Parson makes a Lease for Years, which is not confirmed by the Bishop or Patron then in Being, but by the succeeding Bishop and succeeding Patron, this is a good Lease, and shall bind the Successor, because the Lease was absolutely good against the Parson himself who made it, and the Confirmation was only necessary to make it binding on the Successor; and in this Case, the Lease being duly confirmed during

Moor 66. pl. 180.

5 Co. 15.  
Newcomen's  
Case.  
Cro. Eliz. 18.  
Higgins ver.  
Grant.  
Cro. Car. 38.  
Cro. Jac. 53.

Cro. Eliz. 430.  
Moor, pl. 636.  
Sir Edward  
Denny and  
Eakenstall.

Co. Lit. 301.  
21 H. 7. 1.  
Degg 118.  
4 Leon. 78.  
In which last  
Book the  
contrary is  
held by  
Clench.

5 Co. 15.  
Cro. Car. 38.



the Incumbency, had all the Sanction the Law requires; for there is no prefixt Time for the Confirmation of such Leases, so it be made during the Life and Incumbency of the Lessor.

### 5. How far Regard is to be had to the true Naming of the Corporation or Persons who do confirm.

Bro. Tit.  
Leases 45.  
Dyer 83, 86,  
106.  
11 Co. 21.  
Hob. 32.  
1 Leon. 307.  
But for this  
vide Head of  
Corporations.

Herein we shall only observe, that Corporations Aggregate, as Dean and Chapter, Mayor and Commonalty, Warden and Fellows, &c. may make or confirm Leases, without expressing either the Christian or Surname of the Dean, Mayor, Warden, &c. because in their Politick Capacity, as a Corporation Aggregate, they continue always the same, and are said never to die; but in Leases or Confirmations by a Bishop, Dean, Mayor, &c. or other sole Corporation, both their Christian and Surname, or at least their Christian Name, ought to be expressed, because they are subject to Death and Succession, &c. and therefore must be particularly named to shew whose Lease, &c. it was, and so some hold too in the first Case.

## (H) Of void or voidable Leases by Ecclesiastical Persons: And herein,

### 1. Against whom Leases not pursuant to the Statutes, or otherwise defective, are void or only voidable.

Cro. Eliz. 440.  
1 And. 241.  
Sav. 119  
3 Co. 59.  
Cro. Jac. 173.  
2 Brownl. 164.  
Cro. Eliz. 207,  
690.  
Hard. 326.  
Co. Lit. 45. a.  
10 Co. 59. b.  
2 Leon. 138.  
1 Leon. 308.  
1 Rol. Rep.  
169.  
1 Keb. 182.  
11 Co. 73. a.

**H**ERE it is to be observed, that if a Bishop grants the next Avoidance of a Church, which is not warranted by 1 Eliz. because it is a Thing which lies meerly in Grant, out of which no Rent can be reserved; or makes a Lease of the Advowson of a Church, or grants an Annuity out of the Possessions of his Bishoprick, or makes a Lease of Tithes for three Lives, or a Lease of any other of his Possessions, not pursuant to all or any of the eight Rules before-mentioned; yet in none of these Cases is such Lease or Grant void or voidable by the Bishop himself who made it, but remains good against him during such Time as he continues Bishop; but as to the Successors of the Bishop, such Leases or Grants are void or voidable, as the Case happens to be, as will appear hereafter; and the Reason such Leases or Grants are good against the Bishop himself, who made them, is because they were so at the Common Law, and the Statutes were made only for the Benefit of the Successors, that they should not be bound by the Acts of their Predecessors, which might turn to their Prejudice and Disadvantage; but not to give the Bishop himself Power to avoid or derogate from his own Acts, which would be against all Rules both of Law and Equity, and therefore was not within the Meaning of the said Statutes; for then he would be impowered by Act of Parliament to do wrong to other Persons, which it cannot be presumed the Parliament intended to allow.

1 Rol. Rep.  
151.

So where a Bishop, by Deed inrolled, gave Lands to the Queen, without the Consent of the Dean and Chapter, yet it was held that this was good against the Bishop himself who made such Gift.



So for the Reasons before-mentioned, tho' the 13 *Eliz. cap. 10.* says that all Leases, Gifts, Grants, &c. made by any Persons or Corporations therein mentioned, contrary to the Tenor of that Act, shall be utterly void and of none Effect to all Intent, Constructions and Purposes; yet it hath been adjudged, that a Lease made by a Dean and Chapter against the said Statute shall not be avoided, nor any Covenants therein contained, during the Life and Continuance of the Dean that made the Lease; so that if they have made a Lease for Years of any of their Possessions, and before the Expiration thereof make a concurrent Lease also for the same Lands, and then make a third Lease for Lives, with express Covenant, that the Grantee for Lives shall enjoy the Land against the second or concurrent Lease, and Grantee for Lives being in Possession is evicted, and brings Covenant against the Dean and Chapter; in this Case, tho' the Lease for Lives be void by the 13 *Eliz.* yet it was agreed by the Justices, that because the Dean who made the Lease for three Lives was living, and continued Dean at the Time of the Eviction, that the Lease was not void, and by Consequence an Action was well maintainable against the Dean for Breach of the Covenant therein contained.

So where a Master and Fellows of a College, by deed inrolled, made a Lease for Years, not warranted by that Statute, and afterwards suffered a Fine, and five Years to pass without Claim; tho' this was void against the succeeding Master, yet by Construction the Lease and Fine were held good against the College, (tho' it be a Corporation Aggregate that never dies,) during the Life of the Master, who was Party to the Lease, and made no Claim, because he was the Head and principal Part of the Corporation.

So if a Dean, Archdeacon, Prebend, Parson, or other sole Corporation, make Leases of their sole Possessions, not warranted by the said Statutes, yet they shall bind themselves during their own Time, because the Statutes were made to provide chiefly for the Benefit of the Successors, and not to relieve the Parties themselves against their own Acts or Grants; tho' it is held by *Popham*, that if a Parson made a Lease without reserving any Rent, that this should not bind even himself; but *Quære.*

But where there is a Chapter that hath no Dean, as the Chapter of the Collegiate Church of *Southwiel*, there Grants or Leases made by them contrary to 13 *Eliz.* are void *ab initio* against themselves; and so of Leases or Grants by any other Corporation Aggregate, who have no Head or principal Person; for they must be either void *ab initio*, or good for ever, because they continue always the same, and one has no Superiority or Power more than another; but in Case of a Dean and Chapter, Master and Fellows, &c. tho' they are a Corporation Aggregate, and never die, yet Leases or Grants made by them, contrary to the said Statutes, shall bind during the Time of the Dean, Master, &c. who was Party thereto, because such Dean, Master, &c. who are the Head of the Corporation, are subject to Death and Succession, as other sole Corporations, and therefore shall have no Aid from this Statute to avoid their own Leases; but only their Successors, for whose Benefit the Statute was made, together with the Chapter, shall have Power to avoid such Leases, &c. but if the Dean and Chapter, Master and Fellows, &c. were all equally seised, and the Dean and Master solely should make a Lease, tho' it were in all Respects warranted by the Statutes, yet this Lease seems void *ab initio* at Common Law, because the Dean, Master, &c. had no sole Seisin whereof to make any Lease at all; but the Chapter in the one Case, and Fellows in the other, having an equal Estate and Interest, ought to have joined in such Lease or Grant, and for want of their joining such Lease or Grant seems void at Common Law, as it would be for a Misnomer, &c. and then the Lessee cannot hold it against the Dean and Chapter, if they seek to avoid it.

1 *Brownl.* 21.  
*Moor* 875.  
 2 *Brownl.* 134,  
 158.  
 3 *Co.* 60.  
 1 *Leon.* 308.  
*Co. Lit.* 45 *a.*

11 *Co.* 67. 78. *b.*  
 1 *Roll. Rep.*  
 171.

*Hetley* 24.  
*Co. Lit.* 45. *a.*  
*Comp. Incumb.*  
 380.

1 *Mod.* 204.  
 2 *Mod.* 56.  
*Hard.* 326.  
 1 *Leon.* 308.  
 3 *Co.* 60.  
*Co. Lit.* 45. *a.*  
 325. *b.* 341.

Dyer 239.

As Leases and Grants, not warranted by the Statutes, are not void against the Lessors and Grantors themselves, so neither are Leases or Grants made without due Confirmation, where Confirmation is necessary, but only by the Grantor's Death or Amotion.

7 Co. 35.  
Count. of  
Bedford's  
Case.

If a Bishop makes a defective or voidable Lease or Grant, not only the Successor, but also the King, when the Temporaltes come into his Hands, may take Advantage thereof, by avoiding them during the Vacancy of the Bishoprick, in Privy and Right of the Bishop; but yet this shall not so absolutely avoid the Lease, but that the succeeding Bishop may make the same either good or void, at his Election, as to himself; and this either expressly, as by actual Agreement to the Lease or Grant of his Predecessor; or implicitly, as by Acceptance of Rent incurred after the Death of the Predecessor; or doing any other Acts, which amounts to an Agreement in Law; and therefore this differs from the Cases before put, where Avoidance of a Lease by a Parson shall avoid it, not only for his own Time, but also against all his Successors, so that they can never after set it up again, or affirm it by any Act of theirs whatsoever; for the Parson hath the whole Fee-simple in him as much as any of his Successors can ever have; and therefore when he once avoids the Lease, as to the whole Fee-simple which he hath, he avoids it for ever, so that it can never after revive; but the King hath not the Fee-simple in the Temporalties, but only the Custody or Guardianship of them during the Vacation of the Bishoprick, which is but a temporary and qualified Interest; and therefore what he does shall not be binding on the Successor; but if the Successor himself avoids such Lease or Grant, then it is the same with the other Case, and no succeeding Bishop after can revive or set it up again, because it was avoided by one who had the whole Fee-simple and Estate in him.

But here a Difference is to be observed betwixt such Leases as are actually void by the Death, &c. of the Lessor, and such as are only voidable; and here again we must distinguish, 1. Between the Person leasing. 2. Between the Things leased, and the Leases themselves; and because the Common Law, with respect to the three Distinctions, holds good still, where the several Statutes before-mentioned are not pursued, we shall consider how the Common Law stood in these Particulars, which, together with the Reasons thereof, will shew how the Law is at this Day upon the said Statutes.

The first Distinction to be observed is between the Persons leasing, that is, between such sole Corporations as had the whole Fee-simple absolutely in them, as Bishops, Abbots, &c. and such sole Corporations as were looked upon only to have a qualified Fee-simple, as Parsons, Vicars, Prebends, Provosts in Cathedral Churches, and others who were Presentative or Collative, and not Elective.

Bro. Tit. Ac-  
ceptance 9, 10,  
20, 26. Tit.  
Confirmation  
21. Tit. Dean  
20. Tit. Lea-  
ses 18, 19, 32,  
33, 52.  
F. N. B. 50.  
Plow. 264.  
Cro. Eliz. 18.  
Popb. 121.  
Dyer 46, 239.  
Co. Lit. 45. b.  
102, 341.  
6 Co. S. a.  
Hett. 88.  
1 Rel. Abr.  
481.

As to Leases by Parsons, Vicars, &c. if by the Common Law any of these had made a Lease for Years of any of the Possessions of their Church, without Confirmation of Patron and Ordinary, &c. such Leases by their Death, or other Avoidance, had become absolutely void without Entry or other Ceremony, so as no Acceptance of the Rent, or other Act done by the Successor, could affirm or make them good or binding over against themselves; but Leases for Years by Bishops, Abbots, &c. tho' without Confirmation of the Dean and Chapter, or Assent of the Covent, were not absolutely determined by their Death, &c. but continued good till some Act done by the Successor to avoid them; for they have, and always were allowed to have the whole Fee-simple and Inheritance of their Possessions in themselves; and therefore before the third Council of Nice, Anno 710. might by their sole Alienation, without the Confirmation of the Dean and Chapter, have bound their

1 Rel. Rep. 361. Bridgm. 94. 3 Co. 65. Raym. 166. 2 Keb. 325.

Successor for ever; and tho' by that Council such Alienations are restrained, as hurtful and injurious to the Church, and the Confirmation of the Dean and Chapter made necessary; yet this is only *quoad* Binding the Successor; for the Fee-simple continues still in them, and therefore Leases for Years made by them subsist after their Death or Removal, as they would do if they had been made by a Tenant in Fee of any Lay Possessions, till the Successor comes to avoid them by Aid of the Canons made at that Council, which have received a Sanction from our Law.

So it was in Case of Abbats, Priors, or Deans, &c. where they were sole seised, if they had made a Lease for Years of any of their Possessions, this had not absolutely determined by their Death, &c. because they had the whole Fee-simple in them; and therefore such Leases continued good till the Successor came to avoid them, for Want of Confirmation of the Persons substituted by Law for that Purpose. *Vide the Authorities supra.*

Therefore where a Prebend made a concurrent Lease for Years of Tithes, rendering the antient Rent, without Confirmation of the Dean and Chapter, yet it seems to be allowed, that this was not absolutely void by his Death, &c. but only voidable; and then Acceptance of the Rent by the Successor will make it good during his Time; for Leases not warranted by those Statutes remain at Common Law, which makes them only voidable, not actually void upon the Death, &c. of the Person who makes them. *Harl. 156. Sir John The roughcock and Sir Henry Herbert.*

The second Distinction to be observed is, between the Things leased, and the Leases themselves.

It has been before observed, that Leases for Years by Parsons and Vicars determine absolutely by their Death, without Entry, or other Ceremony; but if they make a Lease for Life or Lives, and die, or are removed, yet the Lease continues good till some Act done by the Successor to avoid them; the Reason is, because such Lease for Life or Lives being an Estate of Freehold, could not pass without the Solemnity of Livery and Seisin; and therefore to defeat that, there must be an Act of equal Notoriety, *viz.* the Entry of the Successor; and by Consequence, if the Successor before such Entry accepts the Rent, or does any other Act signifying his Consent to such Lease, this affirms the same during his Time, so as he can never after avoid it, because it was only voidable, not actually void by the Lessor's Death, &c. and consequently capable of an Affirmance; and the Law is the same at this Day, as to Things which lie in Livery. *Vide the Books supra.*

But as to Things which lie in Grant or Prender, there seems a Diversity between the Common Law and the Law as it stands at this Day upon the before-mentioned Statutes; for if a Bishop makes a Lease for Lives of a Portion of Tithes, or other Things not manurable, reserving the antient Rent, and dies, &c. and his Successor accepts the Rent, yet this Acceptance shall not bind him, because the Lease was absolutely void by the Bishop's Death, &c. who made it, without Entry, or other Ceremony; and the Reason of its being so absolutely void is, because the Things leased lying only in Grant or Prender, no Rent could be thereout reserved, recoverable by the Successor; for distrain he could not, because there was nothing wherein a Distress might be taken; and an Action of Debt would not lie, because the Lease being for Lives, no Action of Debt was maintainable till after the Lives ended; and therefore since his Acceptance of the Rent due at one Day, will not enable him to sue for it, if afterwards denied, he shall not be bound by such Acceptance; but if the Tithes, or other Things lying in Grant had been let for Years, there the Successor's Acceptance of the Rent would have bound him during his Time, because then he might have an Action of Debt for any Arrears that should incur after; and this Construction seems to arise wholly from the Statutes before-mentioned, which, as appears before, were made wholly to provide for the Successor, that he might not be impoverished. *Cre. Jac. 173. Comp. In. uncl. 380-1. Palm. 175. Degg 134, 318. Bre. Tit. Lease 41.*

or prejudiced by the Acts of his Predecessor; for at Common Law all Leases for Lives or Years, as well of Things which lay in Grant as of Things which lay in Livery, were only voidable after the Bishop's Death, &c. not actually void: And herein the Law at this Day, as to Bishops, appears to be the Reverse of the Common Law as to Parsons, Vicars, &c. for as their Leases for Years were absolutely void by their Death, &c. but their Leases for Life or Lives only voidable; so here the Bishops Leases for Lives are absolutely void by their Death, &c. whereas their Leases for Years are only voidable by their Successor: But *Quare* whether the Common Law made any such Distinction as to Things in Livery and Things in Grant, either in Case of Bishops, or Parsons, Vicars, &c. for the only Distinction taken Notice of in the Books is, between Bishops, &c. who had the whole Fee absolutely in them, and Parsons, Vicars, &c. who had only a qualified Fee, and between Leases for Years by Parsons, Vicars, &c. and Leases for Life or Lives made by them; but it seems clear, that if the Law be so at this Day as to Bishops, when they make Leases of Things in Grant, so it is as to all other Ecclesiastical Persons, (except Parsons, Vicars, &c.) within the Statutes before-mentioned, that Leases for Lives of Things in Grant determine absolutely by their Death, for the Reasons before given; but Leases for Years of such Things in Grant are only voidable by the Successor, not absolutely void; but as to Parsons, Vicars, &c. Leases for Years made by them, whether of Things in Livery or Things in Grant, determine absolutely by their Death, if not duly confirmed, or the Statutes not pursued; because then they remain at Common Law, where their Death or other Amotion was an absolute Determination of all Leases for Years in general made by them, and consequently of Leases for Years of Things in Grant, as well as others; and this Distinction in the principal Case between Leases for Lives of Things in Grant, and Leases for Years thereof, by Bishops, and other Ecclesiastical Persons within the said Statutes, (except Parsons, Vicars, &c.) that the one are absolutely void by the Death, &c. of the Lessor, and the other only voidable, seems to be a reasonable Distinction, and to reconcile all the Books, which make it a great Question, if Leases in general by Bishops, &c. not pursuant to the said Statutes, are absolutely void by the Death, &c. of the Lessor, or only voidable; for if Leases for Years by them of Things which lie in Grant are only voidable, and not actually void, because the Successor is not without some Remedy for the Rent, and therefore may adhere to that, if he pleases, and affirm the Lease for his Time; much less are Leases for Years or Lives of Things which lie in Livery (tho' the Statutes are not pursued,) absolutely void by the Death, &c. of the Lessor, since in such Cases the Successor has as full and ample Remedy for the Rent by Distress, or otherwise, as he would have had if all the Circumstances required by the Statutes had been pursued; and then *quilibet potest renunciare Juri pro se introducto*; and if the Successor thinks fit to wave the Defect of such Circumstances, and abide by the Lease, it would be unreasonable, and against the Intent of the Statutes, to put it out of his Power so to do, by making the Lease actually void, so as no Acceptance of the Rent, or other Act done by him, could affirm it; but where his Acceptance of the Rent at one Day will not help him to any Remedy for it the next, there it would be unreasonable that such an unwary Act should strip him of the Benefit intended for him by the said Statutes, and where he had no Remedy for the Rent, should have none for the Land neither, which would totally frustrate the Design and Intent of the Act, and tend to the Impoverishment of most Successors to Ecclesiastical Persons.

2 Rel. Rep.  
161. Ed.  
Coke's Case.  
1 Fen. 406  
Cro Car. 95.  
5 Co. 2.  
10 Co. 60, 61.  
Cro Jac. 175.

Palm. 175.  
Bishop of Ox-  
ford's Case.

But this Acceptance of Rent, which shall affirm a voidable Lease, must be by him who is perfect Successor; therefore where the Successor of a Bishop, before he had a Restitution of the Temporalities out of the King,

accepted

accepted the Rent reserved by his Predecessor upon a voidable Lease, yet it was held, that notwithstanding this Acceptance, he might well enter and avoid the Lease; because before such Restitution he was not perfect Successor; and then such Acceptance of the Rent shall not bind him, any more than if he had been a perfect Stranger.

So where a Master of a College, or Head of any Corporation Aggregate, accepts Rent upon a voidable Lease made by his Predecessor, and the rest of the Corporation, without Authority in Writing from the Corporation to accept the same, this Acceptance shall not affirm the Lease during the Life or Continuance of such Master or Head who so accepted it; for the Right being as much in the Fellows, or other Members of the College, as in the Master, &c. himself, he cannot by any Act of his own conclude or bind them from their Entry upon any voidable Lease; also he himself, in their Right, may enter to avoid such Lease, notwithstanding his own Acceptance of the Rent.

11 Co. 79. a  
1 Rol. Rep.  
172.  
Magdalen  
College's Case.

If a Bishop's Bailiff, of his own Head, and without any Order from the Bishop, receives Rent upon a voidable Lease made by the Predecessor of the Bishop, this shall not bind the Bishop; but where a Bishop made a Lease for Lives of certain Lands, Parcel of the Manor of *A.* reserving Rent, but not in all Things pursuant to the Statutes, and by Consequence voidable by the Successor, and then the Bishop dies, and another is made, and the Bailiff of the Manor came to him, and shewed him in general, that there were certain Rents in Arrear of the said Manor, and thereupon the Bishop commanded him to receive the said Rents, which he did accordingly, and amongst the rest, the Rent upon the said voidable Lease, and after paid all the said Rents to the Bishop, without giving him Notice particularly of that Rent; yet this Acceptance shall bind the Bishop; because he ought to take Notice what Leases are made by his Predecessor, and what Rent he himself received; for if he had no Title, he ought not to have received the Rent at all; if he had, he must be supposed to know it, and then his Acceptance of the Rent shews his Assent to the Lease upon which it was reserved.

1 Rol. Abr.  
476.  
Hetley 24.  
Cro. Car. 95.  
Wheeler ver.  
Danby.

Also it is to be observed, that so far as the Lessor is bound by any void or voidable Lease, so far also the Lessee, his Executors or Assigns, which soever of them have the Interest, are bound thereby, and no further; therefore when the Lease is not void without Entry, if Rent be in Arrear after the Death of the Predecessor, the Successor hath Remedy to recover such Arrears, if he chuses to affirm the Lease; but if the Lease be absolutely void, the Successor hath no Remedy at Law for any Rent incurred after the Death of his Predecessor.

Posth. 121.  
1 Leon. 309.

So the Lessee of a voidable Lease, after the Death of the Lessor, may maintain an Action of Trespass against any Stranger, who shall enter or do any other Act of Trespass upon the Land before the Lease be actually avoided.

1 Leon. 309.

## 2. By what Means, and in what Cases, such voidable Leases may be made good.

This in a great measure has been explained under the foregoing Division; it remains only to shew, that besides Acceptance of the Rent, there are other Ways by which such voidable Leases may be affirmed, as by distraining for Rent due at the Death of the Predecessor, or by bringing an Action of Waste against the Lessee; or, in case the Lease be for Life or Lives, by bringing an Assise for the Rent due after the Death of the Predecessor, or Acceptance of Fealty from the Lessee; all these amount to an Affirmance of such voidable Leases, and make them good against the

Dyer 239.  
Fitz. Tit.  
Abbot 9.  
Bro. Tit. Ac-  
ceptance 15

the Person who so affirms them, for his own Time, because these Acts shew a sufficient Intent in the Successor to continue and acquiesce in the Leases made by his Predecessor.

### 3. The Manner of avoiding of such Leases as are only voidable.

Dyer 222.  
Ayer and  
Ome.  
1 Sid 7.  
Young and  
Wright.  
Dyer 28. a.  
in Margin.

This may be done either by Entry, where the Lease is of Things corporeal and manurable, or by Claim where the Lease is of Things incorporeal; as where a Lease for Years is made, rendering Rent, upon Condition to be void for Non-payment, this Lease shall not be void without a Demand made of the Rent; for if it were otherwise, it would be in the Power of the Lessee to make the Lease void at any Rent-Day he thought fit, and so to add the Wrong of making the Lease void to that of Non-payment of the Rent.

Moor 52.  
Dyer 222.

And where an Entry is to be made, this may be done either by the Bailiff of the Party that would enter, or by other Persons deputed for that Purpose; but a Bailiff, merely in Virtue of his Office, cannot make an Entry for his Master without special Warrant, because his Office is to manage his Master's Lands, and to take the Profits thereof to his Master's Use; but to gain new Lands, which his Master had not before, does not belong to his Office as Bailiff; besides, an Entry being a Thing which the Master may or may not make, his Bailiff shall not determine his Election therein.

1 Rol. Abr.  
514. b.  
Dumper ver.  
Syms.  
Bro. Tit. Cor.  
poration 9.  
6 Co 38.  
4 Co 119.

Where a Corporation Aggregate have Title of Entry to avoid a Lease, they cannot command their Bailiff to enter, unless it be by Deed; for their Parol Command in such Case is void, and the Entry thereupon tortious; because as a Body Politick they are invisible, and incapable of Acts as Natural Persons are: But yet, *per Curiam*, if one distrains as Bailiff to a Corporation, tho' in Truth he be not Bailiff, yet he may make Conuzance as such, and if the Corporation agree thereto, it is good without Deed; because the Command he had in such Case is not traversable.

4 Leon. 181.  
Wood versus  
Chazler.

But a Bishop may by Parol command his Servant to demand a Rent, or make an Entry, and this is good; because as a Sole Corporation he is capable of the same Acts as all Natural Persons are.

Cro. Eliz. 167.  
2 Leon. 97.  
Willis versus  
Jermin.

A Dean and Chapter made a Lease for Years, rendering Rent, and for Default of Payment the Lease to be void; the Rent was Arrear, and not paid; then they made a new Lease to another Person, and affixed their Seal to it in the Chapter-House, before any Entry made upon the first Lessee, and at the same Time made a Letter of Attorney to one to enter and make Delivery of this Lease upon the Land, who accordingly did it; and it was objected, that this second Lease was void; because the Deed being perfected as the Deed of the Corporation, by their affixing their Seal to it, the Delivery after by the Attorney was void, it being perfect before; and the first Perfection of it as a Deed could not make it a good Lease for Years, because the first Lessee was in Possession, and they made no Entry to avoid it; but yet *per Curiam* it was held to be a good Lease, and that there was no other Means for a Corporation to make a Lease but this; and Gawdy said, it was not the Deed or Lease of the Corporation till Delivery, as of another Person; and therefore where it is said in *Davis* 44. to be agreed, that if a Dean and Chapter put their Chapter Seal to a Deed, this is a perfect Deed thereby, without any Delivery; this must be understood when the Dean and Chapter are in Possession, not when they are out of Possession, or have only a Right; and so the Diversity appears to be taken upon the Books; for otherwise the

Dav. 44.  
2 Rol. Abr. 23.  
Flud and Gre-  
gory.  
1 Vent. 257.  
3 Keb. 307.  
Good versus  
Asb.

the Lease must be inevitably void in such Case ; for till it be sealed, the Attorney cannot deliver it as the Deed of the Corporation ; and if the Sealing perfects it presently as their Deed, so that it cannot be delivered after, then it is void for Want of an Entry, and so all Ways the Lease would be void ; which would be a very unreasonable Construction, when it may be so easily avoided ; and in the latter Books it is said, that tho' the Putting of the Seal of a Corporation Aggregate to a Deed carries with it a Delivery, yet the Letter of Attorney to deliver it upon the Land suspends the Operation of it as an Escrow till Entry, &c. but yet the Corporation, if they think fit, may after the Indenture of Lease ingrossed make a Letter of Attorney to another, to seal and deliver it as their Deed or Lease to the Lessee upon the Land, without first affixing their Seal to it ; and so it was done in the Case of the Wardens and Fellows of *All Souls College* in *Oxford* ; but then, as it seems, the Attorney must affix the Corporation Seal to it, and not any other Seal ; but yet in one Book it is held *per Curiam*, that a Corporation Aggregate, as there the President, Fellows, and Scholars of *St. John's College* in *Oxford*, making a Lease, are to subscribe and seal it, and then deliver it by their Attorney, having a Letter of Attorney for it, and that they could not deliver it in any other Manner ; but whether the Attorney might also affix their Seal or not, is not mentioned in the Case.

1 Leon. 306.  
Carter versus  
Claypool.  
1 Bull. 119.  
President, &c.,  
of St. John's  
College versus  
Lord Norris.

## (I) Of Leases made by those who have but a particular Estate or Interest in the Lands leased : And herein,

### 1. Of Leases made by Tenant in Dower or Curtesy.

AS to which it will be sufficient to observe, that if Tenant in Dower or by the Curtesy make a Lease for Years, reserving Rent, and die, this Lease is absolutely determined, so that no Acceptance of the Rent by the Heir or those in Reversion can make it good ; tho' their Estate is *quodam modo* a Continuance of the Estate of their Husband or Wife, yet it is a Continuance of it only for Life, and they have no Power to contract for, or intermeddle with the Inheritance, and consequently their Leases or Charges fall off with the Estate whereout they were derived, and the Lessee is become Tenant by Sufferance by his Continuance of Possession after.

Bro. Tit. Ac-  
ceptance 14.  
19. Tit.  
Leases 17, 19.  
Plew. 30, 272.  
Cro. Car. 398,  
399.  
1 Jon. 354.  
Vaugh. 8c-1.

### 2. Of Leases made by Tenant for Life.

Tenant for Life can make no Leases to continue longer than his own Life ; but if Tenant for Life makes a Lease for twenty Years generally, and after he in the Reversion confirms that Lease, and then the Tenant for Life dies, tho' this at first would have determined by the Death of the Lessor, yet the Confirmation hath made it good and unavoidable for the whole Term ; but if the Lease had been for twenty Years, if the Lessor Tenant for Life should so long live, there if the Reversioner had confirmed this Lease, yet it would not prevent its Voidance upon the Death of the Tenant for Life ; the Diversity between which Cases is this, that in the first Case the Lease being made generally for twenty Years, nothing appears to the contrary but that it was a good Lease for that

Polb. 105.  
1 Co. 147.  
Anne May-  
new's Case.



Time absolutely; for the Death of the Lessor, which would determine it sooner, does not appear in the Lease itself; then when the Reversioner, who alone could take Advantage of that implied Limitation, thinks fit to wave it, and confirms the Lease, as it was made at first, for twenty Years absolutely, this makes it his own Lease for so much of the Time as would have fallen into his Reversion by the Death of the Tenant for Life, before the twenty Years run out; but in the other Case, the Death of the Tenant for Life being made the express Limitation and Circumscription of the twenty Years in the Lease itself, no Confirmation of that Lease, as so limited, can enlarge it to extend beyond the Life of the Lessor, that being the express Determination affixed to it.

10 Co. 49. a.

And yet we find one Case where it is held, that if a Man makes a Lease for Twenty-one Years, if the Lessee so long live, and after the Lessor and Lessee join in a Grant by Deed of the Term to another, and after the first Lessee dies within the Twenty-one Years, that yet the Grantee shall enjoy it during the Residue of the Term absolutely. But to reconcile this Case with the other, it must be intended, that in the Assignment no Notice is taken of the express Limitation affixed to the Lease, but that they joined in an Assignment of the Lease for the Residue of the Twenty-one Years, and then it may well be construed to amount to a Confirmation by the Lessor for that Time, as the Lessor may confirm the Land to the Lessee for any longer Time, and thereby enlarge his Estate or Interest.

Co. Lit. 47. b.

6 Co. 15. a.

1 Rol. Abr.

378.

If *A.* Lessee for the Life of *B.* makes a Lease for Years by Indenture, and after purchase the Reversion, and then *B.* dies, *A.* shall avoid his own Lease, notwithstanding he hath now an Estate capable of supporting the Lease for the whole Term, for he may confess the Lease for Years as it was, and avoid it by shewing his own Estate in the Lands at the Time of that Lease made, and is not estopped to do this, because an Interest passed from him, he well may confess and avoid.

Co. Lit. 45. a.

Dyer 234. b.

Moor, pl. 196.

pl. 959.

Post. 57.

6 Co. 14.

*B.* Tenant for Life of *C.* and he in the Remainder or Reversion in Fee join in a Lease for Years by Indenture, this, during the Life of *C.* is the Lease of *B.* who then only had the present Interest in the Lands, and the Confirmation of him in the Remainder or Reversion; but after the Death of *C.* then this becomes the Lease of him in the Reversion or Remainder, and the Confirmation of *B.* for the Lessors having several Estates in them in several Degrees, the Lease shall be construed to move out of each one's respective Estate or Interest as they become capable of supporting thereof, which is the most natural and useful Construction of the Lease, especially as there can be no Estoppel in this Case, by reason of the several Interests which passed from each; and therefore during the Life of Tenant for Life, if the Lessee, being evicted, should declare of a Lease by both, this would be against him, as was adjudged, because for that Time it was only the Lease of the Tenant for Life.

### 3. Of Derivative Leases, or by one who is but a Lessee for Years himself.

Vide Tit. Assignment and Covenant.

(a) Bro. Tit. Distress 7.

As a Lessee for Years may assign or grant over his whole Interest; so he may grant it for any fewer or lesser Number of Years than he himself holds it; and such Derivative Lessee is compellable to pay Rent, perform Covenants, &c. according to the Terms agreed in such Grant or Assignment; also it is said in (a) *Broke*, that a Termor so assigning may distrain for the Rent, without any Power reserved for that Purpose, tho' a Person who assigns his whole Interest cannot, because he has no Reversion.



But such Derivative Lessee is not liable to the Rent reserved on the original Lease, otherwise than as his Cattle may be liable to a Distress for Rent arrear to the original Lessor, as any Stranger's Levant and Couchant may be; for there is no Privity between him and the original Lessor, as there is between a Lessor and Assignee; and therefore such a one, tho' he take the whole Term, except one Day, shall not be liable to any of the Covenants in the original Lease.

Lessee of a Prebend makes an Under-Lease, and the Lease being pretty far spent, he requested the Tenant to surrender, to enable him to renew, and offered to give any Security to grant him a new Lease for so many Years as he had to come in his old one; but the Tenant was obstinate and would not, unless his Landlord complied with some Demands of his; upon which he brought his Bill in Equity to enforce him to a Compliance; but my Lord Keeper said, tho' it were a Benefit to the Plaintiff, and no Prejudice to the Defendant, yet there being no Agreement in the Deed for that Purpose, he could do nothing in it.

But now by the 4 Georg. 2. cap. 28. sect. 6. it is enacted in the Words following, viz. 'Whereas many Persons hold considerable Estates by 'Leases for Lives or Years, and lease out the same in Parcels to several 'Under-Tenants, and whereas many of those Leases cannot by Law 'be renewed without a Surrender of all the Under-Leases derived out of 'the same, so that it is in the Power of any such Under-Tenants to 'prevent or delay the Renewing of the principal Lease, by refusing to 'surrender their Under-Leases, notwithstanding they have covenanted so 'to do, to the great Prejudice of their immediate Landlords, the first 'Lessees; for preventing such Inconveniencies, and for making the 'Renewal of Leases more easy for the future, be it Enacted by the 'Authority aforesaid, That in case any Lease shall be duly surrendered 'in order to be renewed, and a new Lease made and executed by the 'chief Landlord or Landlords, the same new Lease shall, without a 'Surrender of all or any the Under-Leases, be as good and valid, to all 'Intents and Purposes, as if all the Under-Leases derived thereout had 'been likewise surrendered at or before the Taking of such new Lease; 'and all and every Person and Persons, in whom any Estate for Life or 'Lives, or for Years, shall from Time to Time be vested by Virtue of 'such new Lease, and his, her, and their Executors and Administrators, 'shall be intitled to the Rents, Covenants and Duties, and have like 'Remedy for Recovery thereof; and the Under-Lessees shall hold and 'enjoy the Under-Messuages, Lands and Tenements, in the respective 'Under-Leases comprized, as if the original Leases, out of which the 'respective Under-Leases are derived, had been still kept on Foot and 'continued; and the chief Landlord and Landlords shall have and be 'intitled to such and the same Hereditaments comprized in any such 'Under-Lease, for the Rents and Duties reserved by such new Lease, 'so far as the same exceed not the Rents and Duties reserved in the 'Lease, out of which such Under-Lease was derived, as they would 'have had in case such former Lease had been still continued, or as they 'would have had in case the respective Under-Leases had been renewed 'under such new principal Lease; any Law, &c.

2 Vern. 275.  
574. See vide  
Cro. Eliz. 157.  
1 Leon. 179.

Preced. Chan.  
124. Colchester  
ver. Arnet.  
2 Vern. 383.  
S. C.

#### 4. Of Leases made by a Disseisor or Disseisee.

If a Disseisor makes a Lease for Years, or grants a Rent-Charge, and the Disseisee confirms it, and after re-enters, yet he shall not avoid the Lease or Rent, because by his Confirmation of them he hath departed with so much of his antient Right, which incorporates and mixes with the Lease or Grant, so that he can never after avoid them.

Co. Lit. 300.  
Poph. 50.

If

Co. Lit. 48. b. If one be disseised of Lands, and whilst he is out of Possession intends  
 Cro. Eliz. 483. to make a Lease for Years, the way is to prepare a Deed of Lease, and  
 Stephens ver. after he hath signed and sealed it, before any actual Delivery thereof,  
 Elliot. as his Deed, to deliver it as an Escrow to a third Person, to be delivered  
 3 Co. 55. as his Deed after Entry and actual Possession taken in his Name, or  
 Cro. Eliz. 446 as his Deed after Signing and Sealing before actual Delivery, he may make a Letter  
 Jennings ver. of Attorney to a third Person, to enter upon the Land in his Name;  
 Bragg. and after such Entry to deliver it upon the Land, or elsewhere, as his  
 2 Bendl. 81. Deed, to the Lessee; and tho' such Letter of Attorney be affixed to the  
 2 Rol. Abr. 25. Deed, and to make it an effectual Letter of Attorney, that must be  
 Davies ver. sealed and delivered, yet the Sealing and Delivery of that by the Lessor,  
 Bridges. tho' affixed to the Deed of Lease, will not be construed a Delivery of  
 the Lease itself, because no such Intent appears, but the contrary; and  
 therefore the Delivery of the Letter of Attorney shall have no more In-  
 fluence upon the Deed of Lease, than if it had not been affixed thereto;  
 or such Disseisee may prepare a Deed of Lease, and at the same Time  
 execute a Letter of Attorney to a third Person, to enter upon the Land,  
 and after such Entry to sign, seal and deliver the Lease as his Act and  
 Deed to the Lessee; and all these ways are good, because the Delivery  
 is the essential and finishing Part of a Deed; and if the Possession and  
 Seisin be reduced before that comes, the Delivery after is as effectual  
 as if the whole Deed had been prepared and executed after; because till  
 the Delivery the Deed took no Effect, and when the Delivery was, he  
 was in actual Possession, and consequently might make such Lease; but  
 if such Disseisee, being out of Possession, had sealed and delivered the  
 Deed of Lease as his Deed, tho' he had after actually entered upon  
 the Land, and then delivered the Lease again as his Deed, yet no In-  
 terest would pass to the Lessee by either of these Deliveries; for, as his  
 Deed, it took absolute Effect by the first Delivery, and then the second  
 Delivery, to make it his Deed, was void and to no Purpose; for a  
 Deed cannot have two Deliveries; and the first Delivery, to make it a  
 Lease, was void, because he was then out of Possession, and had only  
 a Right of Entry, which he could not transfer to a Stranger; and  
 therefore the Lease is absolutely void to carry any Interest to the Lessee;  
 and so it would be, if after such Delivery of it as his Deed, he had  
 made a Letter of Attorney to enter and deliver it as his Deed upon the  
 Land, for the first Delivery made it his Deed effectually; but that could  
 pass no Interest, because he was then out of Possession, and the second  
 Delivery, to make it a Deed, was void, because it was his Deed by the  
 first Delivery, and therefore cannot be delivered again; and *Quare*, in  
 the Case above-mentioned, if the Letter of Attorney were at the Con-  
 clusion of the Deed of Lease, in the very same Parchment or Paper,  
 whether the Disseisee could distinguish his Sealing and Delivery of that  
 as a Letter of Attorney, so that it should not amount to a Sealing and  
 Delivery of the Deed itself, and thereby make void any after Delivery,  
 when the Possession and Seisin were reduced.

Plow. 137. The Heir after the Death of his Ancestor, before any actual Entry,  
 may make a Lease for Years, because the Possession in Law was cast  
 upon him immediately by the Death of his Ancestor, and none had  
 Possession in Fact; but if a Stranger had first entered by Abatement,  
 then such Lease made by him after would be void, because by the  
 Entry the Stranger gained Possession in Fact, which divested the Pos-  
 session in Law of the Heir, and so he had neither Possession in Fact nor  
 Law, whereof to make a Lease, and consequently the Lease must be  
 void.

Bro. Tit. If the Heir of the King's Tenant *in Capite*, or in Socage, before  
 Leases 57. Livery, or after Office found, makes a Lease for Years, this seems to be  
 Sav. 55. good, for such Lease being only a Contract between the Lessor and  
 Lessee, may be made before any actual Entry, by Reason of the Pos-  
 session

feſſion and Seiſin in Law, which were caſt on him by the Death of his Anceſtor; but if he had made a Feoffment in Fee, or a Leaſe for Life before Livery ſued, theſe could not be made without actual Entry into the Land to make Livery of Seiſin, and ſuch Entry would be an Intruſion upon the King's Poſſeſſion, and amounts to a Forfeiture, by attempting to take a Freehold out of the King.

### 5. Of Leases made by Joint-tenants or Tenants in common.

As to Leases by Joint-tenants and Tenants in common, we ſhall here, for Method ſake, ſet down ſome of the moſt remarkable Caſes relating thereto, tho' theſe Matters are more fully treated of under their proper Heads.

1. Then if two Joint-tenants are in Fee, and one lets his Moiety to *Co. Lit. 163.* *Bro. Tit.* *Grants 154.* *1 Rol. Abr. 848.* *7. S.* for Years, to begin after his Death, this is good, and ſhall bind the other if he ſurvives, becauſe this is a preſent Diſpoſition, and binds the Land from the Time of the Leaſe made, ſo that he cannot after avoid it; but a Devife for Years in ſuch Manner, by one Joint-tenant, would not bind the other ſurviving, becauſe that is no preſent Diſpoſition nor binding upon the Deviſor himſelf, in as much as he may revoke or cancel his Will, and ſo deſtroy that Devife; and therefore ſuch Devife, not taking Effect to any Purpoſe till his Death, comes too late to prevent the Survivorſhip, which being the elder Title, ſhall be preferred, and ſhut out the Devife; ſo all Grants or Charges, by one Joint-tenant out of the Land, fall off with his Life, and cannot affect the Survivor, becauſe they being no immediate Diſpoſition of the Land itſelf, that comes whole and intire to the Survivor under the firſt Title, and by Conſequence over-reaches all intermediate Charges or Grants thereout by the other Joint-tenant who is dead.

But if one Joint-tenant grant *Vesturam* or *Herbagium terre* for Years, *Co. Lit. 186.* and dies, this ſhall bind the Survivor; ſo if two Joint-tenants are of a Water, and one grants a ſeparate Piſcary for Years, and dies, this ſhall bind the Survivor, becauſe in theſe Caſes the Grant of the one Joint-tenant gives an immediate Inter-eſt in the Thing itſelf whereof they are Joint-tenants.

If two Joint-tenants for Life are, and one of them makes a Leaſe for Years of his Moiety, either to begin preſently, or after his Death, and dies, this Leaſe is good and binding againſt the Survivor; the Reaſon whereof is, that notwithstanding the Leaſe for Years, the Joint-tenancy in the Freehold ſtill continues, and in that they have a mutual Inter-eſt in each other's Life, ſo that the Eſtate in the Whole, or any Part, is not to determine or revert to the Leſſor till both are dead; for the Life of the one, as well as of the other, was at firſt made the Meaſure of the Eſtate granted out by the Leſſor; and therefore ſo long as either of them lives, if the Joint-tenancy continues, he is not to come into Poſſeſſion. Now theſe Joint-tenants having a reciprocal Inter-eſt in each other's Life, when one of them makes a Leaſe for Years of his Moiety, this does not depend for its Continuance on his Life only, but on his Life and the Life of the other Joint-tenant, whichſoever of them ſhall live longeſt, according to the Nature and Continuance of the Eſtate whereout it was derived; and then ſo long as that continues, ſo long the Leaſe holds good, and by Conſequence ſuch Leſſee ſhall hold out the ſurviving Joint-tenant and the Reverſioner, till the Eſtate, whereout his Leaſe was derived, be fully determined; but if a Rent were reſerved on ſuch Leaſe, this is determined and gone by the Death of the Leſſor, for the Survivor cannot have it, becauſe he comes in by Title Paramount the

Lease, and the Heirs of the Lessor have no Title to it, because they have no Reversion or Interest in the Land; but *Quere*, if the Executors or Administrators cannot maintain an Action of Debt or Covenant, either upon the Covenant in Law, or express Covenant, for Payment of the Money, if there be any.

*Cro. Jac.* 91.  
*Moor*, pl. 1074.  
*Whitlock* ver.  
*Horton*.

*A.* and *B.* Joint-tenants for their Lives, *A.* by Indenture leases the Moiety which he holds in Jointure with *B.* to *C.* for sixty Years from the Death of *B.* if he the said *A.* shall so long live, and demises the other Moiety to *C.* for sixty Years from his own Death, if *B.* shall so long live; then *A.* dies, and *B.* survives; and it was adjudged, that this Lease was void for both Moieties; for by the first Words it was a good Lease from *A.* of his Part, upon the Contingency of his surviving *B.* but that never happened; and as to *B.*'s Part, *A.* had no Power to Lease or Contract for it during the Life of *B.* tho' he had happened after to survive him, for that it was but a bare Possibility, which could not be leased or contracted for; and therefore the Lease was void in the Whole.

*Cro. Jac.* 377.  
*1 Rol. Rep.*  
309.  
*3 Eulf.* 130.  
*1 Rol. Abr.*  
131. *Daniel*  
and *Wadding-*  
*ton*

*A.* and *B.* Joint-tenants for their Lives, *A.* leases his Part for sixty Years, if he and *B.* so long live, then *B.* surrenders his Part, and takes back a new Estate, then *A.* dies, living *B.* and it was adjudged that this Lease made by *A.* was determined by his Death; for the Joint-tenancy, which would have given them or their Lessees an Interest in each other's Life, is by the Surrender of *B.* determined and gone, and then the Lease of *A.* stood single on his own Life, and consequently by his Death is determined; so it would be, if after such Lease for Years by one Joint-tenant, they had made Partition of the Joint-Estate, and then the Lessor had died, his Lease would be at an End, because the Joint-tenancy, which should have supported it after his Death, is by the Partition defeated and gone.

*Co. Lit.* 186. a.  
*Cro. Jac.* 83,  
511.  
*Moor*, pl. 194.  
*1 Rol. Abr.*  
351.

If one Joint-tenant or Tenant in common makes a Lease for Years of his Part to his Companion, this is good, for this only gives him a Right of taking the whole Profits, when before he had but a Right to the Moiety thereof; and he may contract with his Companion for that Purpose, as well as he may with any Stranger.

## 6. Of Leases made by Copyholders.

*Moor* 184.  
*1 Salk.* 186.

If a Copyholder takes upon him to make Leases not warranted by the Custom of the Manor, and without the Lord's Licence, this is a Forfeiture of his Copyhold, but no Disseisin to the Lord; and the Lease is good against every Body but the Lord.

*Moor* 292.  
*Heth.* 122.  
*1 Eulf.* 189.

And it seems not to be material whether such Lease be by Parol or in Writing; but it must be a perfect Lease, and must have a certain Beginning and certain End, for otherwise the Lease is void, and carries but an Estate at Will at most, which is no Forfeiture.

*2 Mod.* 79.  
*Richards* ver.  
*Seley*.

A Copyholder for Life having got *B.* to be bound with him for 100 *l.* and given him a Counterbond, executes a Deed, whereby reciting the Counterbond, and the Estate *A.* had in the Lands for Life, *A.* covenants, grants and agrees for himself, his Executors, Administrators and Assigns, with *B.* that he, his Executors and Administrators, should hold and enjoy these Lands, from the making of the Deed, for seven Years, and so from the End of seven Years to seven Years, for and during the Term of Forty-nine Years, if *A.* should so long live, and a Covenant, that if the 100 *l.* were paid, and *B.* indemnified, the Deed to be void; and the Question was, whether this would amount to a Lease for Forty-nine Years, if the Copyholder should so long live; and so being in the Case of a Copyhold, and no Custom to warrant such Lease, be a

Forfeiture of the Estate; and it was argued to be no Lease, because such Construction would be a Wrong to both Parties, to the one by defeating his Security, and to the other by a Forfeiture of his Estate; which would be unjust, when by construing it only to be a Covenant for the whole, each might be safe, and their Intention answered; and it was said, that the Cases, wherein such Words have been held to amount to a Lease, were all of them in Cases of Freehold, where no such Mischief could ensue; but the Court notwithstanding inclined this was a good Lease by the Intention of the Parties, and consequently a Forfeiture; for then the Jury would have found it so; but if the Words had been doubtful, and such as would admit of divers Constructions, there, to prevent a Forfeiture, it should be taken to be only a Covenant, but here the Words are plain and clear; but no Judgment was given.

A Copyholder, by Articles of Agreement, covenanted and promised with another, that he should hold at *Halves* for a Year, according to the Custom of the Manor, at such a Rent, and so from Year to Year for five Years; this was adjudged no Forfeiture, for the Prejudice that would ensue on such Construction to the Copyholder; also the Lease being worded *secundum Consuetudinem Manerii* is tied up to the Custom of the Manor; so that if there be no Custom to warrant this Manner of Leasing, the Lease itself falls to the Ground; also there was further in the Lease a Covenant, that if the Lessor put out the Lessee, he should be allowed so much Rent by way of Retainer; so that the Lessee was at Uncertainty whether he should enjoy it during the whole Term; for this gave the Lessor Liberty to put him out, making the Allowance agreed upon and stipulated between them; and besides, it was doubted if the Words *covenant and promise that he should enjoy* for such a Time, would amount to a Lease, or were not rather relative to enjoying after a Lease made; for the Word *covenant* is none of those reckoned up to make a Lease; and in the Cases where it hath been so held, it was joined with the Word *agreavit*, which imports a mutual Consent or Agreement of both Parties; and here tho' there be the Word *agreed* or *Agreement*, yet it is only in the Style of the Articles; also here the Covenant is, quietly to enjoy, which *a fortiori* does not make a Lease, but regards only the Manner of enjoying it after a Lease made, and being only to hold at Halves, it can be no Lease: This is the Manner of reporting this Case, which rises so by Jumps and Steps, and is so incoherently put, that it is hard to conclude any thing from it relative to the Matter before us; besides that the Gift of the Case seems to turn upon the Words *holding at Halves*; for they are to govern and explain the Words *covenant and promise*, which of themselves may be applied to ten thousand other Things, and have no Meaning at all, till the subsequent Words explain what it is he covenants and promises; and the Words *holding at Halves* are of so ambiguous and doubtful a Signification, that, according to the Rule taken in the foregoing Case, they might well leave Room for the Court to make such a Construction as should prevent a Forfeiture; and in one Case it is expressly held, that *exposing to Half* is no Lease, but only a Liberty to plough and sow, but passes no Interest, nor can the Lessee have Trespass for breaking the Soil; but in the same Book it is said, that if he had exposed it to Halves for two or three *Corps*, this had been a Lease.

An Infant Copyholder, without Licence of the Lord, made a Lease for Years by Parol, rendering Rent, and at full Age was admitted, and accepted the Rent, and then ousted the Lessee; and in this Case, tho' it was agreed, that a Lease for Years, rendering Rent, by an Infant of Freehold Lands was only voidable; yet it was urged, that in Case of a Copyhold it would be otherwise; because the Lease not being warranted by the Custom, would be a Disseisin to the Lord, and consequently a Forfeiture of his Copyhold, which being a great Mischief to the Infant, the Court ought rather to help him, by adjudging such Lease to be absolutely

2 Keb. 267.  
Lentball ver.  
Thomas.

Cro. Eliz. 143.  
Hare versus  
Ciceley.

Latch 199.  
Godb. 364.  
1 Jon. 157.  
Noy 92.  
in all the  
S.C. between  
Apsfeld and  
Apsfeld.

lately void; but notwithstanding this it was adjudged, that the Lease was a good Lease till avoided, and that a Lease for Years by a Copyholder without Licence is not a Disseisin; and admitting it should be a Forfeiture in this Case, yet if the Lord enters for it, the Infant may re-enter upon him, and so is at no Mischief; and therefore he having accepted the Rent at full Age hath made it good and unavoidable; and *Jones* says, that it was held to be no Forfeiture as to the Lord, but that admitting it were, yet it was a good Lease as to all Strangers, and that for this Reason principally it was adjudged such Acceptance had made it good.

*Cro. Car.* 253.  
1 *Jen.* 249.  
1 *Rol. Abr.*  
508.  
*Matthews*  
*ver Weston.*

A Copyholder for Life made a Lease for a Year by Indenture dated such a Day, and the same Day by another Indenture makes a second Lease to the same Party for a Year, to commence such a Day, being two Days after the first Lease would expire, and by another Indenture, dated the same Day and Year, makes a third Lease of the same Lands to the same Party, to commence such a Day, being two Days after the second Lease would expire, and so betwixt each Lease two Days betwixt the Beginning of the new Lease and the End of the former; and if this was a Forfeiture of his Estate, because the Custom of the Manor warranted a Lease but for a Year only, was the Question; and it was agreed, that whether the Custom of the Manor, or the general Custom of the Realm, allows a Copyholder to make a Lease for a Year, this ought to be a Lease in Possession, and he cannot, after such Lease made, make another in Reversion; and these three Leases being made all at one Time, shall be intended one intire Contract, and so a Lease for three Years, which is more than the Custom warrants, and consequently a Forfeiture; and the Intervention of two Days between each Lease was but a Fraud and Covin to defeat the Lord of his Forfeiture, which shall not avail; and therefore it was adjudged against the Copyholder, that he had forfeited his Estate.

*Cro. Jac.* 308.  
1 *Bulf.* 215.  
1 *Rol. Abr.*  
507.  
*Lutterell* and  
*W. Weston.*

So where a Copyholder, who, by the Custom of the Manor, could make a Lease for one Year only, made a Lease for a Year, excepting the last Day of the Year, *Et sic de Anno in Annum*, excepting the last Day of every Year, during his own Life; this was adjudged by all the Court clearly to be a Forfeiture, and the Exception of a Day at the End of every Year to be only a Shift to evade the Custom; which it cannot do; for it is a Lease certain for two Years at least, excepting two Days, which in Effect is a Lease for no more than one Year; and if he might by such Exception of a Day or two, at the End of two Years, get out of the Reach of a Forfeiture, he might then make a Lease for twenty Years, or what other Time he thought fit, which the Law will not permit; and in *Bulf.* this Manner of Leasing appears expressly to have been by Articles, by way of Covenant, that he should have the Land in that Manner, not by Words of immediate Leasing, which make this a direct Authority that a Covenant that he shall have or enjoy such Lands, amounts to an immediate Lease, and not a Covenant barely; and tho' it were in Case of a Copyhold, yet it would not save the Forfeiture.

1 *Rol. Abr.*  
508.  
1 *Bulf.* 190.  
*Cro. Jac.* 301.  
2 *Mud.* 81.

So if a Copyholder makes a Lease for a Year, *Et sic de Anno in Annum* during ten Years, this is clearly a good Lease for ten Years, and if not warranted by the Custom, will be a Forfeiture of his Estate.

These Cases being so adjudged, and that a Copyholder cannot, either by way of Covenant or of executory and renewable Leases annually, prevent the Forfeiture of his Estate, if he exceeds the Number of Years warranted by the Custom, and has no Licence from his Lord for that Purpose; let us see if there be any Way yet found out to avoid this Mischief, and yet make over to the Lessee some Certainty that he shall enjoy the Lands after the Term warranted by the Custom is expired, without which few will care to take Leases for so short a Term as the Customs of

most

most Manors generally allow ; and we find one Case where an Attempt of this kind was made, and it seems to have succeeded accordingly ; the Case was this: A Copyholder made a Lease for a Year only of his Copyhold Land, according to the Custom, and covenanted that after the End of this Year the Lessee should have or enjoy the same Lands for another Year, and so *de Anno in Annum* for ten Years ; this was held by *Telborton*, Justice, to be no such Lease as would make a Forfeiture, because had a lawful Estate but for one Year only ; and the Court agreed with him herein ; and this seems to be a very reasonable Construction ; for when he had in express Terms leased it but for one Year only, and after in the Deed covenanted for the Lessee's having or enjoying it for a longer Term, this Variation in the Manner of Expression must vary the Sense of it likewise ; for now it appears that he intended by the Covenant something different from the Lease itself, otherwise he would not have departed from that Form of Expression, which was the most proper and natural whereby to signify his Intentions of Leasing ; and then it would be unjust and unnatural to strain the Covenant, which has a Meaning proper and peculiar to itself, to signify the same with the first Part of the Deed, which varies not only in Form, but was also intended to quite another Purpose.

And perhaps in such Covenant it may be still better if it were Worded *to permit and suffer* the Lessee to have, hold and enjoy the Lands in such Manner ; for a Covenant in that Form, even of Freehold Lands, will not amount to an immediate Lease, because the Words *permit and suffer* prove that the Estate is still to continue in him from whom the Permission is to come ; for if any Estate thereby passed to the Covenantee, he might hold and enjoy it without any Permission from the Covenantor ; and therefore in such Case the Covenantee hath only the bare Covenant for his Security of Enjoyment, without any actual Estate made over to him.

*Co. Jac. 301.  
1 Bulf. 190.  
Lady Mountague's Case.*

*1 Rol. Abz. 848.  
3 Bulf. 252.  
2 Mod. 81.*

## 7. Of Leases made by Executors or Administrators.

Executors and Administrators, as they may dispose absolutely of Terms for Years vested in them in Right of their Testators or Intestates, so may they lease the same for any fewer Number of Years, and the Rent reserved on such Leases shall be Assets in their Hands, and go in a Course of Administration.

So where Lessee for fifty Years of a Reversion expectant upon a Lease for Life makes his Will in Writing, and thereof one B. his Son, an Infant of three Years of Age, Executor, and dies, Administration is granted to C. *durante Minori Etate* of B. generally, then C. makes a Lease for ten Years, without reserving any Rent, for ought appears, and yet this Lease was held good ; because by the Ecclesiastical Law, *Minor 17 Annis non admittitur fore Executor* ; and therefore Administration being granted generally during his Minority, the whole Term and Power of disposing thereof, for that Time, vests as absolutely in the Administrator as it would have done in the Executor himself, if he had been of an Age capable of acting therein ; because for that Time the Testator died *quasi Intestatus*, and the Administrator for that Time hath the same Power as if he had actually died Intestate ; and therefore such Lease is good, at least till the Executor attains his Age of seventeen Years, when such Administration ceases ; and some held, that such Lease would hold good after, till the Executor avoided it by actual Entry, by reason of the general Power which such Administrator had in the mean Time ; and therefore such continuing Acts are not *ipso facto* determined by the ceasing of the Administration, but are only voidable in the same Manner

*Vide Tit. Executors and Administrators.  
6 Co. 63.  
67. b.  
Sir Moyle Finch's Case.  
Vide 5 Co. 29.  
Prince's Case.*



as other Leases would be, *viz.* by an Entry of the Executor, when he comes to take upon him that Office; but if the Administration had been special, *ad Opus, Commodum & Utilitatem* of the Executor during his Minority, & *non aliter, nec alio modo*, as it was in *Prince's Case*, then none could make Title by Virtue of such a Lease made by such special Administrator, even during the Minority of the Executor; because the Nature and Manner of the Administrator's Power appearing in the very Title which the Lessee must make to such Lease, this Lease would appear not to be pursuant thereto, because it could not be of Necessity, nor for the Use or Advantage of the Infant, since it could not take Effect during the Life of the Tenant for Life; and therefore such Lease would be condemned as void presently.

### 8. Of Leases made by a Bailiff of a Manor.

*Bro. Tit.*  
*Baily* 40, 41.  
*Tit. Leases*  
37.  
*Cro Jac.* 99.  
*1 Rel. Abr.*  
339.

A Bailiff of a Manor cannot, by Virtue of his Office, make Leases for Years; for his Business is only to collect the Rents, gather the Fines, look after the Forfeitures, and such like; but he hath no Estate or Interest in the Manor itself, and therefore cannot contract for any certain Interest therout; but the Lord of the Manor may give him a special Power to make Leases for Years, as he may do to any Stranger; and then such Leases, if they are pursuant to the Power, and made in the Name of his Lord, will be good as Leases by the Lord himself; for the Bailiff, tho' he hath such Power, cannot make them in his own Name; but a general Bailiff of a Manor may make Leases at Will, without any special Authority, because being to collect and answer the Rents of the Manor to his Lord, if he could not let Leases at Will, the Lord might sustain great Prejudice by Absence, Sicknefs, or other Incapacity to make formal Leases, when any of the former Leases were expired; and such Leases at Will are for the Benefit of the Lord, and can be no ways prejudicial to him, because he may determine his Will when he thinks fit.

*2 Cham. Ca.*  
202.  
*Rothwell ver.*  
*Sir Charles*  
*Huffey.*

Also if a Bailiff of a Manor hath a special Power to make Leases for Years, as he ought to make them in the Name of his Master, so they ought to be made in Writing, that the Authority may appear to be pursued; therefore where a Bailiff constituted by Writing to receive Rents, manage and let the Lands, made a Parol Lease for eleven Years, and the Lessee, being turned out at Law upon an Ejectment, brought a Bill for Relief in Chancery, yet it was dismissed, because he had only a Parol Lease, which the Bailiff had no Power to make.

### 9. Of Leases made by a Guardian.

*Lit. sect.* 123,  
124.  
*Co. Lit.* 88, 89.  
*Vaugh.* 18.

A Guardian in Socage may make Leases for Years in his own Name, and the Lessee may maintain Ejectment thereupon; for this Guardian is a Person appointed, not by any special Designation of the Party, but by the Wisdom of the Law, in respect of the Lands descended to the Infant; so that where no Lands descend there can be no such Guardian; and his Office originally was to instruct the Ward in the Arts of Tillage and Husbandry, that when he came of Age he may be the better able to perform those Services to his Lord, whereby he held his own Land; and tho' the Office now be in some measure changed, as the Nature of the Tenure itself is, since the Time that the Socage Tenants bought off their Personal Labours and Services with an annual Rent to the Lord, yet it is still called Socage Tenure, and the Guardian in Socage is still only where Lands of that kind (as most of the Lands in *England* now are,) descend to the Heir within Age; and tho' the Heir after fourteen may chuse



chuse his own Guardian, who shall continue till he is twenty-one, yet as well the Guardian before fourteen, as he whom the Infant shall think fit to chuse after fourteen, are both of the same Nature, and have the same Office and Employment assigned to them by the Law, without any Intervention or Direction of the Infant himself; for they were therefore appointed, because the Infant, in regard of his Minority, was supposed incapable of managing himself and his Estate, and consequently derive their Authority, not from the Infant, but from the Law; and that is the Reason they transact all Affairs in their own Name, and not in the Name of the Infant, as they would be obliged to do, if their Authority were derived from him; and if their Authority were derived from him, it would by no means answer the Intention of the Law in appointing them; for then all Acts done by Virtue of such derivative Authority could be of no more Force than if done by the Person himself who gave that Authority, since none can communicate more Power to another than he has himself; and that would invalidate all their Contracts, and make them favour of the same Imbecility as if made by the Infant himself; therefore to enable them to take effectual Care of the Infant, and his Affairs, the Law has invested them, not with a bare Authority only, but also with an Interest, till the Guardianship ceases; and to prevent their Abuse of this Authority and Interest, the Law has made them accountable to the Infant, either when he comes to the Age of fourteen Years, or at any Time after, as he thinks fit; and therefore their Authority and Interest extends only to such Things, as may be for the Benefit and Advantage of the Infant, and whereof they may give an Account; which is the Reason they cannot present to any Benefice in Right of the Heir, because they can make no Advantage thereof, (for that would be Simon-*Vide Tit. ny,*) and consequently have nothing therein whereof they can give an Account; and therefore the Infant himself shall present thereto.

From what has been said it appears, that a Guardian in Socage hath not only a bare Authority, but an Interest in the Lands descended, and therefore, during that Time, may make Leases for Years in his own Name, as any other who hath an Interest in Lands may do; for he is *quasi Dominus pro Tempore*; and therefore if he makes Leases for Years to continue beyond the Time of his Guardianship, such Leases seem not to be absolutely void by the Infant's coming of Age, but only voidable by him, if he thinks fit; for they were not derived barely out of the Interest of the Guardian, or to be measured thereby, but take Effect also by Virtue of his Authority, which, for the Time, was general and absolute; and therefore all lawful Acts done during the Continuance of that Authority are good, and may subsist after the Authority itself, by which they were done, is determined; and consequently the Infant, when he comes of Age, may by Acceptance of Rent or other Act, if he thinks fit, make such Leases good and unavoidable; but a Guardian by (a) Nurture cannot make any Leases for Years, either in his own Name, or in the Name of the Infant; for he hath only the Care of the Person and Education of the Infant, and hath nothing to do with his Lands merely in Virtue of his Office; for such Guardian may be, tho' the Infant hath no Lands at all, which a Guardian in Socage cannot.

12 Car. cap. 24 is the same in Office and Interest with a Guardian in Socage.

A. lets Land to B. for four Years, and the Lands being holden in Socage, and the Heir under fourteen, the Guardian in Socage by an Indenture, before the first Lease was expired, lets the same Lands in his own Name to B. for eight Years; and if by this Acceptance of a new Lease from the Guardian in Socage the first Lease was surrendered, was the Question; and it is said to be holden by the Court, that it was surrendered, or if it could not be properly called a Surrender, for Want of a Reversion

*Vide Tit. Guardian.*

*Bro. Tit. Garden 19, 70. Cro. Jac. 55, 98. Shopland ver. Ridler. 2 Rol. Abr. 41. Bruden ver. Hussey.*

(a) But note; A Testamentary Guardian, or one appointed pursuant to the Statute

*Vaugh. 179.*

1 Leon. 158, 522. 4 Leon. 7. Owen 45, 56. Willis and Whitewood.

(a) *Hutton*  
105.

Reversion in the Guardian in Socage, yet they held, that at least the first Lease was thereby determined by Admittance of the Lessor's Power to make such present Lease, which, if the first should stand in the way, he could not do; and a Guardian in Socage hath Power to make Leases for Years; and tho' this Case is cited in (a) *Hutton* to be no Surrender, yet it was in a Case, where the Question was of a Surrender strictly and properly so called; and therefore tho' it were not to be cited for an Authority of a Surrender properly so called, yet it might amount to a Determination of the first Lease, which, in the principal Case, all the Court agreed in that it did; but they held, it would be otherwise in Case of such Lease made by a Guardian *per Nurture*, for he can only make Leases at Will; and therefore such second Lease at Will must be absolutely void, when the Lessee was in Possession already by Virtue of a Lease for Years.

*Plow. 293.*  
*Osborne's*  
*Case.*

If a Woman, who is Guardian in Socage to her Son, marries again, and the Husband and she join in a Lease of the Infant's Lands, this Lease, upon the Death of the Husband, becomes void; for the Interest which she had in the Lands was in Right of the Infant, and therefore shall not bind her, as those Acts shall in which she joins with her Husband in parting with her own Possessions.

#### 10. Of Leases made pursuant to Authority.

1 *Rot. Abr.*  
330.  
9 *Co. 76 b. 77.*  
*Cro. Eliz. 115.*  
*Moor, pl. 1106.*

If one hath Power, by Virtue of a Letter of Attorney, to make Leases for Years generally, by Indenture, the Attorney ought to make them in the Name and Stile of his Master, and not in his own Name; for the Letter of Attorney gives him no Interest or Estate in the Lands, but only an Authority to supply the Absence of his Master by standing in his Stead, which he can no otherwise perform than by using his Name, and making them just in the same Manner and Stile as his Master would do if he were present; for if he should make them in his own Name, tho' he added also, by Virtue of the Letter of Attorney to him made for that Purpose; yet such Leases seem to be void, because the Indenture being made in his Name, must pass the Interest and Lease from him, or it can pass it from no Body; for it cannot pass it from the Master immediately, because he is no Party; and it cannot pass it from the Attorney at all, because he has nothing in the Lands; and then his adding, *by Virtue of the Letter of Attorney*, will not help it, because that Letter of Attorney made over no Estate or Interest in the Land to him, and consequently he cannot, by Virtue thereof, convey over any to another; neither can such Interest pass from the Master mediately, or thro' the Attorney, for then the same Indenture must have this strange Effect at one and the same Instant, first to draw out the Interest from the Master to the Attorney, and from the Attorney to the Lessee, which certainly it cannot do; and therefore all such Leases made in that Manner seem to be absolutely void, and not good, even by Estoppel, against the Attorney, because they pretend to be made not in their own Name absolutely, but in the Name of another, by Virtue of an Authority which is not pursued; and therefore this Case of making Leases by a Letter of Attorney, seems to differ from that of a Surrender of a Copyhold, or of Livery of Seisin of a Freehold, by Letter of Attorney; for in those Cases when they say, *We A. and B. as Attornies of C. or by Virtue of a Letter of Attorney from C. of such a Date, &c. do surrender, &c. or deliver to you Seisin of such Lands*; these are good in this Manner, because they are only Ministerial Ceremonies or Transitory Acts in *Pais*, the one to be done by holding of the Court Rod, and the other by delivering of a Turf or Twig; and when they do them as Attornies, or by

9 *Co. 76. 77.*  
*Combes's Case.*

Virtue of a Letter of Attorney from their Master, the Law pronounces thereupon as if they were actually done by the Master himself, and carries the Possession accordingly; but in a Lease for Years it is quite otherwise, for the Indenture, or Deed alone, convey the Interest, and are of the very Essence of the Lease, both as to the Passing it out of the Lessor at first, and its Subsistence in the Lessee afterwards; for the very Indenture, or Deed itself, is the Conveyance, without any subsequent Construction or Operation of Law thereupon; and therefore it must be made in the Name and Stile of him who has such Interest to convey, and not in the Name of the Attorney, who has nothing therein; but in the Conclusion of such Lease it is proper to say, *In Witness whereof A. B. of such a Place, &c. in Pursuance of a Letter of Attorney hereunto annexed, bearing Date such a Day;* or if the Letter of Attorney be general, and concerns more Lands than those comprised in the present Lease, then to say, *In Pursuance of a Letter of Attorney, bearing Date such a Day, &c. a true Copy whereof is hereunto annexed, hath put the Hand and Seal of the Master;* and so to write the Master's Name, and deliver it as the Act and Deed of the Master; in which last Ceremony of delivering it in the Name of the Master by such Attorney, this exactly agrees with the Ceremony of surrendering by the Rod, or making of Livery, by a Turf or Twig, by the Attorney, in the Name or as Attorney of his Master; which proves that there is a great Diversity between using the Name of the Attorney in the making of Leases, and using his Name in making a Surrender of Copyhold, or Livery of Seisin of a Freehold Estate.

The King, by Letters Patent, gave Authority to his Surveyor to make Leases of such Lands, reserving the ancient Rent, and the Surveyor makes Leases by Indenture between the King *ex una parte*, and *J. S. ex altera parte*, and the Indenture *Testatur quod Dominus Rex dimisit, &c.* and the Conclusion was, *in cujus rei testimonium* the Surveyor *Sigillum suum apposuit*; and the Court held these Leases to be void, because not pursuant to his Authority; for a Bailiff cannot make Leases in his own Name, tho' it be but *de anno in annum*, and of Lands usually let, but he ought to make them in the Name of his Master; so here the Surveyor ought not to have put his own Seal to the Lease, but the Seal of the King, for without the King's Seal it cannot be his Lease; and the Manner of Pleading such Lease proves this, for the Words are; *Quod Dominus Rex per A. B. Sigillum suum apposuit*; and a great Case was cited, where such Lease by a Bailiff, in his own Name, was held to be void.

In Ejectment the Case was, that one *A.* devised Lands to *B.* his Son in Tail, with divers Remainders over, and makes one *C.* Overseer of his Will, and willed that he should have the Education of his Son till he came to the Age of Twenty-one, and to receive, set and let, for the said *B.* the said Lands so given him, and thereof to Account to the said *B.* being allowed his Charges, &c. *C.* makes a Lease for seven Years in his own Name, with Reservation of Rent to himself; and this Lease, by Computation, was to continue Half a Year after *B.*'s Attaining his full Age; and if this Lease was good for any Part of the Term, was the Question; *C.* being dead, and *B.* not yet of Age; and it was argued to be good for the whole Term, or at least during the Minority of the Son, and only void for so much as exceeded the full Age of the Son, and that *C.* had an Interest in the Land, and not a bare Authority only; for then all Leases must have been made in the Name of the Infant, and so he might avoid them whenever he thought fit, which the Testator never intended to impower him to do. But *Popham, Clench* and *Fernier* held that, as this Devise is, *C.* was but a Guardian for Nurture, and could not make Leases at his own Will and Pleasure, for then he might make them for one Hundred Years; but here he can only make Leases at Will, for there is no other Time certain appointed, and is but in the

*Moer, pl. 191.  
Dyer 132.*

*Cro. Elz 678,  
734. Pigot  
ver. Garnish.*

Nature of a Bailiff, and accountable; and therefore it was adjudged that the Lease was void; from which Case it appears, that if the Authority had been sufficient to enable him to have made Leases for Years, such Leases made by him during the Continuance of that Authority would not have determined therewith, but should have subsisted during the whole Term for which they were made; and the Infant in such Case could not, when he came of Age, have avoided them, as he may Leases made by his Guardian in Socage, if he thinks fit, because the Lessee would have been in by the Will and Devise, not by the Guardian *par Nurture*, admitting the Authority or Devise had been sufficient for that Purpose, which in none of the following Cases of Devises it seems to be.

*Moor* 774.  
*Yelo.* 73. *Car-*  
*penter* and  
*Collins.*  
*Dyer* 26. *b.*

One devised Lands to his Son when he comes to the Age of Twenty-four Years, and in the mean Time that his Executor shall have the Oversight and Dealing of all his Lands and Goods; this gives the Executor no Interest to make a Lease certain for Years, but only an Authority to oversee and order the Land in Right of the Son, and for his Use and Benefit, as wanting Discretion to manage it himself; but the whole Estate remains in the mean Time in the Son by Descent, and the Executor can only make Leases at Will; for there is no express Devise to him of the Lands till the Son comes to Twenty-four, nor any express Authority to make Leases for Years in the mean Time; and the Heir shall not be disinherited, tho' but for a Time, without a manifest Intent in the Will to that Purpose; and where in that Case the Son died before he came to Twenty-four Years of Age, it was held, that whether the Devise gave the Executor an Interest or an Authority only, yet it determined by the Death of the Son, whenever that happened, for it was only affixed to his Care of the Son, and consequently determined by his Death, and was never intended to exclude the next Heir till the Son should or might have attained his Age of Twenty-four Years; and then the Executor having Power to make Leases at Will only, the next Heir may, whenever he thinks fit, determine them by Entry, or otherwise.

*Cro. Eliz.* 190.  
*Parker* and  
*Plummer.*  
*Cro. Eliz.* 252.  
*Smith* ver.  
*Havens.*  
*Hob.* 285.  
*Balder* ver.  
*Blackbourn.*  
*Dyer* 210. *pl.*  
24.

But if the Words of the Will had been, that the Executor should have the Land, or the Profits of the Land, to his own Use, without Account, till the Son should come to Twenty-four, provided, or to the Intent that he should bring up and educate his Child or Children; this would not only amount to a Trust and Confidence in the Executor, but would also fix such an Interest in him for answering the Purposes of the Will, as would go to his Executors, tho' he should die before the Son attained the Age of Twenty-four Years; and the Education of the Child, or Children, is no such Matter of Privity or Confidence, but that another may do it as well; and consequently in this Case, such Executor may make Leases for Years, till the Son should or might attain to the Age of Twenty-four Years; and this would not determine, tho' the Son should die before that Age, till by Computation of Time he might have attained that Age, if he had lived.

*Moor*, *pl.* 143.  
3 *Co.* 19, 20.  
*Boraston's*  
*Case.*  
1 *Chan. Ca.*  
114.  
2 *Chan. Rep.*  
156.

One devised Lands to his Wife *de Anno in Annum*, till his Son should come to the Age of Twenty-one Years; this was by all the Justices held such an Interest only as would determine by the Death of the Son, tho' before Twenty-one; for the Intent was only that his Wife should have the Lands during the Minority of the Son, by reason of his supposed Incapacity to manage them during that Time, which Reason is at an End by his Death; and this the rather appears to be his Intent by the Words *de Anno in Annum*, which are executory and applicable to each single Year, and shew his Caution, not to give it to his Wife for any determinate Number of Years, lest his Son should die in the mean Time, whose Death, or Attainment of Twenty-one Years, he intended should be the Determination of the Wife's Interest; but by *Dyer* it would have been otherwise, if the Words had been, *till the Son should or might come*

to that Age; and therefore this Case differs from *Boraston's Case*, and the other Cases, which were adjudged, upon a special Reason, that for Payment of Debts, or for the Support and Provision of the Devisee or Executrix, or for Maintenance of his Children generally, where he had several; there in such Cases, tho' the Son to whom it was devised at such an Age should die before that Age, yet the Executrix, or Devisee, should have such an Interest vested in them for those Purposes, as should not determine till the Son should or might have attained that Age, if he had lived; and consequently such Executrix, or Devisee, may make Leases for Years, which shall continue as long as their own Interest therein.

## 11. Of Leases made pursuant to Powers in private Conveyances and Settlements.

As in the Settlements of Estates in Families, it is usual to limit but Estates for Life to the present Takers, to prevent their Power of Alienation and Defeating their Issue of the Provision intended them by such Settlement; and yet it is necessary the Land comprized in such Settlements should be continued in the Occupation and Manurance of Tenants and Farmers, who, being skilled in the Arts of Husbandry, know best how to improve and manage them to Advantage; and therefore to encourage the Industry of such Farmers, it is become customary to empower the Tenants for Life to grant Leases for a certain Time, which otherwise they could not do, having themselves but an uncertain Interest determinable on their Deaths; it will therefore be necessary to consider these kind of Leases, and how far their Pursuing or Deviating from the several Powers whereon they are founded will invalidate them, and how far not; as also upon what Sort of Settlements such Powers may be reserved, and what not.

Tenant for Life, upon a Settlement made 12 Jac. 1. had Power to make Leases of all or any the Lands which at any Time heretofore have been usually demised or letten in Possession for three Lives, or any Number of Years determinable on three Lives, or for Twenty-one Years, or under, reserving the Rent thereupon now yielded or paid, or more, so long as the Lessees, their Executors and Assigns, duly pay the Rents, and perform the Conditions, according to the true Meaning of their Indentures of Lease. The Tenant for Life makes a Lease of several Parts of those Lands, for Years determinable on three Lives, so long as the Lessees, their Executors and Assigns, duly pay the Rents, &c. (*verbatim* as in the Power) reserving the same Rents which were reserved 12 Jac. 1. when the Settlement was made, and specifying particularly what those Rents were; and other Lands, called *Lofield*, which were found not to have been in Lease since 12 Eliz. (when they were let for Twenty-one Years at 100*l.* per Ann. Rent) he now leases those Lands for Twenty-one Years, rendering 100*l.* per Ann. Rent, and with the same Clause as in the other, *viz.* so long as the Lessees, their Executors and Assigns, duly pay, &c. the Rents due at *Mich'* for the Lands in the first Lease were found to be in Arrear, but paid in a Month after; and the Rent upon the Lease of *Lofield* was duly tendered, but not received; and before the next Rent-Day the Defendant, as Heir at Law in Remainder, entered, upon whom the Lessees re-entered to maintain their Leases, &c. and 1. It was agreed, that the Limitation in the several Leases, so long as the Lessees, their Executors and Assigns, duly pay, &c. was well warranted by the Power being in *Terminis* the same with the Power, and therefore was good. 2. That by Non-payment of the Rent at the Days, the Leases were determined, so that no Acceptance after could save

*Vide ante* the Case of *Orby* and Lord *Mobun*, Letter (E); and Note, that these Powers are in a great Measure conformable to the several Qualifications required under that Head.

*Vaugh.* 28 to 35.  
2 *Jon* 27 to 37. *Baruck Tustian Tustram ver. Viscountess Baltinglase.*

save or set them up again. 3. It seemed to be agreed that the first Lease was good, because expressly found, that the Rents reserved were the same as were reserved 12 *fac.* 1. and that necessarily implies that those Lands were then in Lease, and being antient Lands, they shall be presumed to have been usually demised; and the rather, because no Doubt was made of this at the Trial. But 4. It was adjudged that the Lease of *Lofield* was not warranted by the Power; 1. Because the Qualifications annexed to the Power of Leasing shew, that Land not so qualified was not to be leased; now the Land to be leased by Virtue of this Power, was such as had been usually let, which must be twice at least; but *Lofield* appears to have been let but once; therefore not within the Power; also *usually* may signify the common Continuance of Land in Lease; as Land leased for 500 Years long since, is Land usually demised, tho' it were demised but once; but then the Words, *at any Time*, shew that it must be of Lands which had been usually at all Times let, which *Lofield* was not, being out of Lease for above twenty Years before the Settlement; but chiefly and lastly this Lease was adjudged void, because the Power was to make Leases, reserving the Rent thereupon now yielded or paid, *viz.* at the Time of the Settlement; and this Land not having been leased for twenty Years before, could be under no Reservation of Rent at that Time, and by Consequence the Rent thereupon then reserved (which was none) could not be reserved upon any After-Lease to be made; and the Words (*or more*) will not hold, because they are Words of Relation, and must refer to some Rent before, which here was none at all; and because *more or less* are Words of Comparison, and Comparatives necessarily suppose a Positive; but nothing, or no Rent, is a meer Privative; and yet the Objection against this Construction seems considerable; for it was said, that the Words (*at any Time heretofore usually demised*) imply that some Lands were not then in Lease; therefore the Clause of reserving the Rents, which were then yielded and paid, must extend only to the Rent of such Lands as were then in Lease, and not for the others, which were not then in Lease; yet since he had a Power of leasing them, if they had been at any Time theretofore usually demised, he might lease them, reserving what Rent he pleased; and so is one (a) Book expresses in Point as to the Reservation; but the Difference between that Case and this is, that there the Power was to let all or any the Lands generally, without any Restriction; whereas this is restrained to Lands usually letten, which, as appears afore, this of *Lofield* was not, having been let but once; and therefore the very Power of Leasing fails as to that; otherwise the Reservation of a Rent, tho' none was reserved before, seems no great Objection against the Lease; *ideo Quære.*

2 *Fon.* 31.

(a) 2 *Roll. Abr.*  
262. *Cumber-*  
*ford's Case.*

1 *Vent.* 294.  
2 *Lev.* 150.  
3 *Keb.* 544,  
547. *Walker*  
and *Wake-*  
*man.*

A Settlement was made to the Use of *A.* for Life, with Remainders over, provided that the Tenant for Life may make Leases of the Premises, or any Part thereof, so as upon every Lease there be reserved 5 s. an Acre for every Acre of the Land or Premises so demised; the Tenant for Life leases a Rectory, (which was not included within the Settlement, and consisted only of Tithes, without any Glebe,) reserving Rent, or without any Rent at all reserved; and if this were a good Lease within this Power, was the Question; it was argued not, because Construction is to be made upon the whole Clause, and the latter Words, which appoint the Reservation of 5 s. Rent for every Acre of Land, shall restrain the general Import of the Word *Premises* to Land only, which can only consist of Acres; otherwise it may as well be said, where a Power is to make Leases, so as the antient Rent be reserved, that you may, by Virtue of this Power, lease Lands which were never before demised, and that the Words *antient Rent* shall only be applied to the Lands which had been antiently or usually demised; but it was answered and resolved by the Court, that this Lease was within the

Power,

Power, and so would a Lease of Lands, not usually demised, in the Case before put; for the Power being General and Affirmative at first to make Leases of all or any Part, the Restriction which comes after under the *so as*, &c. shall be extended no further than the very Words themselves import, that is, in the one Case to so much an Acre for that which consists of Acres, and to the antient Rent for that which was antiently or usually demised in the other; and this Resolution was founded chiefly on *Cumberford's Case*, where the Power was to make Leases of all or any Part, so as such Rent, or more, were reserved upon every Lease which was reserved within the Space of two Years before; and a Lease was made of Part of these Lands which had not been demised within two Years before; and it was resolved to be a good Lease, and that he might reserve any Rent he pleased, because the Power was general to lease all, and therefore the restrictive Clause should be applied only to such Lands as had been demised within two Years before; but *Hale*, in the principal Case, said, if it had been *res integra*, he might perhaps be of another Opinion. Note also, this Case seems against the Case of *Vaugh.* 35. before.

2 *Rel. Abr.*  
262.

If Land hath been leased, by Virtue of a Contract, from Year to Year for three Years, this cannot be said to be usually letten, because this is but one Lease, tho' renewable every Year.

2 *Rel. Abr.*  
262.

If a Feoffment in Fee be made to the Use of *A.* for Life, Remainder to *B.* in Tail, with Power for *A.* to make Leases reserving, or so that he reserve the accustomed Rent, payable to all those who shall have the Reversion or Remainder; if *A.* makes Leases accordingly, these Leases derive their Essence out of the Feoffment, and after they are made do, in Point of Time, precede all the other Estate limited by that Feoffment; so that the Rent thereupon reserved, shall go with the Reversion or Remainders thereby limited, as a Rent properly so called, and not as a Sum in Gross; and therefore those in Reversion or Remainder may distrain, or have an Action of Debt for Recovery of it, as if they were seised in Fee, and had made such Lease; and where one (*a*) Book calls it a Sum in Gross, this is denied to be Law in (*b*) another, and several Books cited to prove it a Rent; but in (*c*) *Popb.* it is said to have been a Doubt, in the Lord *Dyer's* Time, if such Leases should be good, unless there were a Clause, that the Feoffees, and their Heirs, should stand seised to the Use of such Lessees; for which Reason it may not perhaps still be amiss to insert such a Clause, tho' such Leases have ever since been held to be good without such Clause; for since the same Deed that limits the Estates to *A.* and *B.* gives *A.* Power to make Leases for such a determinate Time, these Leases cannot be derived out of the Interest of *A.* for that being but for his own Life, is not commensurate to such Leases, which at all Events are to last for such a Time; and if such Leases were to determine upon *A.'s* Death, the Power would be nugatory and idle, because without it he might have made such Leases; but the Power being to make Leases which shall endure longer than the Life of *A.* these Leases, when they are made, must be derived out of the same Root as the Estate of *A.* himself is, that is, out of the Estate of the Feoffees, who for that Purpose have a Kind of *Scintilla Juris* left in them to serve such future Leases when they are made, and by Consequence must be seised to the Use of such Lessees, and then the Statute of 27 *II.* 8. presently carries the Possession accordingly, and the Power, being coeval with the other Estates, may well subject them to the Execution thereof, since he who is Master of his own Estate, may dispose of it upon what Terms he thinks fit.

1 *Co.* 134. *a.*  
159.  
*Popb.* 81.  
8 *Co.* 71. *a.*  
1 *And.* 273.  
*Harcourt ver.*  
*Poole.*  
2 *Rel. Abr.*  
261.  
2 *Jen.* 35.

(*a*) 1 *Co.* 139.  
(*b*) In 2 *Jen.*  
35. for  
which is ci-  
ted 1 *And.*  
273. 2 *Rel.*  
*Abr.* 261.  
(*c*) *Popb.* 81.

But these Leases can only be made by Virtue of such Powers upon Estates executed by Transmutation of Possession; therefore if one bargains and sells Lands to another by Indenture enrolled for the Life of the Bargainee, with Power for the Bargainee to make Leases for three Lives,

*Popb.* 81.



or twenty-one Years, yet this is of no Effect to give him any such Power; for here is no Transmutation of the Possession at Law, but only a Use raised by Virtue of the Consideration, to which the Statute immediately carries a Possession, according to that Use; but for the Residue of the Estate, it continues wholly in the Bargainor, as it was before; and then the Persons who are to be the Lessees being unknown, no Consideration can arise from them to the Bargainor, and by Consequence no other Use can then be drawn out of him; and if the Use does not arise at the Time of the Bargain and Sale, it can never arise after; because when the Deed is once perfected, its Operation, as to creating any new or further Interest, is then at an End, and consequently no Leases can be made upon such a Conveyance, for Want of a Consideration to raise a Use to the Lessees.

1 Co. 176.  
*Moor* 144,  
 145.  
 2 *Roll. Abr.*  
 260.  
*Cro. Jac.* 180.  
 3 *Keb.* 809.  
*Raym.* 247.  
*Baynes ver.*  
*Belfon.*

So if one covenants to stand seised to the Use of himself for Life, Remainder to his Wife for Life, with divers Remainders over, with a Power for the Covenantor, for divers good Causes and Considerations, to make Leases for Lives or Years, &c. this Power is perfectly void, so that he cannot by Virtue thereof make Leases, even to his Sons or Daughters, or any other of his Blood, much less to Strangers; because such general Consideration can raise no Use at all, and no Averment of a particular Consideration can help it; because his Intent appears to be general, with regard to the Persons to take such Leases, as to the Consideration whereon they are to be made; for his Intent then was not to demise to one Person more than to another; and since such Leases are to arise and take their Effect out of the Estate of the Covenantor, there must be a Consideration to raise a Use for that Purpose at the Time of the Covenant made, which in this Case there cannot be, when neither the Persons nor the Consideration are known; and if there be no Consideration to raise such Use at the Time of the Covenant perfected, it can never arise after, because the further Operation of the Deed then ceases; but upon a Peoffment, Fine, or Recovery, where the Estate is executed, and a Change of the Possession made presently, there no Consideration is requisite to raise any of the Uses; and then, by Virtue of the Power which is created at the same Time with the Conveyance itself, the Lease may be made at any Time after.

1 *Chan. Ca.*  
 101, 263-4  
*Prince and*  
*Green versus*  
*Chandler.*  
 40 *Eliz.*  
 3 *Chan. Ca.*  
 91.

And yet where one covenanted to stand seised to the Use of himself for Life, Remainder to his eldest Son, with Power for himself to lease a small Part for forty Years, which he accordingly afterwards did, for a Provision for a younger Child; and tho' at Law this was not good, yet the Lord Chancellor *Egerton*, upon a Bill in Chancery, decreed, there should be Relief; because the Son claimed by the same Conveyance by which the Power was limited, and the Conveyance was intended to have been by Livery, but that the Father was advised such Covenant to stand seised would do as well; also the Law in *Mildmay's* Case was not then adjudged; so that neither the Party, nor his Counsel, did then know but that such Power was warranted by Law.

*Godb.* 327.  
*pl.* 419.

A Husband seised of Lands in Right of his Wife, he and his Wife levy a Fine to the Use of themselves for their Lives, and after to the Use of the Heirs of the Wife; proviso, that it shall and may be lawful to and for the said Husband and Wife, at any Time during their Lives, to make Leases for twenty-one Years, or three Lives; and the Wife, being Covert, made a Lease for twenty-one Years; and it was adjudged a good Lease against the Husband, tho' made when she was a Feme Covert, and altho' it was made by her alone, by reason of the Proviso: This is the Case *Verbatim*, as it is put in the Book: But surely the Reporter must be mistaken; for as it is put, there appears no Power for the Wife solely to make Leases, but only in Conjunction with her Husband; therefore the Power must be intended for the Wife solely, or for the Husband and Wife, or either of them; and then, no Doubt, such Lease by the Wife alone



alone will bind the Husband, because it takes its Essence out of the Time, to which both were Parties, and consenting.

*A.* seized of a Reversion in Fee expectant upon an Estate for Life to *B.* covenants to levy a Fine, &c. to the Use of himself for Life, Remainder to the Use of himself in Tail, &c. with Power to *A.* to make any Lease or Leases in Possession or Reversion of all or any the Premises, provided that such Lease, or Leases, *non excedat super numerum trium Vitarum ad Majus*, or twenty-one Years, and so as the accustomed Rent be reserved, payable during such Lease or Leases; a Fine is levied accordingly; then *A.* makes a Lease to *C.* for ninety-nine Years, if two Lives should so long live, to begin after the Death of *B.* rendering 14*l.* per Annum (the antient Rent) to him, his Heirs, and Assigns, and to such Person and Persons to whom the Inheritance shall after his Death appertain; and if this was a good Lease, pursuant to his Power, was the Question; and adjudged that it was; because the first Part of the Power was to make Leases absolutely and indefinitely, in Possession or Reversion, and the Restraint which came after was only, that they should not exceed three Lives, or twenty-one Years, which this Lease here does not; for tho' it is for ninety-nine Years, yet it is determinable on two Lives, which is less; also the Power being to make Leases as well in Reversion as in Possession, and for Lives as well as Years, could not have been executed, as to making Leases for Lives, in any other Manner; for they could not be made for Lives in Reversion, as they may for Years determinable on Lives; and a Lease in such Manner was most consonant to the Nature of his Estate, which was but a Reversion after the Estate for Life to *B.* But the Court agreed, that if one hath Power generally to make Leases for three Lives, he cannot make a Lease for ninety-nine Years, if three Lives so long live; for this is not pursuant to his Power, which was only to make Leases for three Lives; and there being no other Liberty given in the Power, he cannot vary from it; because such Powers being to charge the Inheritance of a third Person, are to be taken strictly. 2. It was adjudged, (a) that the Reservation was good, because such Lease, after it is made, comes in by Virtue of the Power above all the Limitations, and takes its Essence, not out of the Estate for Life, but out of the Estate of the Conuzees before all the other Estates, and then they coming in after, in the Nature of Reversioners, the Reservation to them is good.

It was said by the Judges, in 3 *Keb.* that the Construction in *Whitlock's* Case, that a Person, having Power to make Leases for three Lives, could not make a Lease for ninety-nine Years, determinable on three Lives, was too nice, and expressly contrary to the Intent of the Parties.

Yet in a late Case, where *A.* made a Settlement, and limited the Estate to himself for Life, Remainder to his Son *B.* for Life, with several Remainders over, with a Power to *B.* when he came into Possession, to assign or limit the same to any Woman that he should marry, or for the Use or in Trust for her, in lieu of her Jointure; *B.* on his Inter-marriage, by Deed reciting his Power, demised the Estate to Trustees for ninety-nine Years, in Trust for her, if she should so long live; and tho' it was agreed, that this was no greater Estate than by the Power he was enabled to make, being to determine on her Death, and that an Estate for Years was, in the Eye of the Law, of shorter Duration than an Estate for Life; yet it was resolved, that the Power being positive, and specifying what Estate was to be limited, ought to be construed and pursued strictly, being to arise out of the Estate of a third Person; and they agreed the Rule laid down in (a) *Whitlock's* Case, that all positive particular Powers must, in all material Circumstances, be positively and particularly pursued.

One had Power in Effect to make Leases for the Lives of *A.* *B.* and *C.* and he makes a Lease to them for their three Lives, and the Life of the longer

8 Co. 69. 70.  
2 *Rel. Abr.*  
262. *Whit-*  
*lock's* Case.  
2 *Mod.* 268-9.  
*Lutwich* ver.  
*Piggott.*

(a) 1 *Mod.*  
108.  
2 *Lev.* 27.  
*Poph.* 196.

3 *Keb.* 746.

*Mich.* 8 *George.*  
2. *Rattle*  
ver. *Portam*  
in *B. R.*

(a) 8 Co. 70.  
*Ley* 74.  
Co. 45.  
S. Rule laid  
down.

3 *Keb.* 44.  
*Alfo* verus  
*Pine.*

longer Liver of them ; and this was held to be sufficient within the Power, because for three Lives generally ; and for three Lives, and the longer Liver of them, is all one, since without such Words it would have gone to the Survivor.

2 Bulf. 216. Tenant in Fee makes a Lease for Life, and after levies a Fine to the Use of J. S. for fifteen Years, Remainder to the Use of himself for Life, with Power for himself to make Leases for twenty-one Years, or three Lives, in Possession ; and the Question was, if by Virtue of this Power he might make Leases during the Continuance of the Term for fifteen Years, or not till after that was ended ; and *per Curiam* clearly, he may make Leases presently in Possession ; for the Power issues out of the whole Estate, and by Virtue thereof he may make Leases in Possession presently, and need not stay till the Term ended, or that the Lands came into Possession ; also the Termor shall have the Rent reserved thereon ; and they agreed, that, as this Power was, he could not make Leases in Reversion, but the Term of fifteen Years was immediately subject to the Power, and when that is executed it will charge the Possession.

Palm. 468. Tenant for Life, with Power to make Leases for twenty-one Years, rendering the antient Rent, makes a Lease for twenty-one Years, to begin such a Day after ; this is not pursuant to the Power, and consequently void, because *pro Tempore* it is a future Lease, which this Power does not warrant, but it ought to be made in Possession ; for if he might make them in Reversion or *in futuro*, tho' but a Month after, he may as well make them to begin twenty Years after, or after his Death, and so defeat the Intent of the Power, which being to charge the Estates of third Persons, is to be taken strictly.

Raym. 247.

Dyer 357. But where a Husband seised of Lands in Right of his Wife made a Lease for twenty-one Years pursuant to 32 H. 8. and after by a private Act of Parliament it was enacted, that the Husband should have those Lands for his Life, Remainder to his Wife for Life, and that all Leases and Grants thereof made or to be made by the Husband for three Lives, or twenty-one Years, reserving the antient Rent, should be good ; and the Husband after made a Lease of these Lands, to begin after the Expiration of the first Lease, and it was held good ; for the Lands being in Lease at the Time of the making of the Act, the Intent of the Act seems to warrant such Lease in Reversion, and the rather, because there was no Restraint from making Leases in Reversion, as there is in 32 H. 8. which seems implicitly to give a Power of leasing them in Reversion ; but they agreed, that if the Lands had not been in Lease at the Time of making the Act, or if a Lease had been made in Possession pursuant to the Act, the Husband could not in either of these Cases have made a Lease in Reversion, or to begin at a future Time ; because then the Power might well be executed by making Leases in Possession, which here, having but a Reversion himself, he could not ; also they held, that a Commission from the Queen to make Leases for twenty-one Years, to save her the Trouble of making them, would not warrant Leases in Reversion.

2 Rel. Abr. 261.  
Hele versus Green, adjudged on a special Verdict.

One possessed of a Manor for ninety-nine Years by his Will devises it to A. his Wife, for her Life, with Power to let, set, or make Estates out of it, and that in as ample Manner as I myself might, if I were living ; and after the Death of A. he devises it to B. his Daughter, and the Heirs of her Body begotten, and dies, and A. being his Executrix, consents to the Devise, and after makes a Lease of Part of the said Manor to C. for ninety-nine Years, if three Lives so long live, and dies ; this was adjudged a good Lease against B. the Daughter ; tho' it was objected, that she had Power to dispose of it only during her own Life, because otherwise she might defeat the Remainder limited to the Daughter ; but the Court held, that the Disposition made by her should continue after her Death,

Death, otherwise the Power would be merely idle, since without it she might have disposed of it during her own Life.

One seised of Lands in Fee makes a Lease for ninety-nine Years, if three Lives should so long live, and after settles the Reversion on himself in Tail, with Power to make Leases for one, two, or three Lives, or for twenty-one Years in Possession, and after he makes a Lease for twenty-one Years, to begin after the Expiration of the first Lease; and if this was pursuant to his Power, was the Question; and the Court agreed, that where Tenant in Possession makes a Settlement with Power to make Leases generally, there he can only make Leases in Possession; but where he that makes the Settlement had only a Reversion at the Time, there he may make Leases out of that Reversion; for that agrees with the Intention of the Parties, which is to be the Guide in the Construction of all such Powers; but here the Power being expressly to make Leases in Possession, this Lease, which was of the Reversion only, is not within the Power, as the Court seemed to agree; tho' it was urged, that a Lease *in præsentia* of the Reversion was consonant to the Intent of the Parties, and such a Lease in Possession as the Nature of his Estate would admit of; *ideo Quære*: And note, The Case of *Stocomb* and *Hawkins*, as it is reported in *Cro. Jac.* seems to impeach the Diversity agreed on by the Court; for there it is put, that Tenant in Fee of a Manor, which was then in Lease for Years, levies a Fine thereof to the Use of himself for Life, Remainder to his eldest Son in Tail, with Power for the Tenant for Life to make Leases at any Time for twenty-one Years; and before the first Lease expired the Tenant for Life made a Lease for twenty-one Years, to begin after the Determination of the first Lease, and died; and tho' the Settlement itself was of a Reversion, and the Power general, yet this Lease in Reversion was adjudged void, for that, as the Court said, it ought to have been a Lease in Possession; but *Telverton*, who reports the same Case, mentions it as a Settlement of Lands in Possession, and that the Tenant for Life made a Lease for twenty-one Years, and after, before the Expiration thereof, made another Lease for twenty-one Years, to begin after the Expiration of the first Lease; and this second Lease was adjudged clearly void, and contrary to the Meaning of the Power.

Devisee for Life, with Power to make Leases for twenty-one Years, whereupon the old accustomed yearly Rent shall be reserved, makes a Lease for twenty-one Years, under the old Rent, &c. and a Year before the Expiration of that Lease he makes a Lease to another for twenty-one Years, to begin presently; this Lease seems to be good within his Power as a concurrent Lease, because it is no Charge upon the Reversion, nor is there any more than twenty-one Years *in toto* against the Reversioner; but this Power would not warrant the making of Leases in Reversion; for then he might charge the Inheritance *ad Infinitum*.

Tenant for Life, with Power to make Leases for three Lives, or twenty-one Years, cannot make such Leases by Letter of Attorney, by Virtue of his Power; because such Leases not being derived out of the Interest of the Tenant for Life, but by an Authority derived from the Tenant in Fee, and to charge the Estate of third Persons, the Trust for that Purpose is personal, and cannot be delegated to another.

*A.* makes a Lease to *B.* for Life, and after levies a Fine to the Use of *C.* for Life, Remainder to himself in Fee, with a Proviso or Power to make Leases for twenty-one Years, or three Lives, and that the Conuzees should stand seised to such Uses, afterwards *A.* covenants to stand seised to the Use of *D.* in Tail, with divers Remainders over, and after grants the Reversion aforesaid to *E.* for Life, who distrains *B.* and avows, and Judgment was given against the Avowant; because by the Covenant to stand seised, &c. *A.* had destroyed his Power of making Leases, and by

1 *Lev.* 167.  
1 *Sid.* 265.  
*Raym.* 132.  
1 *Keb.* 778,  
910. *Opsey*  
*ver. Tom-*  
*stus*; & *vide*  
1 *Chan. Ca.*  
17.

*Cro. Jac.* 318.  
*Stocomb ver.*  
*Hawkins.*  
*Yelv.* 222.  
S. C.

1 *Leon.* 147-8.  
*Read* and  
*Nash.*

9 *Co.* 76. a.  
1 *Roll. Abr.*  
330.

*Noy* 66.  
*Cook* versus  
*Bromfield.*

Consequence the Grant to *E.* not being derived thereout, could not affect any of the preceding Estates.

1 *Chan. Ca.*  
*Parry and*  
*Bowen.*

One hath Power to make a Lease for ten Years, and he makes a Lease for twenty Years; yet in Equity this is good for ten Years, and so has been settled several Times.

1 *Chan. Ca.*  
10. *Pollard*  
*ver. Greenville.*

One having Power to make Leases for twenty-one Years in Possession, made a Lease to *A.* for twenty-one Years in Trust for the Payment of Debts; but the Lease was made to commence from a Time to come, and so not pursuant to the Power; yet being made for the Payment of Debts, was supported in Equity.

*Moor* 514,  
611, 645.  
2 *Lev.* 149.  
1 *Vent.* 291.  
3 *Keb.* 512.  
accord, that  
it is the best  
Way to make  
no Livery;  
but *Hale*  
thought it  
no Forfeiture,  
because  
by the sealing  
of the  
Deed the  
Lease takes  
Effect, and  
then the Livery  
comes  
too late.

If one makes a Feoffment in Fee to the Use of himself for Life, with Power to demise, lease, grant, or devise the Lands for three Lives, or twenty-one Years, yet this gives him no other Power in Effect than to limit the Use of the Land for three Lives, or twenty-one Years; for all Leases to be made by him by Virtue of such Power take their Essence out of the original Feoffment; therefore if he makes a Lease for three Lives, and makes Livery of the Land, this is a Forfeiture of his own Estate for Life; because he himself being only Tenant for Life, cannot out of that Estate make such Leases; and when he takes upon him to make Livery of the Land, he takes upon him to make the Lease as Owner of an Estate sufficient for that Purpose, which he is not; and to make such Leases no Livery is requisite, because they taking Effect out of the first Feoffment, the Livery made upon that is sufficient to supply all the future Limitations to be made in Pursuance thereof; but if he pursues the Words of the Power, and says only, *I demise or lease such Lands to you for three Lives*, this is sufficient, and will be taken in Execution of the Power a good Lease for three Lives; so if he only says, *I limit the Use to you for three Lives*, &c. this likewise is sufficient, because this in Effect is the Substance of his Power, and the Statute presently carries the Possession after such Use: So if one hath Power only to limit new Uses, and he gives or devises, &c. the Land itself, this is also good, and enures to a Limitation of the Use; because the Use is but an Equity to have the Land itself, and when he gives, demises, or devises the Land itself, he also gives all his Use and Equity therein, and then the Statute executes the Possession accordingly.

*Carth.* 427-8.  
2 *Salk.* 537.  
5 *Mod.* 244.  
378. *Winter*  
*ver. Loveday.*

It was found by a special Verdict, that *A.* being seised of the Manor of *M.* did, on his Son's Marriage, settle the same to the Use of himself for Life, and after to the Use of his Wife for Life, then to the Son in Tail, with the following Proviso or Power; *viz. That it should be lawful for the said A. during his Life, and for his Wife, after his Death, during her Life by Deed indented to make Leases, either in Possession for the Term of one, two, or three Lives, or for the Term of thirty-one Years, or for any other Term or Terms, Number or Numbers of Years, determinable upon one, two, or three Lives, or in Reversion for one or two Lives, or for thirty Years, or for any other Term or Number of Years, determinable upon one or two Lives, so as such Demise be not made of any the Antient Demesne Lands, Parcel of the said Manor, or of any other Lands which for the Space of seven Years had been used as Demesne Lands, and so as the antient Rent was reserved; afterwards A. by Deed makes an absolute Lease for thirty Years of Copyhold Lands, Parcel of the said Manor, which were in the Tenure of J. S. for the Term of two Lives, to commence after the two Lives then in Being; and in this Case it was held by Holt Chief Justice, Turton and Eyre Justices, contra Rokesby, 1. That a Lease of Copyhold Lands was not warranted by the Power, being within the Exception of Antient Demesne Lands, all Copyhold Lands being Antient Demesne, it being an inseparable Quality of every Copyhold, that it was Time out of Mind Parcel of the Manor. 2. It was held by the said Justices, against Rokesby, that a Lease for thirty Years absolute in Reversion after*

two Lives, might be made by *A.* or his Wife of any Lands which were in their Power of Leasing; and herein *Holt* held, that a Lease to commence at any Day to come, is properly a Lease in Reversion; but in this Case it signifies a Lease to commence after some Interest in Being at that very Time when the Lease in Reversion was made; that this Power to lease for Life in Reversion must be taken to be a Lease of the Reversion itself, and not a concurrent Lease, and that it cannot be otherwise, because a Freehold cannot commence *in futuro*; and where there is a Power given to make Leases in Possession and Reversion, in such Case if a Lease is made in Possession, and afterwards some Life drops, he cannot make a new Lease in Reversion of the same Lands, because his Power is executed by making the first Lease; that where a Qualification is annexed to a Power of leasing, which, if observed, goes in Destruction of the Power, the Law will dispense with such Qualification; as where there is a Power to make a Lease of a Manor, or of any Part thereof, so as the antient Rent is reserved, yet he may by this Power make a Lease of the Services, Parcel of the Manor upon which no Rent can be reserved, otherwise the expresse Power would be defeated.

A Man made a voluntary Settlement on his Son for Life, and after to his first and other Sons in Tail, with Power to the Son to make a Lease in Possession for ninety-nine Years, determinable on three Lives, and also to make Leases for sixty Years, to commence after his Death, if he had Issue Male, to continue so long as he had Issue Male; the Son makes a Lease to his Father in Trust for one of his younger Children, but the Lease was not pursuant to the Power; yet it was decreed good, and taken to be a Lease made by the Father after a voluntary Settlement.

*Abr. Eq.  
Gooding ver.  
Gooding.*

## (K) By what Form of Words Leases may be made.

HERE it may be laid down for a Rule, That whatever Words are sufficient to explain the Intent of the Parties, that the one shall divest himself of the Possession, and the other come into it for such a determinate Time, whether they run in the Form of a Licence, Covenant, or Agreement, are of themselves sufficient, and will in Construction of Law amount to a Lease for Years as effectually as if the most proper and pertinent Words had been made use of for that Purpose; and on the contrary, if the most proper and authentick Form of Words, whereby to describe and pass a present Lease for Years, are made use of, yet if upon the whole Deed there appears no such Intent, but that they are only preparatory and relative to a future Lease to be made, the Law will rather do Violence to the Words, than break thro' the Intent of the Parties; for a Lease for Years being no other than a Contract for the Possession and Profits of the Lands on the one Side, and a Recompence of Rent or other Income on the other, if the Words made use of are sufficient to prove such a Contract, in what Form soever they are introduced, or however variously applicable, the Law calls in the Intent of the Parties, and models and governs the Words accordingly.

My Lord *Coke* tells us, the Words *demise*, *grant*, *betake*, and *to Farm* *Co. Lit. 45 b. let*, and whatever other Words amount to a Grant, may serve for a Lease *2 Mod. 250.* for Years.

So, he says, *dedi* is a sufficient Word to make a Lease for Years.

*Co. Lit. 501. b.*

But

Bro. Tit.  
Leases 71.  
4 Inst. 111,  
112.  
Co. Lit. 45. b.  
2 Co. 17. a.

But there are several other Words which are equally sufficient to make a Lease for Years; therefore in Case of the King, if he makes a Lease for Years, under the Exchequer Seal, in these Words; *Sciatis quod nos commisimus Custodiam* of such Land to such a one, this is a good Lease, and the Lessee may plead it as a Demise or Lease of the Land itself; for this sufficiently shews the Intent of the King to depart with the Possession of the Land for the Time, and therefore amounts to an effectual Lease; and this being the Usage in the Exchequer, all other Courts are bound to take Notice thereof.

5 H. 7. 1.  
1 Leon. 129.  
3 Bulf. 252.  
1 Sid. 428.  
1 Mod. 14.  
2 Keb. 561.  
2 Lev. 194.  
3 Keb. 761.  
Hard. 366.

So if one only license another to enjoy such a House or Land till such a Time, this amounts to a present and certain Lease or Interest for that Time, and may be pleaded as such, tho' it may be also pleaded as a Licence; and if it be pleaded as a Lease for Years and traversed, the Lessee may give the Licence in Evidence to prove it.

1 Leon. 136,  
303.  
Cro. Eliz. 1,  
173.  
Owen 97.  
1 Rol. Abr.  
847.  
3 Bulf. 252.  
Fitz. Tit. Aff-  
fise, pl. 412.

So if *A.* by Articles covenants with *B.* that he shall have or enjoy such Land for such a Time, this is a good and effectual present Lease, because here are sufficient Words to prove a Contract, that the one shall relinquish the Possession, and the other come into it; but if the Covenant had been with *B.* that *C.* a third Person, should have or enjoy such Lands of *A.* for such a Time, or that the Executors of *B.* should have or enjoy it for that Time, this would be no Lease to *C.* the Executors of *B.* but only a bare Covenant with *B.* for when these Words have their natural and binding Force as a Covenant with *B.* they cannot at the same Time have a different Construction, and amount to a Lease to *C.* or the Executors of *B.* who are Strangers to the Contract, and no Parties to the Deed, nor the Executors of *B.* yet in *esse*; neither can these Words amount to a Lease to *B.* because the Intent is manifest that he himself is to have nothing in the Land, but is only a Trustee of the Covenant for *C.* or his Executors; also if these Words should amount to a Lease to *C.* or the Executors of *B.* when they came in *esse*, this would take off from their Operation as a Covenant with *B.* for the same Words cannot at the same Time have two different Constructions and Operations; and it cannot be said they are a Covenant with *B.* by the first Words, and a Lease to *C.* or the Executors of *B.* by the last Words; for that *C.* or the Executors of *B.* shall enjoy the Land, is the very Explanation of the Covenant with *B.* and gives Life and Force to it, and without that he covenants with *B.* for nothing; for till these Words are added, the Covenant with *D.* is but a dead Letter, and has no Meaning or Sense in it.

Bro. Tit.  
Leases 20, 30,  
60.  
Noy 14.  
Cro. Jac. 42,  
659.  
Palm. 201.  
1 Leon. 118,  
119.  
3 Bulf. 252.  
Cro. Car. 207.  
1 Jon. 231.  
Hob. 35.  
Moor 861.  
2 Brownl. 23.  
1 Rol. Rep.  
397.  
3 Bulf. 204.  
1 Rol. Abr.  
847.  
Yelo. 85.  
1 Brownl. 136. Cro. Eliz. 223. Bro. Tit. Leases 21. only cont. per Finew.

So where one by Articles Covenants, Grants and Agrees with *J. S.* that he shall have such Lands, or have, hold and enjoy such Lands for so many Years, these are Words sufficient to shew a present Contract for the Lessee's enjoying of these Lands, and therefore amount to a present Lease of them as effectually as if there had been the Words *dimisit, locavit*, or such like; and tho' there were in the same Articles a Covenant to make a good and perfect Lease, as Counsel should advise, yet that would not prevent or destroy the Operation of the first Words as a present Lease, such Covenant only being *in Majorem Cautelam*, that the Lessee might require further Assurance by Fine, or the like, if he found it necessary; and the Difference is, where such Articles, by way of Covenant, are made by him who is Owner of the Land; and where they are made by a Stranger, or one who has then nothing in the Lands; in the first Case they amount to a present and absolute Lease, but not in the other, because a Man cannot be supposed to lease what he has not; or if it might be so supposed, yet when it appears in the very Articles

that he has nothing in the Lands, his Covenant then can have no other Construction, but that he will procure the Owner of the Lands to permit the Covenantee to hold and enjoy those Lands; which is the proper and natural Interpretation of the Words of Covenant, when he himself has nothing whereof to make a Lease.

A Controversy was between two Persons touching a Lease for Years, which of them had Title to it, and they submitted to the Award of J. S. who awarded that one of them should have the Land; this was held to be a good Gift of the Interest of the Land, that is, an Award, that the whole Lease, or Interest in the Land for the Term then to come, belonged to one exclusive of the other; but if the Award had been, that the one should permit the other to enjoy the Term, this, it is said, would not have given him the Interest in the Land, nor would amount to a Lease; that is, as I suppose, because the Permission being to come from the other Party, the Interest must be supposed to be and continue in him; and it could not amount to a Lease, or an Award of a Lease; not to a Lease, either from the Arbitrator or the other; not from the Arbitrator, because he had nothing in the Land, and was only to award what the other should do; not to a Lease from the other, because it was only the Act and Award of the Arbitrator; neither could it amount to an Award of a Lease from the other, because it was only that he should permit the other to enjoy the Term, which he might do without making a Lease; and the Words being spoken by the Arbitrator, who was a third Person, cannot have the same Operation as if they had been spoken by one who had Interest in the Lands to another, but must be taken according to the Literal Sense and Meaning thereof.

Articles indented in Writing were made between A. and B. in this Manner: *Imprimis*, it is covenanted and agreed between the Parties, that A. doth let such Lands for and during five Years, to begin at Mich' next following, under 10*l.* a Year Rent; or provided that the Lessee shall pay 10*l.* at Mich' and Lady-day, by even Portions during the Term; also the said Parties do Covenant, that a Lease shall be made and sealed, according to the Effect of these Articles, before the Feast of All Saints next ensuing; yet this was held to amount to an immediate Lease, by reason of the first Words in the present Tense, and that the last Words were only for making such a Lease in Writing for further Assurance; and the rather here, because the Lease to be sealed was to be made after the Beginning of the Term.

One said to another, you shall have a Lease of my Lands in D. for Twenty-one Years, paying therefore 10*l.* per Ann. make a Lease in Writing and I will seal it; this was agreed by all the Justices to be a good Parol Lease for Twenty-one Years, tho' no Writing was made of it, (being before the Statute of Frauds) for the Intent of the Parties was sufficiently expressed, and the making of it in Writing was but for further Assurance, and left to the Lessee, if he thought it necessary.

One made his Will in this Manner: I have made a Lease to J. S. for Term of Twenty-one Years, paying but 20*s.* Rent; this was held a good Lease or Devise by the Will for Twenty-one Years, and that the Word *have* should be taken in the present Tense, as *Dedi* is in a Deed of Feoffment, to comply with the Intent of the Testator.

But now on the contrary, if the most proper Form of Words of Leasing are made use of, yet if upon the whole Deed there appears no such Intent, but that it is only Preparatory and Relative to a future Lease to be made, the Law will rather do Violence to the Words, than break thro' the Intent of the Parties, by construing a present Lease, when the Intent was manifestly otherwise.

Forfeiture, vide *infra* Under Leases made by Copyholders.



Noy 128.

Sturgeon ver.  
Painter.

Therefore where Articles were drawn between *A.* and *B.* in this Manner: Articles agreed upon, &c. *Imprimis*, *A.* doth demise such a Close to *B.* to have it for forty Years, and a Rent reserved, with Clause of Distress, &c. In Witness whereof, &c. and afterwards there was written in the same Paper a Memorandum, that these Articles are to be ordered by Counsel of both Parties, according to the due Form of Law; and because the Intent of both Parties appeared by that Memorandum, and by a Lease actually drawn by Counsel, but never sealed, (upon some Disagreement between the Parties) it was ruled by the Court, upon Evidence in Ejectment, that these Articles were not a sufficient Lease, and the Jury found accordingly; and yet here was the Form and Words of a present and immediate Demise or Lease.

1 Rol. Abr.

348. Plea-  
zance and  
Higham.

2 Mod. 81.

So where Articles of Agreement are drawn between *A.* and *B.* in this Manner: First, the said *A.* is contented to demise such Lands, &c. to the said *B.* from Mich' next for six Years; and after these Words, the Rent reserved is 100*l.* per Ann. a Re-entry for Non-payment of the Rent, a Covenant for Reparations, and a Covenant to do such other Thing; and these Articles are sealed and delivered by the Parties; yet they do not amount to a Lease, but are only preparatory Covenants or Instructions towards a Lease, and never were intended to have the Force or Effect of a Lease themselves; besides that, the Word *contented* imports only an Approbation of something to be done after; this Case is cited in (a) *Cro. Jac.* in this Manner: That if one Covenants and Grants with another that he shall have and hold such Lands for ten Years, that this is a good and absolute Lease for that Time; but if he Covenants and Grants that he shall enjoy those Lands for ten Years, this is no Lease, because it sounds only in Covenant; *Quere* of the Difference between *holding* and *enjoying*, for there seems none; therefore the Case must be mistaken.

(a) *Cro. Jac.*  
172.

Dyer 150.

1 Co. 155.

Hob. 35.

Moor 480.

1 Rol. Abr.

348.

Bendl. pl. 115.

One made a Lease for Life, & *Provisum est*, that if the Lessee die within sixty Years, that then his Executors and Assigns should enjoy the Land in his Right for so many Years as should be behind of the sixty Years from the Date of the Lease; this was held to be only a Covenant, and no Lease, for which there are divers Reasons assigned in the Books; as first, because the Words purport an Agreement, and not a Grant, and so sound only in Covenant, which is a very unintelligible Reason. Another Reason given is, because if it should be construed a Demise, it must be void, because there is no Person in *esse* to take it; for the Executors are not *in rerum natura*, nor Parties to the Deed. Another Reason given is, because nothing of the said Term was given to the Lessee himself for Life, as Remainder to him and his Executors for sixty Years. A fourth and last Reason is, because there is no Certainty either of the Beginning or Ending thereof, and therefore it cannot be a good Lease; but a better Reason than any of these seems to be, that he having in the first Part of the Deed made a Lease in express and proper Words, must be supposed to mean something less in this last Part of the Deed, which varies so widely in the Form of Expression, and which has a natural and proper Meaning of its own as a Covenant, but cannot amount or come up to a Lease without Violence and Force done to the Words, as well as the Intent of the Parties; and this the rather seems probable, because *Moor* holds clearly, that if it had been provided that if the Lessor die within sixty Years, that then he demised the Land to another (who was also a Party to the Deed) for so many of the sixty Years as should be then to come; this would be a good Lease, for here he comes into the very same Form of Expression made use of in the first Part of the Deed, which was an actual Demise, and therefore must be supposed to mean the same Thing in the latter Part too, and consequently such Words would make it an actual Demise.



*A.* seised of Lands in Fee by Indenture covenants with *B.* before *Easter* then next, to convey those Lands by Fine or other Assurance to *B.* and his Heirs, to the Use of him and his Heirs, with a Proviso, that if *A.* paid to *B.* 100*l.* at the End of thirteen Years, that then he might re-enter, and that then all Assurances should be to the Conuzor, and covenanted and granted for him and his Heirs, that *B.* and his Heirs should enjoy those Lands till the End of the said thirteen Years, and for ever after, if the 100*l.* were not paid; and *B.* covenanted to pay Annually, during the thirteen Years, two Capons, and that during the thirteen Years he would not commit Waste; no Assurance was made within the Time; and if this, upon the whole Deed, amounted to a Lease for thirteen Years, was the Question; and it was adjudged that it was no Lease, but only a bare Covenant, and this Judgment affirmed in Error; for the Intent of the Parties was to make Assurance of the Inheritance by way of Mortgage, and the Covenant was only that he should enjoy the Lands during the Time of the Mortgage, whether it continued thirteen Years only, or for ever; and if a Fine had been levied, or a Feoffment made, it is plain this Deed had been no Lease, but only a Covenant to lead or declare the Uses of such Fine or Feoffment; and tho' none was levied or made, yet the Deed still continues of the same Nature as it did at first, or as if such Fine or Feoffment had been actually executed; and the Covenant on *B.*'s Part, that he would do no Waste, does not expound it otherwise, for that was only that he, being a Mortgagee in Fee, should do no Waste, for which otherwise there would be no Remedy.

So where one, by Indenture inrolled, for Money bargained and sold Lands to one and his Heirs, provided, that if the Bargainor for five Years paid annually 10*l.* to the Bargainee at the Days limited in the Deed, and at the End of the said five Years should pay 240*l.* then the Bargain and Sale to be void; provided also, and it is further covenanted and agreed between the said Parties, that the Bargainee, his Heirs or Assigns, shall not intermeddle with the actual Possession of the Premises, or the Perception of the Rents and Profits, till Default be made in the Payment of the said Sums; this was held to be no Lease to the Bargainor for five Years, but only in the Nature of a Lease at Will, by reason of the Negative Words, that the Bargainee should not intermeddle with the Rents and Profits for that Time, and consequently so long was to leave the Bargainor in Possession as he was before.

So where *A.* acknowledged a Recognizance to *B.* of 200*l.* and *B.* by Indenture of Defeasance, did covenant, promise and agree with the said *A.* that if *A.* his Heirs or Assigns, should, after such a Time, convey such an Advowson to him and his Heirs; and if the said *B.* his Heirs, Executors, &c. shall, and may at all Times hereafter, peaceably and quietly have, hold, use, occupy, possess and enjoy the said Advowson, without the Let, Suit, Trouble, &c. of the said *A.* or any other Person or Persons, &c. then the Recognizance to be void; and the Question was, if this last Clause amounted to a Lease of the Advowson; and the Court was of Opinion that it did not, for the Intent of the Parties was not to make a Lease of it, but only a Condition to defeat the Recognizance, and that this last Clause should have Relation to the Estate in Fee precedent, being if the said *A.* his Heirs, &c. which cannot be intended of a Lease; also the Clause is indefinite, at all Times hereafter, and does not limit any certain Time for Life or Years wherein Advowson shall be peaceably enjoyed, and therefore shall be intended during the Estate in Fee before mention'd; but no Judgment was then given.

If one makes a Lease for Life, and after grants that the Lands or the Reversion shall remain to another for Twenty-one Years after the Death

*Plow.* 148, 150. *Bro. Tit. Leases* 71. *Yelv.* 85. *1 Brownl.* 156

of the Tenant for Life, these Words are sufficient to pass a Reversionary Interest by way of future Lease without Attornment, tho' there is not the Word *Demise*, or any other Word usual or proper to describe a Lease for Years by; but here being Words sufficient to prove a present Contract for the Reversionary Interest of these Lands after the Estate for Life determined, these in Case of a Lease for Years, which is but a Contract, are in themselves sufficient and adequate to any other Form.

(L) **What Certainty is requisite to Leases for Years as to their Beginning, Continuance and Ending: And herein,**

1. **With Regard to the Date of the Lease.**

1 *Mod.* 180.

**A**S to the Date, that may be considered either as it is an impossible Date, or an uncertain Date, between which the general Difference taken in the Books is, that if a Lease be made to begin from an impossible Date, there the Lease shall take Effect from the Delivery, because it could not be any Part of the Agreement between the Parties, as from the 30th Day of *February*, or the 32d Day of *April* next; but where the Limitation is uncertain, as a Lease in *October*, *Habendum* from the 20th of *November*; without saying from *November* next following or preceding, or what other *November*; this Uncertainty vitiates the Lease itself, because it was Part of the Agreement, that the Lease should begin from the 20th Day of some *November* or other; but it not appearing to the Court what *November* was intended, they cannot determine it for the Parties, and therefore for such Uncertainty the Lease itself becomes void.

1 *Sid.* 461.

1 *Vent.* 84.

2 *Keb.* 656

So where a Lease is made to begin from the Nativity of our Lord God last past, without saying from the Feast of the Nativity, this Lease shall begin presently, because it could be no Part of the Agreement between the Parties that the Lease should begin from the Nativity itself, which is past so many Hundred Years ago, and therefore for this Impossibility of Relation the Lease shall begin presently; but if it were to begin from the Nativity of our Lord God generally, or from the Nativity of our Lord God next ensuing, omitting the Word *Feast*, *Twissden* was of Opinion such Lease would be void, for the Uncertainty of its Commencement; but *Sid.* in reporting of the Case, seems to be of a contrary Opinion, and makes a *Quære*, if it shall not begin presently; and in Truth this seems the most reasonable Opinion, for as to Impossibility of Relation, there is the same in this as there is in the other; and therefore by the same Reason it shall begin presently.

1 *Rol. Abr.*

349. *Dar-*

*cett's Case.*

850. *Elme*

*ver Leaves.*

In Ejectment, if Plaintiff declares on a Lease by *J. S.* 20 *August* for twenty Years *a Festo Annunciationis beatæ Mariæ Virginis ultimo Præterito ante Datum hujus Indenturæ*, or *Indenturæ prædictæ*, where no Mention is made of any Date or Indenture before in the Declaration, this Lease shall be taken to commence from the Feast of the Annunciation next before the 20th of *August* in that Year, wherein the Declaration is, because it must have been so construed if the Words *ante Datum hujus Indenturæ* had been omitted, and the Addition of those Words can be to no Purpose, nor of any Use, when no Indenture at all is mentioned before, and therefore shall be void, or as if they had been totally omitted.

If a Lease be made for thirty-one Years, *Anno 1531.* and after, *Anno 1535.* the Lessor, reciting the said Lease, by Indenture makes a new Lease in these Words, *Novimus me dictis 31 Annis finitis & completis dedisse & concessisse omnia Præmissa to J. S. Habend' & tenend' a Die Confectionis Præsentium (Termino prædict' finito) usque ad Finem Terminum 31 Annorum tunc immediate sequentium plenarie complendorum,* this Lease shall begin in Computation from the Expiration of the first Lease for thirty-one Years, and shall continue for thirty-one Years after such Expiration of the first Lease; for if it should begin from the Day of the making of the Deed, then there would be four Years thereof to come after the Expiration of the first Lease, which would be plainly against the Intent of the Parties; and therefore it shall be interpreted that he shall have it for thirty-one Years after the Day of the Date, and the Expiration of the first Term of thirty-one Years, *viz.* after both.

So where Lessee for an hundred Years made a Lease for forty Years to B. if he should so long live, and after leased the same Lands to C. *Habend'* for twenty-one Years from the End of the Term of B. to begin and be accounted from the Date of these Presents; and the Question was, if the Lease to C. should be said to begin presently, or after the Term of B. and the Judges were clear of Opinion, that the Lease to C. should not be accounted from the Time of the Date, but from the End of the Term of B. because by the first Words it is a good Lease in Reversion in that Manner, and then it shall not be made void by any subsequent Words, or, as *Coke* said, the last Words ought to be construed to give an Interest as a future Interest presently, and the actual Possession after the Expiration of the first forty Years Term is well granted by the first Words.

A Man made a Lease for Years, to begin at the Feast of our Lady Mary, for twenty-one Years, without shewing in Certainty at which of the Feasts of our Lady, *viz.* the *Annunciation* or the *Purification*; yet *Anderson* held it a good Lease, and that the Lessee might determine the Certainty of the Beginning of the Lease, by his Entry, at which of the Feasts he thought fit; but *Periam* doubted; and in Truth this Case seems within the Rule before laid down to be void, for the Uncertainty of the Time of its Commencement.

In Ejectment the Plaintiff declares upon a Lease for Years, *Habend'* from the Sealing and Delivery, and declares that the Sealing and Delivery was 1<sup>o</sup> *May*, and the Ejectment was the same Day; and it was moved in Arrest of Judgment, that the Ejectment could not be supposed the same Day, for the Lease did not begin till the next Day ensuing the Sealing and Delivery; but the Court disallowed the Exception; for where the Lease is to begin from the Time of the Sealing and Delivery, or generally to hold for twenty-one Years next following, the Ejectment may well be supposed to be the same Day; for the Beginning of the Lease is presently upon the Sealing and Delivery; and therefore such a Lease shall end the same Time and Hour.

If an Indenture of Demise bears Teste 4 *May*, 10 *Jac.* and is delivered 5 *May*, 10 *Jac.* *Habend' a Festo Annunciationis Beate Mariæ Virginis tum ult' præterit', pro Termino viginti unius Annorum prox' sequent' Datum dictæ Indenturæ,* this Lease commences in Computation from *Lady-Day* before the Date, and in Interest the 5th Day, which is the Day next after the Date; and so all the Words of the Indenture shall take Effect the 5th Day, being the Day of the Delivery of the Deed, and then the Lease will determine on the Feast of the *Annunciation* twenty-one Years after; and therefore the Count which was of such a Lease, omitting *Datum Indenturæ,* was held to be well enough warranted by this Lease found in *hec Verba*, the Ejectment not being laid till the 5th of *May*.

2 Leon. 14.  
pl. 82  
Fyne versus  
Foslers

In Ejectment the Plaintiff declared upon a Lease made 14 Jan. 30 Eliz. from *Chishmas* before for three Years, and upon Evidence the Plaintiff shewed a Lease bearing Date 13th Jan. the same Year, and proved to have been then executed; and it was moved, for this Variance between the Declaration and the Evidence, that the Jury might be discharged; but *Anderfon* Chief Justice said, that the Evidence was sufficient to support the Declaration; for if the Lease was sealed and delivered 13 Jan. it was then a Lease 14 Jan. *quod ceteri Justiciarii concesserunt.*

1 Rol. Abr.  
852.  
Crown's ver.  
Causley.

If an Indenture of Demise bears Teste 25 March, 15 Car. and is delivered the Day of the Date, and the *Habend'* is from and after the Day of the Date of these Presents, for and during the Time and Term of seven Years from henceforth next and immediately following fully to be compleat and ended, this Lease begins in Computation from the Delivery of the Deed, which was the Day of the Date, and in Interest the next Day after the Date, and so all the Words will have an Operation; for it appears that he was not to have the Possession till the next Day after the Date, by the Words *Habend'* from and after the Day of the Date, which excludes the Day of the Date, but that the seven Years should commence by Computation from the Delivery, *viz.* from henceforth, which refers to the Limitation of the seven Years; and therefore where the Plaintiff declared on this Lease by Indenture dated 25th of March, *Habend' a Die Datus* for seven Years, it was adjudged against him, for by Computation it began *a Datu Indenture.*

Plow. 198.  
Dyer 177.  
pl. 35.  
C. Lit. 45. b.  
1 Co. 154.  
1 Rol. Abr.  
849.  
2 Leon. 106.

If one makes a Lease to *A.* for twenty-one Years, and after makes another Lease to *B.* for Years, to begin *a Fine & Expiratione predict'* *Termini 21 Annor' Dimissor'* to *A.* and then the Lease to *A.* is determined, either by an express Surrender, or by an implied Surrender in Law, as by *A.*'s Acceptance of a new Lease for Life from the Lessor, the Lease to *B.* shall begin presently; but if the Lease to *B.* had been to begin *post Finem & Expirationem predict'* *21 Annor'*, there the Lease to *B.* should not begin upon the Surrender, Forfeiture, or other Determination of the first Term to *A.* till the twenty-one Years actually run out by Effluxion of Time; the Reason of which Difference is, that in the first Case the Word *Term* comprehends as well the Estate or Interest in the Land, as the Time for which it is demised; and therefore the second Lease being limited to begin *a Fine & Expiratione predict'* *Termini 21 Annor'*, whenever the Term, which includes also the Estate and Interest, is determined, the Lease to *B.* shall begin; but in the other Case, the Lease to *B.* is not to begin till after the End and Expiration of the twenty-one Years, which cannot be ended but by Effluxion of Time.

6 Co. 34.  
Cro. Jac 71.  
Bishop of  
Bath and  
Wells's Case.  
Iyer 312.  
pl. 89.

The Bishop of Bath and Wells, 18 H. 8. made a Lease in Writing to *A.* and *B.* for sixty Years; Proviso, that if the said *A.* and *B.* die within the said Term of sixty Years, that then, after the Death of the said *A.* and *B.* and of the longer Liver of them, it shall be lawful for the said Bishop, and his Successors, to enter into the said Lands; *A.* dies, the Bishop dies, and his Successor, 22 H. 8. demises the said Lands to *C.* *Habend' cum, post five per Mortem, sursum Redditionem, vel forisfact'* *pred'* *B. vacare contigerit*, for sixty Years, with Confirmation of the Dean and Chapter, and then *B.* dies within the sixty Years, and the Grantee of the Bishop would avoid this Lease to *C.* 1. Because being limited to begin upon one of three Accidents, *viz.* Death, Surrender, or Forfeiture, none of which happened, it could not begin at all; for it was not determined by the Death of *A.* and *B.* within the sixty Years, as all the Court agreed, but continued till the Lessor, or his Successors, entered; for so it was expressly provided by the Lease, and that was a meer Condition, and not a Limitation; and then the second Lease, as was argued, cannot begin at all, or at least the Time thereof shall run on from the Death of *B.* the Survivor; but it was adjudged the second Lease was good; for it was only limited *cum per Mortem, sursum Redditionem, &c.* the first Lease

should determine, but also *cum post Mortem vacare contigerit*; so that this second Lease may well begin when the first Term by Effluxion of Time is run out *post Mortem* of the Parties; and this differs from a Remainder limited to one after the Death of another; there it ought to begin immediately after the Death, without any *Interim*; but here it shall not begin till after the first Term run out *post Mortem*, whenever in such Manner *vacare contigerit*, and is a good Lease presently in Point of Interest, to take Effect in Possession whenever the first Lease, by any of these Accidents, happens to be at an End, and is a good *Interesse Termini* in the mean Time; and this Construction ought to be made, to support the Lease, because it shall be taken most strongly against the Lessor, and for the Benefit of the Lessee.

If *A.* reciting that *B.* hath a Lease for Years of such Lands, demises the same Lands to *C.* for Years, to begin after the End or Determination of the said Lease to *B.* where in Truth *B.* hath not any Lease at all of those Lands, the Lease to *C.* shall begin presently; for in Judgment of Law, a void Limitation and no Limitation is all one; so if he recites a Lease which in Construction of Law appears after to be void, or misrecites a good Lease in a Point material, *Habend'* from the End of the said Lease, this new Lease shall begin presently; tho' where the first Lease is good in Law, and only misrecited in a Point material, the new Lease can begin presently only in Enumeration of Years, not in Interest, till the End of the first Lease; for in these Cases the Commencement of this new Lease, being referred to a Thing which is not, cannot be any ways ascertained or governed thereby, and then it is as if no such Recital had been, which would have left the Lease to begin presently, as the strongest Construction against the Lessor, since there is nothing now to ascertain or determine its Beginning at any other Time.

*Vaugh.* 75. 2 *Lev.* 242.

So where the Queen-Mother, having the Inheritance of certain Lands settled on her for her Jointure, 14 *Car.* 1. reciting, that whereas Queen *Eliz.* 22 April, in the 42d Year of her Reign, had demised those Lands to such a one, &c. (whereas the Lease intended was in Truth 32 *Eliz.*) the said Queen-Mother did thereby demise the said Lands, to begin after the End or Determination of the Estate granted to the other, *per Literas Patentes predictas*, for twenty-one Years; and the Question upon this Misrecital was, when the second Lease for twenty-one Years should begin, whether after the Expiration of the first Lease made 32 *Eliz.* tho' falsely recited to be made 42 *Eliz.* or whether it should begin presently; for if so, the first Lease would continue beyond the twenty-one Years limited in the second Lease, and so the Lessee have no manner of Benefit of it; and yet notwithstanding it was adjudged, that for this Misrecital the second Lease should commence presently; and so the Lessee was obliged to pay a Rent of 60*l.* *per Annum* for the whole twenty-one Years, tho' he had nothing in the Lands all that Time; and this Judgment given in *C. B.* was afterwards affirmed upon Error in *B. R.* and in this Case the Court agreed, that if the Date of the recited Lease only had been mistaken, and the second Lease had been of the Lands, *Habend'* after the Expiration or Determination of the Estate or Lease of the first Lessee generally, in such Case the second Lease had been good, and should not have begun before; for then there had been sufficient Certainty for the Time of its Commencement, and then *Utile per Inutile non utitur*; but here being limited to begin after the Determination of the Estate granted *per Literas Patentes predictas*, where there were no such Letters Patent, and so the Relation idle and null, the second Lease begins presently, as if no such Recital or Relation had been, and there is no *Utile* at all; for it is tied up to begin after a Lease which is not; and the Court denied *Periam's* Opinion to be Law, that if I let Lands to *B.* to begin after the

Expi-

1 *Bendl.* pl. 72.  
1 *And.* 3.  
*Dyer* 116.  
pl. 70.  
*Bro.* Tit.  
*Leases* 62.  
*Plow.* 148.  
1 *Rel. Abr.*  
849.  
*Cro. Car.* 399.  
1 *Fon.* 355.  
*Miller and*  
*Manwar.* ng.  
*Co. Lit.* 46. b.  
1 *Lev.* 77.  
1 *Keb.* 360.  
*Basset* versus  
*Lewis.*  
2 *Leon.* 11.  
pl. 17.  
2 *Lev.* 242.  
1 *Lev.* 234.  
1 *Sid.* 460.  
1 *Vent.* 85.  
2 *Keb.* 322.  
*Foot* versus  
*Benkeley.*

1 *Leon.* 201.

*Hob. 128.  
Withers ver.  
Cotton.*

Expiration of a Lease thereof, which I have made to *J. S.* where in Truth I have made no Lease to *J. S.* that the Lease to *B.* shall never begin; this was denied to be Law, and against the Current of all Authorities; also the Court said, the principal Case here differs from *Withers* and *Casson's Case*, where one made a Lease for Years, *Habend' a Festo Purificationis*, and after by Deed, reciting that he had made a Lease to commence *a Festo Annuntiationis*, granted the Reversion to another, and that Grant held good; for in the Grant of the Reversion the Misrecital of the particular Estate is not material in the Case of a common Person, so long as he hath a Reversion in him; but here in the principal Case one Term is recited to give Certainty to the Commencement of another, and is tied up by such precise Words to begin after the Determination of the Lease granted by the said recited Letters Patents, that this cannot be referred to a Lease that varies in the Date, tho' agreeing in other Circumstances, (which yet is not here, for the Certainty of the Term to *B.* is not recited,) and tho' a Lease is good without a Date, yet when a Lease is recited to be of such a Date, a Lease which bears another Date cannot be said to be such recited Lease; so that the Lease here must begin presently; which, by the Way, makes the Grant good, either to pass the Reversion with Attornment, or being by Indenture, to take Effect upon the Surrender, Forfeiture, or other Determination of the first Term; and such Recital makes no Estoppel either against the Lessor or Lessee, or any claiming under them; or if it should, yet the Jury are not estopped to find the Truth; and then the Court shall judge accordingly.

*Vaugb. 82.  
1 Vent. 84.  
Vaugb. 73, 80.  
Rogw and  
Huntington.  
Dyer 93 pl. 28.  
4 Co. 74.  
Palmer's  
Case.  
Cro. Eliz. 603.*

And this Rule, that if the former Lease be misrecited in the Date, &c. and a new Lease made, to begin after the Expiration of the said recited Lease, that such new Lease shall begin presently, holds as well in the Lease itself, as where the Jury find an Indenture of Lease, whereby it is recited, that the Lessor made such former Lease of such Date, and under such Rent, without finding it so in Fact, but only by way of Recital in the Deed, such second Lease shall in Construction of Law be adjudged to begin presently, tho' in the Deed it is limited to begin after the Expiration of the first Lease so recited; because the Jury do not actually find the first Lease, but only a Recital of it in another Deed, which Recital may be false, for ought appears to the Court; and then the second Lease shall begin presently, as if no such first Lease were at all, since the not finding it effectually is as if there were none such made.

*2 Rol. Abr. 55.  
Hilfwell and  
Ayleworth.*

King *Hen. 8.* in the 31st Year of his Reign leased Lands to one for twenty-one Years, and after granted the Reversion to a Bishop, who reciting all the Lands contained in the Letters Patent, and the Land itself before leased, by Name, and reciting the Letters Patent thus, That whereas *H. 8.* by his Letters Patents dated 20 *H. 8.* where in Truth they were dated 31 *H. 8.* and also misreciting the Day of the Date, grants all the Lands, Tenements, &c. to the first Lessee for a certain Number of Years, *post Expirationem hujusmodi Literarum Patentium*; in this Case it seems, that the Date being mistaken, and the Commencement of the new Lease referred to the Expiration of the said Letters Patent, when in Truth there were no such Letters Patent as were recited, the second Lease shall begin presently, and so by Acceptance thereof will amount to a Surrender of the first; *aliter* it would have been if the second Lease had been limited to begin after the End of the first Term generally.

## 2. With Regard to other Circumstances taken Notice of in the Deed of Lease, whereby to ascertain the Commencement thereof.

As to other collateral Circumstances taken Notice of in the Deed of Lease, in order to ascertain the Commencement thereof, these are various, according to the Agreement of the Parties.

Therefore if one makes a Lease for Years to another for so many Years as *J. S.* shall name, this at the Beginning is uncertain; but when *J. S.* hath named the Years, this ascertains the Commencement and Continuance of the Lease accordingly, and in the mean Time, if the Lessee enters, he seems to be Tenant at Will; (but *Quære* if by such Entry before the Commencement of the Lease he is not a Disseisor, as other Lessees are who enter before their Time;) but if the Lease had been made for so many Years as the Executors of the Lessor should name, this could not be made good by any Nomination; because to every Lease there ought to be a Lessor and Lessee; and here the Nomination which ascertains the Commencement not being appointed till after the Death of the Lessor, makes the Lease defective in one of the main Parts of it, *viz.* a Lessor, and therefore of Consequence must be void; which is also the Reason that in the first Case the Nomination ought to be made in the Life-time of the Lessor, and not by *J. S.* after his Death, for then it will be void.

If a Person makes a Lease for so many Years as he shall live, or the Parson of *D.* makes a Lease of his Glebe for so many Years as he shall be Parson there, these Leases are said to be absolutely void, for the Uncertainty of their Continuance; because none can say how long the Lessor will live, or be Parson; and then it cannot be a Lease for Years, when by no Possibility the Number of Years can be ascertained; but if the Lease were for twenty-one Years, or any other certain Number of Years, if the Lessor should so long live, or continue Parson, or if *J. S.* should so long live, these are good; because the Lease at first is certain for the determinate Number of twenty-one Years, tho' the Death of *J. S.* may determine it sooner; and that is a common and usual Limitation, and seems to have been introduced to obviate the Objection of Uncertainty in the other Manner of Leasing; but even in that Case it should seem that the Lessee will be Tenant at Will, or if Livery were made, will be Tenant during the Life or Incumbency of the Lessor, and so have the Freehold in him, tho' for Want of Certainty in the Number of Years, he cannot be said Lessee for Years.

One made a Lease of *Blackacre* to *A.* for ten Years, and of *Whiteacre* to *B.* for twenty Years, and after by Indenture reciting both Leases makes a Lease to *C.* of *Blackacre* and *Whiteacre* for forty Years, *Habend'* after the End or Determination of the said several Demises made to *A.* and *B.* and then the Lease to *A.* of *Blackacre* determines; and if the Lease to *C.* therein should begin presently, or if *C.* must wait the Determination of the other Lease to *B.* likewise before his Lease should commence, was the Question; because it was urged, that this Lease should begin all at one Time, and not to have several Commencements; but it was adjudged, that this Lease to *C.* in *Blackacre* should begin presently; for the *Habend'* shall be taken *respective Reddendo singula singulis*, *viz.* that the first Lease of *Blackacre* to *C.* for forty Years shall begin presently after the Determination of the first Lease thereof made, and so for *Whiteacre*, when the first Lease thereof determines; because every Deed shall be taken strongest against the Lessor or Grantor, and most beneficially for the Lessee or Grantee, which in this Case without such Construction would be the

2 Leon. 86.  
Godb. 25.  
Co. Lit. 45. l.  
1 Co. 155.  
6 Co. 35.  
Plow. 6, 373.  
524.  
1 Rol. Abr.  
848.

Co. Lit. 45. b.  
1 Rol. Abr.  
848.

5 Co. 7.  
Moor, pl. 340.  
Cro Eliz. 199.  
2 Leon. 105.



Reverse thereof, and against the plain Intent of the Parties, by letting in the Lessor to the Possession and Enjoyment of the Lands comprised in the first Lease, till the second Lease, which had no Relation thereto, were determined.

1 Vent 137.

2 Keb. 796.

Taylor versus

Fitzgerald.

In Ejectment the Plaintiff declared, that J. S. demised to him *per quoddam Scriptum Obligatorium* such Lands, *Habendum a Die Datus Indenturæ prædictæ*; on Not guilty pleaded, it was found and adjudged for the Plaintiff in Ireland; and it being assigned for Error here, that there was no Time specified when this Lease should begin; for it was *Habendum a Die Datus Indenturæ prædictæ*, and no Indenture was mentioned before, but only *Scriptum Obligatorium*; yet *per Curiam* it was resolved; that the Writing should be intended an Indenture, tho' improperly called *Scriptum Obligatorium*; for every Deed obligeth; or if it should not be intended an Indenture, then it begins presently, as if it had been from an impossible Limitation, as the 40th of Sept. or such like.

1 Lev. 20.

Chantrell ver.

Randal.

2 Sid. 165.

S. C. by the

Name of

Clerk versus

Candle.

Copyhold Land was granted to A. B. and C. for their Lives *successive*; and then the Lord grants and demises the said Land to D. for forty Years, after the Death, Surrender, Forfeiture, or other Determination of the Estate to A. B. and C. then A. and B. die, C. marries, and dies, and his Wife holds herself in for Life by the Custom, as her Free Bench, and dies; and if the Lease for forty Years should commence from the Death of the Husband, or of the Wife, was the Question; for if it should begin from the Death of the Husband, it would be now ended, and so the Ejectment not maintainable; if from the Death of the Wife, there would be yet twenty Years of the Lease to come; and the Court agreed, tho' the Law will not supply these Words, *which should first happen*, so that the Lease should begin upon the Death, Forfeiture, Surrender, or other Determination, which should first happen, yet they thought in this Case it should not begin till after the Death of the Wife; for that is the first effectual Determination thereof; for it does not determine to any Purpose by any of the other Ways, since the Wife is in, in Continuance of her Husband's Estate, for Life; and it cannot reasonably be intended that this Lease should begin during the Continuance of the precedent Estate, which by Possibility may continue longer than the forty Years; for the Wife may outlive the forty Years, and then the Lease for forty Years from the Death of the Husband would be void.

Mich. 6 Georg.

2. in Canc'

Irish versus

Hook.

So in a late Case where B. had a Lease of twenty-one Years of Copyhold Lands, to commence after the Determination of the Estate which A. at that Time had therein, and the Widow of A. being intitled to her Free Bench, and happening to outlive her Husband twenty-one Years, it was held by my Lord Chancellor, that the Estate of the Wife was only an Excrescence of her Husband's Estate, which did not determine till the Wife's Death, at which Time the Lease made to B. should commence, and continue for twenty-one Years.

### 3. The Certainty of Leases for Years as to their Continuance.

Flow. 271.

Say versus

Smith and

Fulker.

As to the Certainty of Leases for Years, as to their Continuance, this ought to be ascertained either by the express Limitation of the Parties at the Time of the Lease made, or by a Reference to some collateral Act, which may with equal Certainty measure the Continuance thereof, otherwise it will be void.

Flow. 271.

Therefore where a Man made a Lease for ten Years, and granted that if the Lessee, his Heirs, or Assigns, should pay to the Lessor, or his Assigns, such a Parcel of Tyles at the End of every ten Years then next ensuing, that then he, his Heirs, or Assigns, should have a perpetual

Demise



Demise of the Premises from ten Years to ten Years continually following, and out of the Memory of Man; this was held to be a good Lease but for ten Years certain, because for all the Years to come it was uncertain, (besides the Repugnancy and Nonsense of the Words *extra Hominum Memoriam*,) for the Payment of the Tyles was to precede all the ten Years that ever should be, and so must last to the End of the World, before any second ten Years, by Virtue of the Lease, was to begin; and then to be sure there could be no ten Years at all; and so all the other ten Years, being to begin upon an impossible Condition precedent, can never take Place at all, but are absolutely void and idle.

If *A.* lets Lands to *B.* for so many Years as *B.* hath in the Manor of *D.* and *B.* hath then a Term for ten Years in that Manor, this makes *A.*'s Lease to him good, and fixes the Measure and Continuance thereof, so that *B.* shall have the Lands demised for ten Years: So a Lease to one during the Minority of *J. S.* who is then ten Years of Age, is a good Lease for eleven Years, if *J. S.* so long live; for if he die sooner, that determines the Lease, since nothing appears to extend it beyond his Life, and his Minority ceases by his Death.

If I have a Rent of 20*s.* *per Annum* in Fee issuing out of *Blackacre*, payable annually at the Feast of *Easter*, and I grant that Rent to another till he shall have received of the same Rent 21*l.* the Grantee shall have the Rent for twenty-one Years certain; because the Land is a certain Security for 20*s.* *per Annum*, which will take up twenty-one Years certain to answer 21*l.* and therefore so long the Grant of the Rent shall have Continuance.

But if a Man lets Lands of the Value of 20*s.* *per Annum* till 21*l.* be levied of the Issues and Profits, this is but a Lease at Will without Livery, because it is uncertain whether the Land will be every Year of an equal Value; and tho' Livery should be made, whereby he will have a Lease for Life, or a Freehold Estate, yet this will be determinable upon the 21*l.* levied; for by the original Contract he was to have it no longer than till the Money levied.

If a Woman be *ensient* with a Son, and a Lease is made till such Issue in *Ventre sa Mere* shall come to full Age, this is a Lease only at Will, and cannot be any Lease for Years; because it is uncertain when, or whether ever the Son will be born, and consequently the Beginning, Continuance, and Ending of this Lease is uncertain; and therefore it cannot be said any Lease for Years, since it is to begin presently as a Lease, and yet nothing appears in the Deed itself, nor is there such a Reference to any collateral Circumstance as may then measure the Continuance thereof.

If *A.* seised of Lands grants to *B.* that when *B.* pays to *A.* 20*s.* that from thenceforth he shall have and occupy the Lands for twenty-one Years, and after *B.* pays the 20*s.* this is become a good Lease for twenty-one Years from the Time of such Payment made; for tho' the Commencement of it was contingent and uncertain, and depended upon *B.*'s Election to pay the 20*s.* yet after he had paid them, this takes off all Uncertainty, and fixes the Commencement and Continuance of the Lease.

If one makes a Lease to *J. S.* for twenty Years, if the Coverture between *A.* and *B.* shall so long continue, this is a good Lease for that Time *Prima Facie*, tho' the Dissolution of the Coverture may determine it sooner; and there also it seems, that a Lease to one generally during the Coverture between *A.* and *B.* is a good Lease; but this surely can be no other than a Lease at Will; for the Uncertainty how long the Coverture will continue takes off from any Certainty in the Number of Years that can be affixed to such Lease, and consequently it cannot be esteemed any Lease for Years more than where it is for so many Years as the Lessor shall live, or continue Parson, &c.

14 H. 8. 13. If one lets Lands for one Hundred Thousand Days, this by *Bro.* is a good Lease for that Time, because the Measure and Continuance thereof by Days is as certain as it would be if it were for so many Years as comprehend those Days, since Days are Part of and go to make up the Years; tho' it should seem that this cannot be properly called a Lease for Years, because the Years are only an accidental Circumstance in the Enumeration of the Days, not any Part of the original Contract between the Parties.

6 Co. 35-6. If a Man makes a Lease for Years, without saying how many, this shall be a good Lease for two Years certain, because for more there is no Certainty, and for less there can be no Sense in the Words.

*Bro. Tit.* If one makes a Lease for ten Years at the Will of the Lessor, this is a good Lease for ten Years certain, and the last Words are void for the Repugnancy by *Bro.* but if one lets Lands at Will for a Year, & *sic de Anno in Annum*, this is a Lease only at Will by the first Words, and the last Words being repugnant shall not controul them, or add any more Certainty to its Continuance.

1 *Roll. Abr.* 851. If a Man leases Lands for such a Term as both Parties shall please, this is but a Lease at Will, because what that Term will be is utterly uncertain; and the Pleasure of the Parties seems to be limited to attend the Continuance as well as the Commencement and first Fixation thereof.

6 Co. 35. b. A Parson made a Lease of his Rectory to one for three Years, and so from three Years to three Years, and so from three Years to three Years, during his Life; or, as it is in *Rolle*, for three Years, and at the End of those three Years for other three Years, & *sic de tribus annis in tres annos*, during the Life of the Lessor; the whole Court held it clearly a Lease for twelve Years; but by *Dodderidge*, if the Lease had been for three Years, and so from three Years to three Years, and so from the said three Years to three Years; this had been but a Lease for nine Years, because the Words *from the said three Years* tie up the Relation Retrospectively to the three Years last mentioned, which made in all but six Years, and then there are but three Years more added, which make the whole but nine Years; and for the Words (*during the Life of the Lessor*) they cannot enlarge it to any farther certain Number of three Years, by reason of the Uncertainty of the Lessor's Life, and therefore beyond the twelve Years, or nine Years, it amounts only to a Lease at Will, unless Livery were made, which must necessarily pass a Freehold determinable upon the Lessor's Death.

3 *Keb.* 760, 768. *Ferringham ver. Graves.* And yet in one Book where a Lease was made for three Years, and after the End of those three Years for other three Years, & *sic de tribus annis in tres annos*, during the Life of the Lessor, this was held to be only a Lease for nine Years, because the Words & *sic de tribus annis* shall be referred to the three Years last mentioned; for otherwise these Words would exclude the three Years next after the six Years, and make the three last Years to begin after nine Years, and so make a Chasm in the Lease, by shutting out the three Years next after the six Years, so as for the three last Years it should be only a future Interest; which Case seems to be of a new Stamp, and to thwart the preceding Case, as to the Resolution of its being a Lease for twelve Years; and there *Jones* and *Wild* held, that a Lease *a tribus annis in tres annos* was but a Lease for three Years to commence *in futuro*.

2 *Lev.* 241. Error of a Judgment in Ejectment at *Lancaster*, where the Case on a Special Verdict was this: The College in the Time of Queen *Eliz.* reciting a Lease made by them 1 *E. 6.* demised to one *Trafford* for Twenty-one Years, rendering 20 *l. per Ann.* Rent, *Habendum* from the End of the said Term, made in the Time of *E. 6.* and then follows a Condition of Re-entry for Non-payment of the Rent, and after that a Covenant and Grant, that after the said Twenty-one Years ended he shall have the Land for other Twenty-one Years, and so from Twenty-one Years to

Twenty-one Years, till Ninety-nine Years are past thence next ensuing shall be compleat and ended; and it was found that there was no Lease made in the Time of *E. 6.* and that since the Date of the Lease made in the Time of Queen *Eliz.* more than Ninety-nine Years are passed, but from the End of the Term of Twenty-one Years Ninety-nine Years are not yet come; so that the Question was only, if the Lessee shall have Ninety-nine Years in all from the Time of the Date of the Lease *Tempore Eliz.* or Ninety-nine Years over and above the first Twenty-one Years; for it was agreed, that tho' no Number of Twenty-one Years will center in Ninety-nine, yet the Term shall last for Ninety-nine Years, which is a certain Term, and the odd Years shall be rejected; and it was adjudged at *Lancaster*, that the Lessee shall have Ninety-nine Years besides the first Twenty-one Years, which shall not be accounted Parcel of them, and that by reason of the Word *thence*; for if it should be from the making of the Lease *Tempore Eliz.* it would be *hence*; but *thence* is a Word which denotes another Time, not the present Time, and so *thence* must refer to the making of the first Twenty-one Years, because there is no other Time to which it can refer, there being no Lease at all *E. 6.* to which it can refer, and so the Term is not yet expired; and so was the Opinion of the whole Court, and affirmed the Judgment.

If a Man makes a Lease for a Year, and so from Year to Year, *Quamdiu ambabus partibus placuerit*, this is a Lease for two Years certain at least, and at most, after three Years, this is but an Estate at Will; so if a Parson makes a Lease for a Year, and so from Year to Year as long as he shall continue Parson, or as long as he shall live, this is a Lease for two Years at least, if he lives and continues Parson so long; and after the two Years, or at most after three Years, but an Estate at Will for the Uncertainty, unless Livery be made.

One made a Lease for three Years, and after for three Years, and so from three Years to three Years until ten Years be expired; this was resolved to be a Lease but for nine Years; and that the odd Year should be rejected, because that cannot come to fall within any three entire Years according to the Limitation, which in this Case are to be taken all together as one Year, or else so much of the Limitation, as cannot come within that Description, must be rejected; and this seems to agree with *Brook* and *Plowden*, which in general hold a Limitation in that Manner from Year to Year for forty, fifty, or one Hundred Years to be a good Lease for the whole Term, because this is no such Break of an odd Year, at the latter End of the Lease, as there is in the other Case.

One made a Lease *de Anno in Annum, quamdiu ambabus partibus placuerit*; this was agreed by all to be a Lease certain for two Years, but there the Lessee entered and occupied for two Years, and also for Part of the third Year, and then died, and for Rent arrear for Part of the third Year Debt was brought against his Executors; and upon *Nihil debet* pleaded, and Verdict for the Plaintiff, it was moved in Arrest, &c. that after the two Years, this being a Lease at Will determined by his Death, and then no Action lies for the Rent of the third Year; and of this Opinion was *Popham*; but it was held by *Gawdy* and *Fenner*, that tho' at first this was a Lease certain but for two Years, yet when he occupied Part of the third Year, this was then become a Lease certain for that Year also, so that neither of them could avoid it; for otherwise, after that the Lessee hath been at great Charges in Manurance, the Lessor, by a Determination of his Will, might strip him of all his Profit.

A Parol Lease was made *de Anno in Annum, quamdiu ambabus partibus placuerit*; it was adjudged that this was but a Lease for a Year certain, and that every Year after was a springing Interest, arising upon the first Contract and Parcel of it; so that if the Lessee had occupied eight or ten Years, or more, these Years, by Computation from the Time past, made an

*Plow. 273.*  
*Co. Lit. 45. b.*  
*6 Co. 35.*  
*Cro. Jac. 308.*  
*1 Bulf. 215.*  
*1 Rol. Abr.*  
*851.*  
*1 Lev. 46.*  
*2 Fon. 5.*  
*1 Lutw. 214.*

*Noy 143.*  
*1 Rol. Abr.*  
*850.*  
*Bro. Tir.*  
*Leases 49.*  
*Plow. 273.*  
*522 a.*  
*2 Co. 23.*  
*2 Lev. 242.*

*Cro. Eliz. 775.*  
*Agard ver.*  
*King.*  
*1 Mod. 3.*  
*1 Sid. 423.*  
*2 Keb. 543.*  
*Goffwick ver.*  
*Mason.*  
*Kelw. 63.*

*Hill. 7 Ann.*  
*in B. R. Legg*  
*ver. Hackett.*  
*2 Saik 414.*  
*S. C.*

entire Lease for so many Years; so that if Rent was in Arrear for Part of one of those Years, and Part of another, the Lessor might distrain and avow as for so much Rent arrear upon one entire Lease, and need not avow as for several Rents due upon several Leases, accounting each Year a new Lease; and it was also adjudged, that after the Commencement of each new Year, this was become an entire Lease certain for the Years past, and also for the Year so entered upon, so that neither Party could determine their Wills till that Year was run out, according to the Opinion of the two Judges in the last Case; and this seems no way impeached by the Statute of Frauds and Perjuries, which enacts, that no Parol Lease for above three Years shall be accounted to have any other Force or Effect than of a Lease only at Will; for at first, this being a Lease certain only for one Year, and each accruing Year after being a springing Interest for that Year, is not a Lease for any three Years to come, tho' by a Computation backwards, when five or six or more Years are past, this may be said a Parol Lease for so many Years, but with this the Statute has nothing to do, but only looks forward to Parol Leases for above three Years to come; and this Opinion, in the principal Case, seems to be confirmed by the like Resolution of the Court, where the Plaintiff declared, that he retained the Defendant *Anno 1657.* for one Year then next ensuing, and so from Year to Year, *Quamdiu ambabus partibus placuerit*; and lays it, that *Anno 1661.* the Defendant withdrew himself from his Service for a Month, *per quod, &c.* and the Court held, that tho' the Retainer at first was for a Year certain, yet after every other Year begun, the Retainer held for that Year also, and gave Judgment for the Plaintiff.

2 Keb. 16.

2 Salk. 413.

And yet there are other Cases in which it seems to have been held, that a Lease made *de Anno in Annum, quamdiu ambabus partibus placuerit*, is a Lease for two Years certain at first, and after a Lease for every several Year that the Lessee holds on; and that if upon such Lease three Years Rent be Arrear, the Declaration must be of several Leases for so many Years as were past; and in these Cases it is held, that there must be Half a Year's Warning given to oust the Lessee, and that unless such Warning be given, it will be Evidence of an Agreement to hold for another Year; from which Cases it appears that there is yet no uniform unanimous Opinion settled as to this Matter.

1 Lev. 559.  
Panton ver.  
Cham.

One let a Stable for a Week for 8 s. and so from Week to Week at 8 s. a Week, *Quamdiu ambabus partibus placuerit*; this was held, at most, but a Lease for three Weeks certain, and for the Residue at Will; so that the Lessee, at the End of the three Weeks, was not punishable for negligent keeping of his Fire, that being only an involuntary Waste, wherewith Lessee at Will is not chargeable.

#### 4. The Certainty of Leases for Years as to their Duration and Ending.

As to this, tho' the preceding Point may seem to have taken in all that can come in properly here, since the Continuance of Leases for Years must shew their Determination likewise; yet there are some Cases remaining which seem more properly to be inserted under this Head.

2 Bendl. 2.  
pl. 2.

13 Co. 66.

2 Broc. 292.

5 Co. 9.

Cro. Jac. 378.

3 Bulf. 131.

1 Rol. Rep.

309, 310.

3 Leon. 103

pl. 150.

Therefore where a Lease was made for forty Years to two Persons, if they lived so long, or to *A.* for forty Years, if he and *B.* should so long live, or the Lessor and Lessee, or the Lessor and *J. S.* should so long live; in all these Cases the Death of either of them determines the Lease, because their Lives are the Collateral Measure and Limitation of the Continuance of the Term, or rather the Condition whereon the Estate depends; and by the Death of one of them, the Condition is as much broken as if both were dead, since, with Regard to the Con-

tion, both made but one Person; and they cannot now both so long live, one being dead already; and the Condition being intire cannot be severed or divided, so as when Part of it is broken and gone, the Estate should still subsist and hang upon the other Part thereof; and therefore this differs from a Lease to two Persons for their Lives, for this gives an Estate to both for their Lives, and both have an Estate of Freehold therein in their own Right, and consequently this cannot determine by the Death of one of them, for then the other could not be said to have an Estate for his Life, as the Lessor at first gave it; but Rolle seems to think, that where it is to two for forty Years, if they so long live, that this does not determine by the Death of one of them, because it is an Interest in both, which shall survive; but the other Books are against it, because their Life is but a Collateral Condition and Limitation of the Estate, and therefore is broken when one dies.

Upon Articles of Intermarriage between *A.* and *B.* it was agreed that the Defendant, Father of *A.* should settle the Lands in Question upon *C.* for his Life, and after his Death upon *B.* for her Jointure, with a Proviso, that *C.* should make a Lease thereof to the Defendant for Ninety-nine Years, if he, and *D.* his Wife, should so long live, which Lease was made accordingly; then *D.* dies, and if by her Death the Lease was determined, was the Question between the Defendant and the Plaintiff, Lessee of *C.* and the Court, upon the first opening of the Case, without Argument, were all of Opinion that it was, and gave Judgment accordingly on the Reasons of the foregoing Case.

One made a Lease for forty Years, if *A.* his Wife, or any of their Issue, should so long live; and it was adjudged that the Lease was not determined by the Death of one of them, but should continue till all were dead, by reason of the Disjunctive *or*, which goeth to and governs the whole Limitation; but if the Words had been, *if A. and his Wife and Issue should so long live*, there clearly, by the Death of any of them within the forty Years, the Term had been at an End, by reason of the Copulative *and*, which conjoins all together, and makes all their Lives jointly the Measure of the Estate.

A Lease was made for Twenty-one Years, if the Lessee so long lived and continued in the Lessor's Service; the Lessor dies: *Per Curiam*, the Lease is not determined, because it was the Act of God that he could serve no longer.

A Lease is made to two for Years, with a Proviso, that if the said Lessees die within the Term, that the Term shall cease; they make Partition, or one aliens his Part, and dies, yet the Lessor cannot enter into his Part, but the Assignee or Executors of the Lessee (if no Assignment) shall have that Part during the Life of the Survivor, and there shall be no Occupancy; and it is not like a Lease made to two for Term of their Lives; there if they make Partition, and one dies, his Part shall revert to the Lessor presently; and if it had been to them for their Lives & *eorum diutius vivant*, yet this would not have prevented the Reverter upon such Partition, *quia expressio eorum quæ tacite insunt nihil operatur*; and the Partition breaks the Joint-tenancy, and defeats the Right of Survivorship, and so lets in the Reversion *immediate* to each one's single Part; but in the principal Case, the Lease at first is general and absolute to both for so many Years, which gives them a Joint-tenancy in the Term, and will carry it to the Survivor and his Executors; and then the Proviso, which comes after, tho' it straiten it from going to the Executors of the Survivor, yet it does not give it to the Lessor till both are dead within the Term; and the Partition or Alienation breaks the Joint-tenancy, and prevents the Survivorship, and consequently none but the Alienee, or Executors of the Lessee, can have that Part during the Life of the other Lessee.

1 Vent. 74.  
Bailes ver.  
Wenman, &  
side 1 Brownl.  
30.  
1 Mod. 187.

Moore, pl. 375.  
3 Bullf. 131.  
133.  
1 Rel. Rep.  
310.  
2 Brownl. 292.  
Cro. Eliz. 269.  
1 Leon. 74.  
244.  
Co. Lit. 225. a.

Cro. Eliz. 643.  
Noy 70.  
Wrenford ver.  
Gyles.

Dyer 67. pl.  
15.  
Co. Lit. 219.

3 Aff. pl. 8.  
4 Co. 73.  
3 Bullf. 131.  
1 Rel. Rep.  
310.

(M) In What Cases and to What Respects an Entry by the Lessee is requisite to the Perfection of his Lease.

Co. Lit. 46. b.  
51. b. 270. a.  
Plow. 142. b.  
423. a.  
5 Co. 124. b.  
Cro. Jac. 61.  
2 Mod. 249.  
2 Vent. 203,  
204.

AS to this it is to be observed, that at Common Law no Lease for Years, whether it were with or without any Reservation of Rent, was looked upon to be compleat till an actual Entry by the Lessee; for tho' the Lessor had done all on his Part to perfect the Contract, so that he could not afterwards any way derogate from or avoid it, yet till there was a Transmutation of the Possession by the actual Entry of the Lessee, it wanted the chief Mark and Indication of his Consent thereto, without which it might be unreasonable to adjudge him in actual Possession to all Intents and Purposes, since it might so happen that such Lease was made in his Absence, and when he knew nothing of it, and perhaps might be greater than he would be willing to give, or the Estate might be so incumbered as to bring a Load upon him rather than any Advantage; for which Reasons (amongst others) the Law would not cast the immediate and actual Possession upon him *nolens volens*; and for this Reason it was, that till actual Entry he could not maintain an Action of Trespass or Ejectment, because those Actions, complaining of an immediate Violation of the Possession, could not be proper for him who had no actual Possession; but yet the Lessor having done all that was requisite on his Part to divest himself of the Possession, and pass it over to the Lessee, had thereby transferred such an Interest to the Lessee, as he might at any Time reduce into Possession by an actual Entry, as well after the Death of the Lessor as before, and such an Interest as he might before Entry grant over to another, or if he died before Entry, it would go to his Executors, or to the Survivor and his Executors; if the Grant were made to two jointly, any of which might enter at their Pleasure, and so reduce the Contract into an actual Execution; for it was perfect and compleat on the Lessor's Part, and the Perfecting of it on the Lessee's Part was intirely in his own Power, and left to his own Discretion to use when and as he thought fit; and therefore this differed from a Lease for Life, or a Feoffment in Fee, for these being Estates of Freehold must necessarily be executed by Livery of Seisin, which carried the immediate and actual Possession to the Lessee or Feoffee, in as much as the Operation of the Livery could not be in Suspence for the Prejudice that might thereby accrue to Strangers, who, after such solemn Transmutation of the Possession by Livery, could take Notice of no other Tenant of the Freehold, and therefore must necessarily bring their *Precipes* against them for Recovery of their Rights, which if they might after be defeated and eluded on Pretence of any Disagreement, or that there was no actual Consent or Agreement thereto, and so the actual Possession not vested in them would be greatly injurious to the Rights of Strangers; besides that, the Livery can be made to none but the Lessee or Feoffee himself in Person, or some other Person lawfully authorized by Letter of Attorney to receive the same; and therefore they can no ways be supposed ignorant of the Terms upon which they took it, and so no such Reason for suspending the actual Execution of it; and therefore if a Lease were made to *A.* for Life, the Remainder to *B.* for Life, and then *A.* died, a Release to *B.* and his Heirs, before actual Entry, would be good to enlarge his Estate, because he had the Freehold in Law in him, immediately upon *A.*'s Death, to answer to the *Precipes* of all Strangers as fully as he could ever have it by any Entry. But now in the Case of a Lease for Years it is quite different, as has been shewn,

and therefore till actual Entry, which is an Agreement on his Part, in Case of such Lease for Years, equivalent to the Acceptance of Livery in Case of the passing of a Freehold, the Lessee for Years hath not the Possession, and as he hath not the Possession, so neither hath the Lessor a Reversion to grant either to the same Lessee or a Stranger; but yet if a Rent were reserved on such Lease for Years, and before actual Entry of the Lessee, or Commencement of his Lease, the Lessor should release to him all his Right in the Land; tho' this would not be sufficient to carry the Reversion by way of Enlargement of his Estate, yet would it extinguish the Rent, because every Deed must be taken most strongly against the Grantor, and to be made to some Purpose or other; and since this cannot operate on the Estate to enlarge that, or carry any further Interest to the Lessee, yet it may well operate upon the Rent which was issuing out of the Land, and coming to the Lessor, in respect of the Land he had departed with, and therefore shall be construed to extinguish and determine that rather than it shall be totally void.

And this way of executing Leases for Years, by an actual Entry, was <sup>2 Mod. 251.</sup> always held necessary at the Common Law, and for a considerable Time after the Statute of Uses likewise, till the way was found out of conveying a Freehold by a Lease for a Year, and a Release thereupon, according to the common Form now used; for it being found troublesome and inconvenient to put the Lessee under a Necessity of making an actual Entry in all Cases before a Release could be effectual thereupon to enlarge his Estate, especially where the Lands lay at any considerable Distance from the Place where the Deeds were executed; therefore to prevent this Trouble and Inconvenience for the future, they began to construe, that where the Words and Consideration were sufficient to raise a Use, tho' it were but for a Year, that the Statute would carry the actual Possession after it, and consequently make the Lessee equally capable of enlarging his Estate, by a Release thereupon, as if he had actually entered by Force and Virtue of the Lease; and the Consideration, if it were valuable, tho' never so small, was looked upon to be sufficient for the Raising of a Use, and therefore 5 s. or such other Consideration, came to be the Standard in a Lease for one Year, which in Time grew to be a Thing meerly of Course and Form, as the inserting of the 5 s. was, which was seldom or never paid, tho' the Lessee, by his Acceptance of the Lease upon such Consideration, was estopped to deny or aver against it; but because there were some Opinions, that where a Conveyance might enure too ways, either at the Common Law or upon the Statute, that there the Common Law should be preferred and take Place. 1. Therefore to bring the Lease more effectually within the Statute, they likewise inserted the Words therein *Bargain and Sell*, which, together with the Consideration, were held even at Common Law sufficient to raise a Use; and then the Statute, which came after, carried the Possession accordingly, without any actual Entry made by the Lessee; and so the Conveyance, by way of Lease and Release, grew in Time to be the most common and easy Method of transferring a Freehold or Fee, and so has now continued for several Years, almost to the Disparagement of Conveyance by Livery; and to bring the Lease still more effectually within the Statute, it was afterwards used at the End of the Lease to say, *That such Lease was made to the Intent, that by Virtue of the Statute of Uses, the Lessee might be in actual Possession, and be thereby enabled to accept and take a Grant and Release of the Freehold and Inheritance thereof, &c.*



(N) Leases for Years, When to take Effect as a Reversion, When as a future Interest, and When neither the one nor the other.

6 Co. 26.  
Cro. Jac. 72.  
Cro. Eliz. 152.  
1 Leon. 171.  
3 Leon. 17.  
4 Leon. 23.  
Bro. Tit. At-  
tornment 41,  
60.  
Lit. sect 576.  
Dyer 26. a.  
58, 124.  
pl. 42, 125.  
pl. 44, 178,  
233. pl. 10,  
117 pl. 76,  
350 pl. 18,  
576-7.  
1 Bendl. 286.  
Pov. 148,  
150, 151.  
Bro. Tit.  
Leases 71.  
Telo. 85.  
1 Brownl. 136.  
4 Co. 53.  
Dyer 46.

**I**F one, having made a Lease for Life or Years to *A.* of Lands, does after make another Lease for Years to *B.* of the same Lands, or of the Reversion of those Lands, *Habund'* the said Lands, or the Reversion of those Lands, to the said *B.* *cum post sive per Mortem, Resignationem, Sursum Redditionem, vel aliquo alio Modo vacare contigerit*; in this Case *B.* hath Election to take such Lease either as a Reversion or a Reversionary Interest, if he can prevail for an Attornment of *A.* the Tenant in Possession, or if not, yet as a future *Interesse Termini* such Lease will be good to take Effect in Possession upon the Determination of the first Lease, be it by Death, Surrender, Forfeiture, Effluxion of Time, or any other Way; the Reason whereof is, that when the Lessor hath expressly departed with, and made over an Interest to the Lessee for such a Time, and this Interest cannot take Effect in Possession, because the Lessor himself had not the Possession to give, but must therefore be carved and derived out of the Reversion which the Lessor had, the Lessee *prima Facie* hath a Reversion, or Reversionary Interest for the Time, in the same Manner as the Lessor or Grantor himself had; but then the perfecting such Lease as a Reversion, or a Reversionary Interest, to draw after it the Rents and Services, depending on the Will and Pleasure of the Tenant in Possession, whether he will attorn, and become Tenant to such Lessee or Grantee, or not; and if he thinks fit not to attorn, it cannot pass as a Reversion, or Reversionary Interest; yet this shall not totally invalidate and void such Lease or Grant, if by any other Means it can be made good and become effectual; and this it may as a future *Interesse Termini*, to take Effect in Possession on the Determination of the first Lease, when or what Way soever that happens; and therefore, as such, it shall take Effect, rather than be absolutely void, when the Lessor or Grantor hath done all in his Power to divest himself, on the Possession for so much a longer Time; but then such second Lessee hath only an Election to take it as a Reversion, or Reversionary Interest, when the Lease is made to him by Deed Poll or Indenture; for if it were made by Parol, then he can only take it as a future *Interesse Termini*, to take Effect in Possession upon the Determination of the first Lease, when or which Way soever that happens, and not as a Reversion, or Reversionary Interest, to draw after it the Rents and Services; because a Reversion cannot be granted or pass without Deed; for a Deed is of the very Essence of the Grant of a Reversion, or Reversionary Interest, and without it no Reversion, or Reversionary Interest, can pass out of the Lessor.

And this introduces a threefold Distinction in the Manner of making such Leases for Years, where there is a prior Lease or Estate then in Being: 1<sup>st</sup>, When they are made by Parol. 2<sup>dly</sup>, When by Deed Poll. And, 3<sup>dly</sup>, When by Indenture or Fine.

As to the first, If one makes a Lease to *A.* for ten Years, and the same Day makes a Parol Lease to *B.* for ten Years of the same Lands, this second Lease is absolutely void, and can never take Effect either as a future *Interesse Termini*, or as a Reversionary Interest, tho' the first Lessee should forfeit or otherwise determine his Estate, or tho' the first Lease

1 Leon. 421. b.  
422. b.  
1 Bendl. pl.  
246  
Cro. Eliz. 167.  
Plov. 432.  
Hutt. 175. Bro. Tit. Leases 48. Moor 185 pl 329. Dyer 112. pl. 49.



were on Condition, and the Condition broke within the ten Years; neither shall the Lessor have the Rent reserved upon such second Lease, but such second Lease is absolutely void, as if none such had been made; the Reason whereof is, because the first Lease being made for ten Years, the Lessor during that Time had nothing to do with the Possession, or to contract with any other for it; and the second Lease being made the same Day, and for no longer Term than the first ten Years, could not pass any Interest as a future *Interesse Termini* certainly; for the first Lessee had the whole Interest during that Time, and his Forfeiture or Determination of it sooner, which was perfectly contingent and accidental, shall never make good the second Lease as a future *Interesse Termini*, when at the Time of making thereof it was absolutely void, for Want of a Power in the Lessor to contract it; and as a Reversionary Interest it cannot be good, for Want of a Deed; for a Reversion, whether it be granted for Life or Years, not being capable of Execution either by Livery of Seisin, or Entry and Transmutation of the Possession, there can be no Evidence of the Creation or Existence of such a Grant, without a Deed to ascertain it; and therefore a Deed in such a Case is as essential to the making good the Grant, as Livery of Seisin or Entry in the other Cases, where they deal for the Possession; and by Consequence this second Lease not being good, either as a future *Interesse Termini*, or a Reversion, must be absolutely void; but now if such second Lease had been made for twenty Years, then it had been good as a future *Interesse Termini* for the last ten Years, and void for the first ten Years, for the Reasons before given, but for the last ten Years it had been good; because when the first ten Years were elapsed, the second Lessee might then execute, and reduce it into Possession by Entry, as well as if it had been at first made in Possession; for it had been good for the whole twenty Years if the first Lease had not stood in the Way, and that can stand in the Way no longer than it continues, and therefore by its Determination lets in the second Lease; but as a Grant of the Reversion such second Lease could not be good, for Want of a Deed, for the Reasons before given; neither could any Attornment help it, or let in the second Lease till the first ten Years run out by Effluxion of Time.

But now, 2dly, if such second Lease had been made by Deed Poll, then it might well enure as a Grant of the Reversion, and draw after it the Rents and Services of the first Lessee, if he would consent to attorn, and by Consequence, whenever the first Lease determined by Surrender, Forfeiture, or otherwise, such second Lessee having the immediate Reversion must come in for the Residue of his Term; but without such Attornment to make it operate as a Grant of the Reversion, this second Lease, tho' by Deed Poll, would be absolutely void, as if it were made only by Parol, because during the first ten Years the Lessor had no Power to contract for the Possession; and therefore if this Grant could not take Effect as a Grant of the Reversion, which was all the Lessor had a Power of, it must likewise be absolutely void; but if such second Lease by Deed Poll had been for twenty Years, then with Attornment this would be a good Grant of the Reversion presently, to take Effect in Possession whenever the first Lease determined, or if no Attornment could be had, yet it would enure as a future *Interesse Termini* for the last ten Years, and would be absolutely void for the first ten Years, as much as if it had been made by Parol.

But now, 3dly and lastly, if such second Lease for ten Years had been made by Indenture or Fine, then this would have been good as a present Lease, by reason of the Estoppel to both Parties by the Indenture or Fine, and therefore whensoever the first Lease determined, the second Lease should commence in Possession; and in the mean Time the second Lessee, by reason of the Estoppel, would be obliged to pay the Rent reserved

*Vide the Authorities cited above.*

*Vide the Authorities to the first Distinction.*

served in an Action of Debt; and if such second Lessee could prevail for an Attornment, then his Lease would enure as a Grant of the Reversion, and draw after it the Rents and Services of the first Lessee, and would take Effect in Possession whenever that determined; but without such Attornment, tho' the second Lease would be good between the Parties, by reason of the Estoppel, yet not as a Reversion, and therefore such second Lessee could have no Remedy for the Rents and Services of the first Lessee.

1 Co. 155. a.  
Cro. Eliz. 322.  
Plow. 422. a.  
453. a.

So if one had made a Lease for Life, or for eighty Years, if the Lessee should so long live, and after by Indenture let the same Lands to another for Years, to begin presently, and then the first Lease determined by Death, Surrender, or Forfeiture, the second Lessee should have the Lands in Possession presently, for the Residue of the Years; because such second Lease, by reason of the Estoppel, took Effect between the Parties presently, and therefore shall come in Possession whenever the first Lease is out of the Way; but if such second Lease were only by Deed Poll, then there must be an Attornment to make it good as a Grant of the Reversion, as there must likewise in the other Case, where it was made by Indenture; and without such Attornment the second Lease could only take Effect in Possession upon the Determination of the first Lease by the Death of the Lessee, according to the express Limitation, and not upon any sooner or other Determination by Surrender, Forfeiture, or otherwise; much less, if such second Lease were by Parol, could it take Effect upon any other Determination of the first Lease; for tho' in these Cases the first Lease, depending upon the Life of the Lessee, was uncertain how long it would continue, yet so long as it did continue, the first Lessee had the sole and absolute Possession, and the Lessor no Power to contract for any Thing but his own Reversion during that Time; and therefore if his second Lessee cannot attain the Reversion, the Contract can take no Effect for the Possession till the Death of the first Lessee; because that being the Lessor's own Limitation affixed to such Lease, he cannot deal for the Possession before that Time comes; and therefore no accidental Determination of the Lease sooner shall let in the second Lessee, unless he can prevail for the Reversion by Attornment of the first Lessee, in Case of the Lease by Deed Poll, or unless in Case of the Indenture, which, by reason of the Estoppel, shall let him in whenever the first Lease is out of the Way, whether he obtained an Attornment or not.

3 Leon. 17.  
4 Leon. 23.  
5 Co. 113.  
Mallorie's  
Case.

But in all the Cases before-mentioned, if such Lease by Indenture or Deed Poll were by Way of Bargain and Sale for Years, then, it should seem, it would pass as a Reversionary Interest presently, without any Attornment, by Force of the Statute of Uses, and it being only for Years, there would need no Inrollment of the Indenture or Deed Poll: And *note*; By the Statute of Frauds and Perjuries, 29 Car. 2. no Parol Lease for above three Years is to have any other Effect than only as a Lease at Will; so that such Parol Leases now for ten or twenty Years are out of Doors.

## (O) Leases for Years by Estoppel, how far and against Whom such Leases are good.

IF one makes a Lease for Years by Indenture of Lands wherein he hath nothing at the Time of such Lease made, and after purchases those very Lands, this shall make good and unavoidable his Lease, as well as if he had been in the actual Possession and Seisin thereof at the Time of such Lease made; because he, having by Indenture expressly demised those Lands, is by his own Act estopped, and concluded to say he did not demise them; and if he cannot aver that he did not demise them, then there is nothing to take off or impeach the Validity of the Indenture, which expressly affirms that he did demise them, and consequently the Lessee may take Advantage thereof, whenever the Lessor comes to such an Estate in those Lands as is capable to sustain and support that Lease; and this Estoppel by Indenture is so mutual and reciprocal, that if a Man takes a Lease for Years by Indenture of his own Lands, whereof he himself is in actual Seisin and Possession, this estops him during the Term to say the Lessor had nothing in the Lands at the Time of the Lease made, but that he himself, or such other Person, was then in actual Seisin and Possession thereof; for by Acceptance thereof by Indenture, he is for the Time as perfect a Lessee for Years, as if the Lessor had at the Time of making thereof the absolute Fee and Inheritance in him; but if such Lessee of his own Lands, being ejected by the Lessor, should bring an Ejectment, and the Lessor should plead Not guilty, and give the Lease, and some Matter of Forfeiture thereof, in Evidence to support his Plea, without pleading, and relying on the Estoppel, and the Jury should find the special Matter, *viz.* that the Defendant had nothing in the Lands at the Time of such Lease made, but that the Plaintiff himself was then in actual Seisin and Possession thereof, whether the Court upon this Verdict are bound to adjudge according to the Truth of the Case, *viz.* that such Lease by one who had then nothing in the Lands was void; or if they are to adjudge according to the Law, working by Way of Estoppel upon such Lease by Indenture, seems a Doubt upon all the Books; but my Lord Coke lays it down for a Rule, that the Jury do well to find the Truth, *viz.* that the Lessor had then nothing in the Lands; but then upon such Finding the Court is to adjudge, according to the Operation of Law upon the Estoppel wrought to both Parties by the Indenture, that they are bound; but if the Jury, understanding that the Lessor had nothing in the Lands at the Time of the Lease made, and that therefore his Lease could not be good in Fact, but only by way of Estoppel, and inferring from thence that they, who are sworn to say the Truth, were not bound by such an Estoppel, which was plainly against the Truth, should therefore give a general Verdict against the Lease, that the Defendant was guilty of the Ejectment; in this Case, says my Lord Coke, such Jury are liable to an Attaint; and this seems the better Opinion; for tho' it be true that the Jury are not bound by the Estoppel, and therefore may find that the Lessor had nothing in the Lands at the Time of the Lease made, which is a Truth of Fact the Lessee is estopped to affirm, and is the only Subject Matter of the Estoppel; yet the Consequence of such Estoppel, and how far the Lease is made good thereby against the Parties, is a Matter of Law, and not of Fact; and therefore if they take upon them, first, to find that the Lessor had nothing in the Lands at the Time of the Lease made, and then to find that such Lease is void, or, which is all one, to find that such Lease was void, because the Lessor had then nothing in the Lands, as the essential Cause which induced them to find such Lease to be void, or that there was no such Lease; in this

*Co. Lit.* 47.  
227. a.  
*Plow.* 434.  
4 *Co.* 53.  
*Cro. Eliz.* 140.  
*Sar.* 98.  
*Owen* 96.  
1 *Leon.* 206.  
*Cro. Eliz.* 362.  
*Moor.* fol. 323.  
2 *Brownl.* 150.  
*Cro. Car.* 110.  
1 *Rel. Abr.*  
871.  
*Cro. Jac.* 73.

4 *Co.* 53.  
*Rawlins's*  
*Case.*  
*Co. Lit.* 47. b.

they take upon them to judge of Matter of Law, and in so doing exceed their Duty, and consequently, if they are mistaken, lay themselves open to an Attaint; for in Truth of Fact there was such Lease made, and in Truth of Fact the Lessor had nothing in the Lands at the Time of making thereof; and all this is their Duty, and belongs to them to find; but whether such Lease so circumstanced be good or void, is Matter of Law for the Court to adjudge, upon these Circumstances; and therefore if they will take upon them to anticipate the Judgment of the Court, by giving their own Judgment thereon, they must do it at their own Peril, and if they mistake be liable to an Attaint.

*Co. Lit.* 47. b.  
1 *Rel. Abr.*  
871.

But if such Lease for Years were made by Deed Poll of Lands wherein the Lessor had nothing, this would not estop the Lessee to aver that the Lessor had nothing in those Lands at the Time of the Lease made; because the Deed Poll is only the Deed of the Lessor, and made in the first or third Person; whereas the Indenture is the Deed of both Parties, and both are as it were put in and shut up by the Indenture, that is, where both seal and execute it as they may and ought; for otherwise, if the Lessor only seals and executes the Indenture, the Lessee seems to be no more concluded than if the Lease were by Deed Poll; for it is only the Sealing and Delivery of the Indenture as his Deed, that binds the Lessee, and not his being barely named therein, for so he is in the Deed Poll; but that being only sealed and delivered by the Lessor, can only bind him, and not the Lessee, who is not to seal and execute it; and it should seem that such Lease by Deed Poll binds the Lessor himself as much as if it were by Indenture, because it is executed on his Part with the very same Solemnity, and therefore it should seem he is bound by such Lease by way of Estoppel.

*Cr. Eliz.* 37,  
700.  
*Co. Lit.* 552. a.

And yet it is generally said, that these Estoppels ought to be mutual, or otherwise neither Party is bound by them; therefore if a Man takes a Lease for Years of his own Lands from an Infant or Feme Covert by Indenture, this works no Estoppel on either Part, because the Infant or Feme, by reason of their Disability to contract, are not estopped; therefore neither shall the Lessee be estopped, because all Estoppels ought to be mutual.

1 *Rel. Abr.*  
871.

So if a Man takes a Lease for Years of his own Lands by Patent from the King, rendering Rent, this shall not estop the Lessee, as an Indenture between common Persons in such Case would do; because the King cannot be estopped; for it cannot be presumed the King would do Wrong to any Person, and therefore being deceived in his Grant makes it absolutely void; and if he be not estopped, neither shall the Lessee; because all Estoppels ought to be mutual; but perhaps there may be some Difference between these Cases of a bare Acceptance of a Lease from such Persons, as by reason of their Imbecility, Incapacity, or other Impediment arising from their own Persons, could not make such Lease, but that the same was either absolutely void, or at least voidable on their Part; and therefore the Lessee may shew such Incapacity to avoid them, as made by Persons who wanted Power or Ability to contract; and so the whole Contract must fail, not for Want of a sufficient Estate in the Lessors, (for if they were of full Age, and sole, &c. that would not be material,) but for Want of a sufficient Power or Ability to contract; but now when such Lease is made by a Man of full Age, tho' by Deed Poll, why this should not bind and estop him as well as if it were made by Indenture, seems hard to understand; for he hath executed it on his Part with the same Solemnity; and tho' it cannot bind or estop the Lessee, because he never executed it, yet why that should invalidate it on the Lessor's Part, whose Deed it was, and who did all he could to bind himself, does not seem very intelligible; besides that, the Books, which put the Case of the Lease by Deed Poll, saying only that the Lessee is not estopped thereby, seem to allow that the Lessor is notwithstanding estopped;

estopped; for otherwise they would take Notice of their being both at large, as they do in other Cases.

If Lessee for Years accepts a Lease for Years of a Stranger by Indenture, who hath nothing in the Reversion, this is a good Lease by way of Estoppel between them, and not a Confirmation; for nothing appears that the Lessor knew the Lessee then had any Thing in the Lands, and then it is the same with the other Cases, and works by way of a bare Estoppel; but *Fenner* thought it a Confirmation, against all the other Judges.

If one lets Lands to me, by Deed inrolled, unknown to me, and brings Debt upon the Lease, I may say *ne Lessa pas*, as *Littleton* held; but by all the Justices, he who made such Lease is concluded to say the contrary, which Case seems to be an Authority in Point to establish what has been laid down, that in Case of a Deed Poll, (as this which is called a Deed inrolled must be intended to be,) the Lessor himself is estopped, tho' the Lessee be at large; and this cannot be intended an Indenture, because then the Lessee would have been estopped likewise, if he had sealed it, which in this Case it appears he did not, because it was unknown to him, and therefore was not estopped, whether it were by Indenture or Deed Poll.

These Estoppels continue no longer on either Part than during the Lease, for as they began at first by making of the Lease, so by Determination of the Lease they are at an End likewise, for then both Parts of the Indenture belong to the Lessor.

When an Interest actually passes by the Lease, there shall be no Estoppel, tho' the Interest purported to be granted be really greater, than the Lessor at that Time had Power to grant; as if *A.* Lessee for the Life of *B.* makes a Lease for Years by Indenture, and after purchase the Reversion in Fee, and then *B.* dieth, *A.* shall avoid his own Lease; tho' several of the Years expressed in the Lease are still to come; for he may confess and avoid the Lease which took Effect in Point of Interest, and determined by the Death of *B.* So if Lessee for ten Years make a Lease for twenty Years, and afterwards purchaseth the Reversion, yet it shall bind him for no more than ten Years, for the same Reason; because when he made a Lease for twenty Years, this was certainly a good Lease for ten Years, and so far an Interest passed, which he may confess, and avoid it for the Residue, by saying, that he had no more than for ten Years in it himself; *sed Quære* of this, for the Reason seems not satisfactory.

In Ejectment, Plaintiff declared of a Lease for five Years, and upon Not guilty pleaded, the Jury found that the Lessor of the Plaintiff had only a Term for three Years in the Lands leased, & *fi.* &c. *Hale* held this Verdict against the Plaintiff, for the Judgment should be, that the Plaintiff *recuperet Terminum suum Prædictum*, which is five Years; and here the Lessor's Interest does not continue so long, and perhaps the Defendant may be the Reversioner after the five Years ended, and then by this Means the Plaintiff's Lessor will recover the Land for two Years more than he hath Right to do; and said, that for this Reason he had before caused another Plaintiff to be nonsuit; *Wild* was of the same Opinion, but *Twissden* inclined *cont.* & *Adjournatur*.

If a Man takes a Lease for Years of the Herbage of his own Land by Indenture, this works an Estoppel to say that the Lessor had nothing in the Lands at the Time of the Lease made, because it was not made of the Lands themselves; and this in Consequence will avoid the Lease itself.

If Baron and Feme join in a Lease for Years by Indenture, rendering Rent, where the Baron hath all the Estate, and the Wife nothing; in this Case, after the Death of the Baron, the Lessee, in an Action of Debt

1 *Rel. Abr.*  
871. *Style*  
and *Herring*

*Bro. Tir.*  
*Leases* 36.  
7 *E. 4.* 29.

*Co. Lit.* 47. b.  
4 *Co.* 54. a.  
8 *Co.* 44.  
*Cro. Eliz.* 36.  
1 *Rel. Abr.*  
877.

*Co. Lit.* 47. b.  
1 *Vent.* 358.  
& *vide Skin.* 2.  
*Carth.* 247-8.  
1 *Salk.* 275.

2 *Lev.* 140.  
3 *Kebl.* 492.  
*Roe and*  
*Williamson.*

*Co. Lit.* 47. b.  
1 *Rel. Abr.*  
871.

1 *Rel. Abr.*  
877.  
*Cro. Eliz.* 701.  
*Breerton* vet.  
*Evans.*

Debt brought by the Feme, shall not be concluded to say, that at the Time of the Lease made the Feme had nothing in the Lands; for this shall not enure by way of Estoppel, because an Interest actually passed, tho' not from the Feme. But another Reason given is, because the Feme being Covert was not estopped, and by Consequence neither shall the Lessee, because all Estoppels ought to be mutual.

*Co. Lit. 45. a.*  
*1 Rol. Abr.*  
877.  
*Cro. Eliz. 701.*

If Tenant of the Land, and a Stranger, join in a Lease for Years by Indenture, this is the Lease only of the Tenant, and the Confirmation of the Stranger; and yet the Lease operates, as to the Stranger, by way of Conclusion, and so it does to the Lessee with respect to the Stranger, because he having nothing in the Lands, the Indenture could no otherwise take Effect as to him.

*Co. Lit. 45. a.*  
*1 Rol. Abr.*  
877.

If *A.* seised of ten Acres, and *B.* of other ten Acres, join in a Lease for Years by Indenture, these are several Leases according to their several Estates, and no Estoppel is wrought by the Indenture to either Party, because each have an Estate whereout such Lease for Years or Interest may be derived; and the Reason why Estoppels at any Time are allowed is, because otherwise when the Party hath nothing in the Lands, the Indenture must be absolutely void, which would be hard to say, when he hath, under Hand and Seal, done all in his Power to make it good, and since it can be good no otherwise, it shall be good by Estoppel rather than be absolutely void; but when an Interest passes from each Lessor, the Indenture works upon such Interest to carry that, and therefore leaves no Room for its operating by way of Estoppel; but yet since both equally joined in the Lease, without distinguishing the several Interests they had therein, the Indenture works by way of Confirmation, with respect to each from whom the whole Interest did not pass; that is, *A.*'s Confirmation for *B.*'s Part, and as *B.*'s Confirmation for *A.*'s Part; for since the Lease of the whole was undistinguished, and by Reason of the several Interests that passed from each excludes any Estoppel, therefore rather than the Indenture shall be void with respect to the Part of each other, it shall be construed a several Confirmation by one of the other's Part, and by the other of the other's Part, which is the least Operation the Indenture can have with respect to each, from whom no Interest passes, without being absolutely void.

*1 Rol. Abr.*  
877.

So if two Tenants in common of Lands join in a Lease for Years, by Indenture, of their several Lands; this shall be the Lease of each for their respective Parts, and the Cross Confirmation of each for the Parts of the other, and no Estoppel on either Part; because an actual Interest passes from each respectively, and that excludes the Necessity of an Estoppel, which is never admitted, if by any Construction it can be avoided, as being one of those Things which the Law looks upon as odious, because it chokes and disguises the Truth.

*Co. Lit. 47. a.*  
*1 Rol. Abr.*  
878.

But if two Joint-tenants for Life, or in Fee, join in a Lease for Years by Indenture, reserving Rent to the one of them only, this shall give him the Rent exclusive of the other; and here the Estoppel turns not then upon the Interest passed by the Lease, for that is several, according to their several Rights, as in the other Cases, which excludes any Estoppel; but it turns upon the Reservation of the Rent, which being made in this Manner, to one exclusive of the other, by Indenture, works an Estoppel against all the Parties to say the contrary; and tho' the Rent issues out of one Part as well as the other, yet it not being Part of the Thing demised, but moving as it were rather by way of Grant from the Lessee after the Lease made, the Lessors are considered as accepting it in this Manner by Indenture, which concludes them as well as it doth the Lessee; but if the Lease had been by Parol, or Deed Poll, reserving Rent to the one Joint-tenant only, this would not have excluded the other Joint-tenant from an equal Share therein, because this Reservation coming as it were by way of Grant from the

Lessee,

Lessee, and being only by Parol, or Deed Poll, could not estop or conclude the Lessors, who, with respect to the Rent, were as it were Grantees, and only passive therein; and the Rent shall follow the Reversion in Proportion to their several Estates in that, as the Cause for which the Rent was reserved or granted in that Manner, and so let in both to an equal Participation thereof.

If two Coparceners join in a Lease for Years, by Indenture, of their several Parts, this is said in one Book to be but as one Lease, because they have not several Freeholds therein, but only one, as both making but one Heir, and therefore shall join in an Assise; but *Moor* is *cont.* where in Ejectment the Plaintiff declared of a Lease by two Coparceners *quod dimiserunt*; and Exception being taken to it, the Exception was allowed, because the Lease was several as to each Coparcener, for their own respective Moiety; and this seems the better Law, because tho' they have but one Freehold with Regard to their Ancestor, and therefore if they are disseised shall join in an Assise, yet as to their Disposing Power thereof they have several Rights and Interests, so that neither of them can lease or give away the Whole.

If *A.* Mortgages Lands to *B.* upon Condition to re-enter on Payment of 10*l.* and after *A.* before the Day of Payment is come, being in Possession, makes a Lease for Years, by Indenture, to *C.* and then after performs the Condition, this shall make the Lease to *C.* good against himself by Estoppel; and it was farther adjudged, that even the Feoffee of *A.* should be bound by this Lease, which took its Effect only at first by Estoppel, because he, coming in under one who was estopped, should be himself estopped likewise, which was still a stronger Case than the first; and this was adjudged in *Ireland*, and afterwards affirmed on a Writ of Error here, and seems a very reasonable Judgment; for if a subsequent Purchase shall make good a Lease of Lands by Indenture, tho' the Lessor had nothing in those Lands at the Time of the Lease, and therefore his Lease at first could only take Effect by Estoppel, much more in this Case, where the Lessor had a Possibility of coming into the Lands again, shall his Performance of the Condition after make the intermediate Lease; and so it should seem too if the Condition were broken at the Time of the Lease, so as he had then nothing but an Equity of Redemption; yet if he should after be admitted to redeem in Chancery, this would make good the intermediate Lease which took Effect at first only by Estoppel.

*B.* Tenant for Life of *C.* and he in the Remainder or Reversion in Fee join in a Lease for Years by Indenture, this, during the Life of *C.* is the Lease of *B.* who then only had the present Interest in the Lands, and the Confirmation of him in the Remainder or Reversion; but after the Death of *C.* then this becomes the Lease of him in the Reversion or Remainder, and the Confirmation of *B.* for the Lessors having several Estates in them in several Degrees, the Lease shall be construed to move out of each one's respective Estate or Interest as they become capable of supporting thereof; which is the most natural and useful Construction of the Lease, especially as there can be no Estoppel in this Case, by reason of the several Interests which passed from each; and therefore during the Life of the Tenant for Life, if the Lessee, being evicted, should declare of a Lease by both, this would be against him, as was adjudged, because for that Time it was only the Lease of the Tenant for Life.

1 *Roll. Abr.*  
878.  
*Moor*, pl. 939.  
*Milliner* ver.  
*Robinson*.

1 *Roll. Abr.*  
874, 876.  
*Omelaughland*  
ver. *Hood*.

*Co. Lit.* 45. a.  
*Dyer* 234.  
*Moor*, pl. 196.  
*Popb.* 57.  
*Moor*, pl. 939.  
6 *Co.* 14, 15.



(P) Leases for Years and future Interests, how far they may be barred or destroyed, and how far not, and Where an Entry before the Term begun is a Disseisin.

IT has already appeared, that all Leases for Years at the Common Law, when they come in *esse*, are to be executed by the Entry of the Lessee; we shall therefore now consider what Care the Law has taken for the Preservation and Security of such Leases as are limited to begin at a future Time, and so cannot be executed by Entry presently; what Power the Lessee hath over such an Interest, and whether, and by what Acts, either of the Lessor, or Strangers, the same may be barred and prevented from ever taking Effect.

*Cro. Eliz.* 15.  
5 *Co.* 124.  
5 *Leon.* 156,  
158.  
3 *Mod.* 198.

As to future Interests, if one make a Lease for Years, to commence after the Death of a Tenant for Life, or after the End of a Lease for Years then in Being; and after the Death of the Tenant for Life, or Expiration of the Term for Years, a Stranger enters by Tort, yet may the Lessee of the future Interest grant over his Term for Years, before or without any Entry made, and thereby transfer over his Power of entering and reducing it into Possession to the Grantee, for till Entry of the Lessee of such future Interest, the Lease is not executed, but remains in the same Plight as it was upon the first making thereof, and then no intermediate Acts, either of the Lessor, or of Strangers, can disturb or hurt it; because whoever comes to the Possession, whether by Right or Wrong, takes it subject to such future Charge, which the Lessee may execute by his Entry whenever he thinks fit, as by a Title Prior and Paramount to all such intermediate Violations of the Possession; but if the Lessee of such future Interest had once entered after the Death of the Tenant for Life, or End of the Lease for Years, and had after been put out, then he could not grant over his Term and Interest to a Stranger, because by his Entry the Lease was actually executed, and being after defeated by the Entry of another, he had only a Right of Entry left in him; which Right of Entry the Law will not suffer him to transfer over to a Stranger no more than a Right of Action; and for the same Reason, because in both Cases it may encourage Champerty and Maintenance; but in the other Case, where he hath not entered, he only transfers over such Interest as he himself had, and which the tortious Entry of the Stranger hath not disturbed or altered from what it was at the first making thereof.

*Cro. Eliz.* 127.  
1 *Leon.* 118.  
*Wheeler ver.*  
*Thoroughgood.*

So if one makes a Lease for Years, to begin two Years hence, and after the two Years expired before any Entry, and whilst the Lessor continues still in Possession, the Lessee may grant over his Term and Interest to another, because his *Interesse Termini* was not divested or turned to a Right, but continued in him in the same Manner as it was at first granted; and in the same Manner he transfers it over to another, who by his Entry may reduce it into Possession whenever he thinks fit.

5 *Co.* 123.  
*Cro. Jac.* 60.  
*Saffin's Case.*  
1 *Leon.* 99.  
3 *Mod.* 198.

One made a Lease for Years, to begin after the End or Determination of a former Lease for Years then in Being; the first Lease determined, and before Entry of the second Lessee, he in Reversion entered, and made a Feoffment in Fee, and levied a Fine with Proclamations, and five Years passed without Entry or Claim of the second Lessee; and if his Term was barred, was the Question; and it was adjudged, that by this Fine and Nonclaim his Term was barred, because after the first Lease expired, the second Lease was actually then come in *esse*, and reducible

into



into Possession by an Entry presently; and then his not entering, which was his own Fault and Laches, shall not stop the Operation of the Fine from running against him; but if such Fine had been levied during the Continuance of the first Lease, there it was agreed that the Operation thereof should not begin to run on against the second Lessee till the first Lease were determined, because till then the second Lease was only an *Interesse Termini*, which the second Lessee could not reduce into Possession by any Entry till the first Lease determined, and so was not obliged to take Notice of the Acts of Strangers, or of the Ter-tenant in Possession; for if such future Interest might be devested before it came in *esse*, the Lessee or Grantee thereof, having never entered, would have no Means to revest it, and therefore till it comes in *esse*, the Law takes care and secures it to the Lessee or Grantee in the same Manner as it was at first granted; but when the first Lease is at an End, then the second Lessee is to take care of it himself; and if he suffers five Years to elapse after that Time without Entry or Claim, this will bar such Interest, because his Right then commences in Possession, and from thenceforth the Operation of the Fine begins to run on against him; and where in *Noy* it is held, that if *A.* leases to *B.* for Years, but yet *A.* still continues in Possession, and after levies a Fine with Proclamations, and five Years pass, that this does not bar the Term of *B.* but only carries the Reversion of *A.* this Case was denied by *Twissden* to be Law, for till the Entry of *B.* the Lessor hath no Reversion; and therefore the Fine can only operate on the Possession.

As the Lessee must enter when his Lease comes in Possession, so if he enters before, this is a Disseisin; therefore where one brought Debt for Rent, and declared upon a Lease 29 *Septemb.* *Habendum* from the Feast of St. *Mich'* next ensuing for Twenty-one Years, rendering 10*l.* per Ann. Rent, *Virtute cujus* Defendant 29 *Septemb.* entered, &c. on *Nihil debet* pleaded, and found for the Plaintiff, it was moved in Arrest of Judgment, that here, by the Plaintiff's own shewing, there is no Rent in Arrear, for he says *Virtute cujus* Defendant 29 *Septemb.* entered, which is a Day before the Commencement of the Term; and then such Entry is a Disseisin, because he had then no Right to enter; and this the Court clearly agreed, and that no Continuance of Possession, tho' after the Term actually begun, would purge the Disseisin or alter the Estate of the Lessee; but yet they agreed that Debt lay for the Rent in respect of the Privy of Contract upon the Lease made, but that the Disseisin having gained a tortious Fee, that should not give way to the Term for Years, tho' it were legal, being but a Chattel.

So where *A.* made a Lease to *B.* 23 *Septemb.* *Habendum* to him for Eighty-one Years from *Mich'* next ensuing, if *C.* should so long live, and from and after the Day of the Death of *C.* for Thirty-one Years more; the Lessee enters the 23 *Septemb.* and so, before the Commencement of the Term, continues in Possession for some Years; then the Lessor re-enters, and the Lessee being out of Possession after the Death of *C.* and during the Continuance of Thirty-one Years, assigns over that Term to the Plaintiff's Lessor, who being kept out of Possession, brings Ejectment, and recovered. 1. It was held, that the Term not being to begin till *Mich'*, this was till then a future Interest, and the Lessee's Entry before was a Disseisin, and not a Possession, by Virtue of the Lease. 2. That whether this Lease for Thirty-one Years were only a Continuance of the first Term, and that both together made but one Term, as *Bridgman* held, because the last Day of the Life of *C.* shall be conjoined to the first Day of the Thirty-one Years, and so no Fraction be allowed, especially being for Eighty-one Years, which *B.* cannot be supposed to out-live; or whether they were two distinct Terms, as others held; yet either way it was not turned to a Right by the Entry of the Lessor, because *B.* was not possessed by Virtue of the Term, but by Disseisin, and to

*Noy* 123.  
*Ar. held ver.*  
*Cook*  
1 *Vent.* 81.  
1 *Sid.* 459.

2 *Leon.* 99.  
*Cro. Eliz.* 169.  
1 *Rel. Abr.*  
605.  
*Dyer* 89, 96.  
2 *Rel. Abr.*  
120.

1 *Lev.* 45.  
1 *Keb.* 54  
*Hennings ver.*  
*Brabazon.*

purge

purge that was the Entry of the Lessor; for if a Stranger had entered after *Mich'*, and disseised the Lessor, this would not have turned the Term to a Right, because as to that the Time for Entry of the Lessee was not come, nor was his Entry in respect of that; no more will the Entry of the Lessor turn it to a Right, and then it was well assignable to the Plaintiff's Lessor, especially if it should be taken as a future Interest, as some held it should; for then the Lessee was never in Possession by Virtue thereof, and consequently the Lessor's Entry could not turn it to a Right.

*Cro. Eliz.* 905.  
*Waller ver.*  
*Campion.*

But where one declared of a Lease 16 April, *Habendum* from the *Annunciation* last past for ten Years, *Virtute cuius intravit & habuit tenementa prædict'* from the said *Annunciation*; this was held good, and that the Lessee was no Disseisor; for it shall be intended that he entered and occupied before by Agreement, and took a Diversity between this Case where the Commencement of the Lease is limited from a Time past, and where it is limited to begin at a Time to come; there the Entry of the Lessee, before that Time, is a Disseisin.

### (Q) How far, and by what Means, Leases for Years in Trust to attend an Inheritance may be barred or destroyed.

*Cro. Car.* 110.  
*Isham ver.*  
*Morris.*  
1 *Sid.* 459.  
2 *Vent.* 329.  
S. C. cited,  
*et vide Tit.*  
*Uses and*  
*Trusts,* and  
where Equi-  
ty will set  
aside Trust  
Terms in  
Favour of  
Dowerels,  
Jointres, &c.  
under these  
Titles.

IF Lessee for Years assigns over his Lease in Trust for himself, and after purchases the Inheritance, and occupies the Land, and then levies a Fine with Proclamations, and the Lessee does not claim this Lease within five Years after the Fine levied, this Fine and Non-claim will bar the Interest of the Lessee, tho' he who levied the Fine had himself the Possession by reason of the Trust; for this Trust passed included in the Fine, and the Trustee not making Claim within the five Years, his Interest is barred thereby, and consequently so is the Interest therein of the *Cestui que Trust*. But Note; it appears in other Books, where this Resolution is cited, that the Conuzee was a Purchaser of the Estate, and then having no Notice of the Term, nor having made any Agreement for it, to have it assigned in Trust for himself, if the Fine had not barred it, but it should have been set up against his Purchase, he would have been so far cheated and deceived in his Purchase; and therefore it is said it would have been otherwise, if by Agreement this Term had been to be assigned in Trust for the Conuzee, and that upon very good Reason; for he who hath the Inheritance, and in Trust, for whom a Term or Estate by Extent is assigned, must be taken as Tenant at Will to his Trustee, and consequently that his Possession is the Possession of the Trustee, and then a Fine levied by him who hath the Inheritance, will work only upon that, when it appears that it was so intended, and that the Term should be kept on Foot, and not barred; whereas in the Case of *Isham* and *Morris* there does not appear to have been any such Intention, nor does it appear that the Conuzee knew any Thing of the Term.

*Hard.* 400.  
*Fokus ver.*  
*Salisbury.*

*A.* seised of Lands, for Continuance thereof in his Name and Blood, &c. makes a Lease to *B.* for five Hundred Years, in Trust for himself during Life, and after in Trust for his Brother, and so to others; and after *A.* being in Possession according to the Trust, covenants with *D.* to stand seised of those Lands, upon the same Considerations as in the Lease, to the Use of himself for Life, with Remainders over, as in the Lease, and upon the same Trusts, and that the said Lease, and all Estates made or to be

be made by him should be to the same Uses and Trusts, and then *A.* levies a Fine, and five Years pass, *A.* still continuing in Possession according to the Trust, and after *A.*'s Death the Lessee enters; and if this Lease was barred by the Fine and Nonclaim for five Years, was the Question: No Judgment appears to have been given; but *Hale* seemed to be of Opinion that it was not, because here appeared no Intent to bar it; for *A.* was but Tenant at Will, and the Fine did not displace the Lease; as if Lessee for Years levies a Fine, and five Years pass, the Lessor is not barred, because *Nihil operatur* by the Fine, and *Partes Finis nihil habuerunt* may be pleaded to it; otherwise it would be if such Fine had been levied by the Tenant for Life; therefore where Lessee for Years intends to levy a Fine, it is usual for him first to make a Feoffment, whereby he transfers the whole and present Possession and Fee to the Feoffee, and then the Fine operates upon the whole Estate so united in the Feoffee; but here the Lease for Years was antecedent to the Estate of the Lessor upon which the Fine operates, and was subsisting in another Person, *viz.* in the Lessee, at the Time of the Fine levied; and he cited the Dutcheſs of *Richmond's* Case in *C. B.* which is said to be the same in *Terminis*, and to be so adjudged, 1. Because the Lessor was only Tenant at Will, and there was a mutual Confidence between them: 2. By reason of the Privity that was between them: And he also cited one *Heal's* Case, where *A.* conveyed Lands in Fee to *B.* with a Covenant to make further Assurance, then *B.* lets to *A.* for forty Years, and then, on Request, *A.* makes further Assurance, the Lease is barred without precedent Agreement to the contrary, for that would have saved the Lease, and then the further Assurance would have been taken only to operate by way of Corroboration and further Confirmation of the Lease; but the principal Case in *Hard.* seems to be very darkly put in the Book; for it does not appear to whom the Fine was levied; and the Notion of the Term being antecedent to the Fine, and therefore not barred, for that Reason, seems strange; for if it were subsequent, it could not most certainly be touched by the Fine; and there in another Book this Case is cited as a Case in Point, that the Term was barred by the Fine; and this seems agreeable to some of the following Resolutions.

It was held *per Curiam*, that a Fine levied in Pursuance of a Trust cannot destroy any Lease made by *Cestui que Trust*; but tho' a Fine levied by *Cestui que Trust* does not destroy or extinguish the Trust, yet it is not safe to do it, for the Danger of not being able to prove an Agreement to the contrary.

*A.* seized in Fee makes a Lease to *B.* for an hundred Years, in Trust to attend the Inheritance, *B.* enters, then *A.* enters, and receives the Profits, and after makes a Lease for fifty-four Years, and covenants to levy a Fine *sur Conuzance de Droit*, to confirm that Lease, and a Fine is afterwards levied accordingly, and five Years passed without any Claim made by *B.* and it was adjudged in *C. B.* and affirmed afterwards upon Error in *B. R.* 1. That when *A.* entered upon *B.* he was but Tenant at Will to him, to which Estate it is not always requisite that there be the express Consent of both Parties; but if there be any thing tantamount, it is sufficient, as here the Trust implies, that the Lessor shall take the Profits, being *Cestui que Trust*, which includes at least an Estate at Will. 2. That when *A.* made the Lease for fifty-four Years, tho' this would not be a Disseisin, because the Reversion was in the Lessor himself, who made that Lease, yet by this the Lease for an hundred Years was divested, displaced, and turned to a Right. And, 3. That being so divested, this was barred by the Fine and Nonclaim; and it was held, that *A.* only should have the Term of an hundred Years, divested or not, and not *B.* who was but his Trustee; and in this Case *A.* hath made such Election by levying the Fine to corroborate the Term of fifty-four Years, and there is no Reason that *A.* should have the Land against his own

1 Lev. 271.

1 Keb. 24-5.

1 Vent 35,80.

1 Sid. 349.

458.

1 Lev. 270.

2 Keb. 521.

597, 650.

Freeman ver.

Barnet.

3 Mod. 193.

8 C. cited.

Fine; besides, if the Term of an hundred Years should not be barred by the Fine and Nonclaim, then *B.* must have it, which was never intended; and it is but reasonable such Term should be subject to be barred or extinguished by *Cestui que Trust* of that and the Inheritance; and a general Rule was taken in this Case, that when Lessee at Will, or he who enjoys the Land by express or implied Assent of his Grantee or Feoffee, makes a Lease for Years, or levies a Fine, that this shall be construed an Ouster, Disseisin, or Bar, when such Construction tends to the Establishing a lawful Estate, as in the principal Case; but when such Construction tends to the Destruction of an honest Estate or Interest, then such Lease or Fine shall be no Ouster, Disseisin, or Bar; and therefore *Keeling* Chief Justice put these two Cases: If one makes a Lease for Years, for Security of Money by way of Mortgage, and as the Course is, continues in Possession, and takes the Profits, and then levies a Fine to *J. S.* and pays the Interest duly, and the five Years without Notice or Claim pass, that this shall be no Bar to the Lease of the Mortgagee: So if one purchase Lands, and for the better Security had a long Lease assigned to *J. S.* in Trust to attend the Inheritance, and then takes the Inheritance to himself by Fine, and five Years pass, and there are Mortgages made in Time after the first Lease made, and before the Fine levied, yet such Fine does not destroy the first Lease to *J. S.* but that the Purchaser may use it to defend himself against the Incumbrances; and thought this Difference would reconcile all the Books.

3 Mod. 195.  
*Smith versus*  
*Pierce.*

One by Will devised Lands to Trustees for ninety-nine Years, in Trust for the Payment of his Debts and Legacies, Remainder to *A.* his Brother in Tail; but if *A.* gave Security to pay the said Debts and Legacies, or should pay the same within such a Time, then the Trustees should assign the Term to him, &c. *A.* enters after the Death of his Brother, with the Assent of the Trustees, and received the Profits, and paid all the Legacies, and also all the Debts but 18*l.* and afterwards *A.* levies a Fine to the Use of himself for Life, Remainder to his Wife for Life, with divers Remainders over, and dies, leaving his Wife and one only Daughter his Heirs at Law; the Wife enters, and five Years were past without any Claim; and now the Daughter, in the Name of the Trustees, brought an Ejectment; and the Questions were, 1. Whether this Term for ninety-nine Years was bound by the Fine and Nonclaim. 2. Whether it were divested and turned to a Right at the Time of the Fine levied; for if it were not, then the Fine would not operate upon it: No Judgment appears to have been given in it; but upon the Difference taken in *Freeman* and *Barns's* Case, it should seem not to be barred; for then it must turn to the Prejudice of honest Creditors, who were Strangers and third Persons, and by his Entry on the Trustees could be only Tenant at Will, because his Entry was with their Consent, and no manner of Intent appears in him to divest their Estate or Interest, and then his Fine shall operate only on his own Estate-Tail, like a Fine levied by a Mortgagor, who is but Tenant at Will to the Mortgagee, and whose Acts being by Permission of the Mortgagee, shall not turn to his Prejudice; tho' some said, the five Years and Nonclaim passing in the Life-time of the Wife, who was the Survivor, made a great Difference in the Case; *ideo Quære.*

2 Vent 329,  
330.  
*Dighton ver.*  
*Greenvil.*

If one takes an Assignment of an Estate extended upon a Statute in the Name of *J. S.* in Trust to attend the Inheritance which he hath in himself, and after he by Lease and Release, and Fine levied in Pursuance thereof, conveys that Reversion and Inheritance to another, and five Years pass without any Claim made by *J. S.* the Trustee, yet this will not bar the Estate or Interest upon the Extent, if it appears that the Conuzee of the Fine was a Purchaser of the whole Estate, and so after his Purchase *J. S.* to be Trustee for him of the Statute Interest; but in such Case the Fine shall operate only upon the Inheritance, and not to the barring the

Statute

Statute Interest, which is to attend and go along with the Inheritance by way of Trust for the Purchaser; but if the Purchaser had no Notice of such Statute Interest standing out, nor was by Agreement to have the Trust thereof upon his Purchase, then, rather than he should be cheated thereby, the Fine of *Cestui que Trust* should operate to the Barring his own Trustee.

Upon Evidence to a Jury at the Bar, on Trial of an Issue out of Chancery, it was agreed, that if one makes a Lease for an hundred Years in Trust for himself and his Wife, and afterwards they both join in levying a Fine to a Purchaser, for a valuable Consideration, who hath no Notice of this Lease in Trust, tho' the Fine does not convey the Term itself to the Conuzee, the Estate in Law being in the Trustee, yet this destroys the Trust, so that the Lease shall not hurt the Purchaser. 3 Keb. 564.

These Reasons and Resolutions seem to make it manifest, that in the Case of *Focus* and *Salisbury* if the Conuzee of the Fine were a Purchaser for a valuable Consideration without Notice of the Term, that then the Fine would so destroy the Trust of that Term, that it should not hurt him; but if the Fine were only in Pursuance and Corroboration of the former Estates, then there would be no Reason in the World that it should operate so as to destroy the Term. Hard. 400.

## (R) Leases for Years, When merged by Union With the Freehold or Fee.

**A**NOTHER Way, whereby a Term for Years may be defeated, is by way of Merger, when there is an Union of the Freehold or Fee and Term for Years in one Person at the same Time; in this Case the greater Estate merges and drowns the lesser, because they are inconsistent and incompatible; and yet there are several Exceptions out of this Rule, not only where such Union is transitory, but even where it is permanent and continuing.

First then, if a Man makes a Lease for Years to *A.* and afterwards makes a Feoffment in Fee to *B.* with a Letter of Attorney to *A.* to make Livery, and he makes Livery accordingly, yet this shall not drown or extinguish his Term, because he did it only as Servant to the Lessor, and in his Stead and Right, and the Feoffee after Livery made is in by the Lessor, and claims nothing from the Lessee, neither shall his Term pass merged or confounded in the Fee, which by the Livery he gave to the Feoffee, because he gave it only in Right of the Lessor, and not in his own Right; tho', perhaps, to secure his Term, and settle the Reversion (which was all that was intended to pass) in the Feoffee, it may be proper for him after such Livery to make an Entry for his Term, because the Livery gave the actual Possession, tho' the Agreement and Intent of the Parties will direct it so as to transfer only the Reversion expectant upon that Term after the Lessee hath re-entered. Co. Lit. 52. a.  
Moor 11, 280,  
605.  
Cro. Jac. 177.  
2 Rol. Abr.  
495.

If the Lessor infeoffs his Lessee for Years to several Uses, the Interest of the Lessee is saved by 27 H. 8. of Uses, which saves to all Persons, and their Heirs, which be or shall be seised to any Use, all such former Right, Title, Entry, Interest, &c. as they might have had to their own proper Use in or to any Manors, Lands, &c. whereof they be or shall be seised to any Use, as if that Act had not been made; and therefore in such Case his Term being saved expressly by this Act, he may enter and enjoy it, as if the Feoffment to Uses had been to any Stranger. 7 Co. 48. a.  
66. a.  
Moor, pl. 345.  
Cheyney's  
Case.

*Cro. Jac.* 643.  
*2 Rol. Rep.*  
 245.  
*Ferrets and*  
*Curson.*  
*2 Mod.* 254.  
 cited.

*A.* leases to *B.* for Years, and after the Lessor by Indenture inrolled and Fine conveys those very Lands to the Lessee, and others, and their Heirs, to the Use of them and their Heirs, to the Intent that a Common Recovery should be had and suffered against them, with Voucher of the Lessor, and that he should vouch over the common Vouchee, to the Use of *D.* and *E.* and their Heirs; all which was done accordingly; and the Question was, if by all or any of these Acts the Term were extinct and gone; for the Reversioners, who were in under the Recovery, brought Debt against *B.* the Lessee for Rent; and on *Nihil delict* pleaded, and all the said special Matter found, it was adjudged, that the Term still had Continuance, and was not merged; for altho' it was merged and extinct by the Union of Estates till the Recovery came, yet when that was suffered the Uses thereof were guided by the Bargain and Sale inrolled, and then it is all one as if it had been no Conveyance or Assurance to such Uses *ab Initio*, and is within the Equity and Intent of the Saving of the 27 *H.* 8. and is like a Feoffment to Uses, and then the Term and Rent are revived; for the Intent of the Statute was not to hurt those who had Estates, but to preserve them; and it was agreed *per totam Cur.* that if a Fine or Feoffment had been made or levied to the Lessee for Years, that the Term would not have been extinguished, but should be preserved by 27 *H.* 8. The Objection against all this was, that the Bargain and Sale and Fine were to his own Use, otherwise he could not have been Tenant to the *Præcipe* for suffering of the Common Recovery, and therefore, being to his own Use, there was nothing to be saved within that Statute; but it was answered and resolved, for the former Reasons, that his own Term was saved within the Equity and Intent of the Statute.

*2 Mod.* 8, 9.  
*Nurse and*  
*Yearworth.*

One seised of Lands in Fee makes a Lease to *B.* for ninety-nine Years, to such Uses as he should by his last Will direct, afterwards he makes his Will in Writing, (having then no Issue by his Wife *privement enseint*,) and thereby devises these Lands to the Heirs of his Body on the Body of his Wife begotten, and for Want of such Issue, to *B.* and his Heirs, and dies, and about a Month after a Son was born, who by Virtue of this Devise enjoys the Land, and after his full Age suffers a Common Recovery, and then devises the Lands to the Plaintiff, and dies; the Plaintiff brought this Bill against *B.* to have this Lease for ninety-nine Years assigned to him; and for the Defendant it was objected, That an Estate in Fee being by the Will limited to *B.* who was also Lessee for ninety-nine Years, the Term was thereby drowned. 2. That this was in Nature of a Devise to an Infant *in Ventre sa Mere*, which, as was objected, is not good, if there be none born at the Time when the Devise should take Place: But notwithstanding it was decreed, that the Defendant should assign the Term to the Plaintiff; for that such Devise to an Infant *in Ventre sa Mere* is good as an Executory Devise, and tho' the Lands descend to the Heir at Law in the mean Time, or go to the Devisee in this Case, yet it is subject to be defeated by the coming in *Issue* of the Infant, and the Term for Years in the mean Time was only suspended, and by Consequence must revive in the Lessee when the Accession of the Inheritance, which occasioned that Suspension, is defeated, and the Term being created subject to the Uses of the Will, must follow the Devise of the Inheritance, as a Trust to be disposed of as the *Cestui que Trust* shall direct.

*Ther.* 111. b.  
 in Margin,  
*per Po ham*  
 and *Anderson.*

If one make a Feoffment in Fee to the Use of himself for Years, without limiting any other Estate, the Use shall not result to him in Fee; because that would merge the Term, against the express Declaration and manifest Intent of the Parties; and therefore in such Case the Reversion in Fee must continue and settle in the Feoffee.

In Ejectment the Case was thus : *Cook* let to *Fountain* for ninety-nine Years, and two Years after by Lease and Release *Cook* conveyed the Inheritance to *Fountain* and another, to the Use of *Cook* and the Heirs of his Body, with divers Remainders over ; and if by this Conveyance the Lease for ninety-nine Years was merged and destroyed in all, or in Part, was the Question : First, it was agreed, that if such Conveyance to Uses had been by Fine or Feoffment, it would not have been destroyed, but would have been preserved by the Saving in 27 H. 8. so likewise they agreed, that if there had been no Lease for a Year, but the Release had been immediate to the Lease of ninety-nine Years to such Uses, in this Case also the Lease for ninety-nine Years had been preserved by Force of that Statute ; but here being a Lease for a Year precedent, it was argued, that this was to the Use of the Lessee, and then by Acceptance thereof he admitted the Lessor's Power to make such Lease, and by Consequence this was a Surrender of the Lease for ninety-nine Years before the Release to the other Uses came to take Place, and then the Release after cannot revive it ; and it was said, tho' this be all one Conveyance, yet it differs from a Feoffment ; for it will not purge a Disseisin, nor make a Discontinuance ; and if before the Release the Lessee grants a Rent-Charge, acknowledges a Statute, confesses a Judgment, or makes a Lease for Half a Year, and then a Release is made to him and his Heirs to such Uses ; yet it was said that he who hath the Inheritance would have no Remedy to avoid these Charges, but in Chancery. On the other Side it was argued, that this was no Merger of the ninety-nine Years Lease ; or if it were, yet for no more than a Moiety ; for the Reason of Merger and Extinguishment is not, as hath been argued, the Party's Admittance of the Lessor's Power to make a Lease, but because of the Accession of the immediate Reversion to the particular Estate a Merger is effected ; and therefore a new Lease by the Lessor to his Lessee is not a Merger or Surrender of the first Term, if there be any interposing or intermediate Term ; and yet in that Case the Lessee admits the Lessor's Power to make the Lease presently, as much as in the other ; and then if the Union and Accession of the two Estates be the Cause of the Merger, the *Quantum* of the Thing granted will be the Measure of that Merger, and by Consequence the first Lease here shall be extinguished but for a Moiety of the Lands. But, 2dly, it was argued, That it was not extinguished for any Part ; for his Term is saved within the Letter, or at least within the Equity of 27 H. 8. for the Intent of the Saving therein was to preserve the Balance between the *Cestui que Use* and his Feoffees, according to the Rule of Equity, by which they were governed before : Now suppose that *Fountain* had a Lease for ninety-nine Years before this Statute, and that *Cook* had desired him to accept a Feoffment to his Use, without Doubt the Chancery would not have compelled him to assign till the ninety-nine Years expired ; and the same Right seems now to be preserved by the Saving, and the Words are general, all that shall be seised to any Use, not all that shall be seised by Feoffment or Fine ; so that the Seisin to Use is the only Thing the Statute regarded, and not by what Sort of Conveyance, and Lease and Release are now a common Conveyance ; and the Lease being expressly said to be to enable him to accept a Release to other Uses, shall not be construed to any other Intent, or to be to his own Use, otherwise than to enable him to accept such Release ; and then if it should be admitted that the Lease for ninety-nine Years were extinguished by the Lease for a Year, yet by the Release it is revived ; for being but one Conveyance, it is within the Equity of the Statute ; and *Cro. Jac.* 643. is a stronger Case, and yet resolved there, that tho' the Bargain and Sale had destroyed the Term for a Time, yet by the Recovery it was revived, because then but one Conveyance *ab Initio* ; so here. To all this it was replied, That the very Reason of Merger was the Admittance of the Lessor's Power to demise, and then the whole is

2 Lev. 126.

1 Mol. 107.

3 Keb. 283.

309.

1 Vent. 195.

280.

Cook versus

Fountain.



surrendered, because he admits the Lessor to have Power to demise the Whole, tho' he had but a Moiety, to himself; and that where there is an intermediate Estate, no Merger shall be, does not make against it, for the intermediate Estate disproves his Admittance, that the Lessor hath such Power; but here is no such intermediate Estate or Impediment, and being Joint-tenants *per my & per tout*, by the Lease, the Whole is Merged by Admittance of the Lessor's Power to demise the Whole, tho' they agreed that a Merger may be Part of an Estate or Term, and not for another's Part. *Hale* cited a Case, 6 Car. 1. *Hele Sevan*, where *A.* mortgaged Lands to *B.* for Years, *B.* re-demises to *A.* upon Condition, that if he does not pay such a Sum, that he shall re-enter; and in the first Conveyance were Covenants for farther Assurance by *A.* then *B.* desires him to levy a Fine, which *A.* does accordingly; and there it was agreed, that the Term re-demised was extinguished; but if it had been expressed to what Intent the Fine was, it was agreed there would have been no Extinguishment of the Term; and in this Case the Lease is found to be *ea intentione* to enable him to take a Release, but no Judgment appears to be given; but it seems reasonable that the Lease for Ninety-nine Years, in this Case, should not be merged, or at least but for a Moiety, and even in that Case Equity would set up the Moiety or the whole Term again.

2 Bulf. 12.  
Chamberlain  
ver. Ewer.

If Tenant *pur auter vie* makes a Lease for Years, and dies, living *Cestui que vie*, by this the Lessee for Years is become Occupant, and then this Accession of the Freehold merges his Estate for Years, because they cannot consist together in one Person; but if in that Case the Lessee for Years had made a Lease at Will, and then the *Cestui que vie* had died, (which was the principal Case) it was adjudged that the Tenant at Will was the Occupant, and by Consequence the Lease for Years, which was in another Person, not drowned or merged, there being no Union of the Term for Years, and the Freehold in one Person; and then the Lessee for Years may, by Determination of his Will, enter and enjoy his Term, and the Occupant cannot prevent or hinder him, because he Claims in *quasi* by the first Lessor who had made such Lease for Years, and to which the Estate for Life, during the Life of the *Cestui que vie*, was subject and liable.

Bro. Tit.  
Surrender 52.  
2 Bulf. 12.  
Bro. Tit.  
Leases 63.

If Tenant *pur auter vie* makes a Lease for Years to *A.* Remainder to *B.* for Years, and *A.* enters, and then the Tenant *pur auter vie* dies, here *A.* the Tenant for Years, shall be Occupant, by reason of the Possession he had in him when the Life fell; and yet his Term for Years is not drowned, by reason of the intermediate Remainder to *B.* for Years; for this Estate by Occupancy is in the Nature of a Reversion expectant upon both the Terms for Years, as it was in the Tenant *pur auter vie* himself after these Leases made; and in some Cases a Term for Years, and a Freehold, may consist together in one Person; as if Lessee for twenty Years makes a Lease to his Lessor for five Years, this Term for five Years is not drowned in the Freehold or Fee of the Lessor, by reason of the intermediate Reversion for fifteen Years in the first Lessee.

Cro Jac. 619.  
Salmon ver.  
Swann.

The Case in Effect was this; *A.* seised in Fee grants an *Interesse Termini* to *B.* for one Hundred Years, to begin at such a Time, and before that Time makes a Lease for Twenty-one Years to *C.* to begin in Possession presently; then *B.* before the Commencement of his Term, grants it to *A.* who after grants a Rent-Charge, and the Grantee of the Rent-Charge distrains *C.* for it; and the only Question was, whether the *Interesse Termini* were drowned in the Inheritance, or if it had any Existence in *A.* so that he might thereout grant the Rent, for then it would avoid the second Lease for Years, being before it, and by Consequence be liable to the Payment of the Rent; and it was resolved that it was drowned in the Inheritance, for notwithstanding the second Lease for Years, the *Interesse Termini* is not so severed from the Reversion, but that



that by Grant thereof to him who hath the Inheritance such future Term or Interest is drowned, and shall never rise again; and by Consequence this Rent shall not Charge the Possession of the Termor who had the Estate before the Rent granted, and comes Paramount it; for tho' there was a Severance of Possession by the second Lease, yet the *Interesse Termini* being granted before that Lease, and to continue for a longer Time, that second Lease was subject to be defeated by the *Interesse Termini* when it took Effect; and therefore the *Interesse Termini* was *quasi* immediate to the Freehold and Inheritance, and therefore might drown in it.

My Lord Coke lays it down for a general Rule, that one cannot have a Term for Years in his own Right, and a Freehold *in Auter droit*, but that his own Term shall drown in the Freehold; and puts these Cases: If a Man, Lessee for Years, intermarries with the Feme Lessor, this shall merge and drown his own Term for Years; but if a Feme Lessee for Years intermarries with the Lessor, her Term is not thereby drowned, because, says he, one may have a Term for Years *in Auter droit*, and a Freehold in his own Right, as the Husband in this Case shall have; so if Lessee for Years make the Lessor his Executor, the Term is not thereby drowned, because the Lessor hath the Term *in Auter droit*. So also if a Master of an Hospital, being a sole Corporation, by the Consent of his Brethren, makes a Lease for Years of the Possession of the Hospital, and afterwards the Lessee for Years is made Master, the Term is drowned *Causa qua supra*; but if it had been a Corporation Aggregate, the making of the Lessee Master had not extinguished the Term, no more than if the Lessee had been made one of the Brethren; but if Lessee for Years of the Glebe be made Parson, the Term is merged, by reason of the Union of the Term and Freehold in him to his own Right and Use, tho' he has them in several Capacities.

But this Rule seems to admit of divers Exceptions; for where the Husband, possessed of a Term for Years, took Wife, and after the Inheritance descends or comes to the Wife, the Term for Years of the Husband is not thereby drowned or merged, because the Descent was an Act of Law, which the Husband could not prevent, and therefore shall not turn to his Prejudice; but he shall have the Inheritance in Right of his Wife, and the Term for Years in his own Right, as he had before, and therefore may give away or dispose of the Term as he thinks fit, notwithstanding such Descent of the Inheritance to his Wife; and this was the Opinion of *Fenner*, *Croke* and *Fleming*, Chief Just. and so given in Direction to a Jury in a Trial at Bar; and upon a general Verdict to that Purpose they gave Judgment accordingly; and *Croke* seemed to make a Question, if the Husband, in this Case, had Issue by his Wife after the Inheritance descended to her, so as thereby he was intitled to be Tenant by the Curtesy, and to have a Freehold in his own Right, if this should Merge the Term till the Wife's Death; and yet he said this was a much stronger Case; but *Williams totis viribus* against the Judgment, and held the Term clearly extinct; but notwithstanding Judgment was given *ut supra*; and in this Case all the Court agreed, that if the Lease had been made upon Trust for the Advancement of such a Woman, and the Lessee had after intermarried with that Woman, and then the Inheritance had descended to her, that this would not merge the Term, but that he might clearly dispose thereof to the Purpose intended, because he had it *in Auter droit*, and to another Use; so in another Book it seems to be agreed, that if a Man, being possessed of a Term for Years in Right of his Wife, purchases the Inheritance, that by this the Term for Years, tho' in Right of his Wife, is merged and extinct, because the Purchase was the express Act of the Husband, and therefore amounts in Law to a Disposition of the Term, by reason of the Merger consequent thereupon; but a bare Intermarriage of the Feme Termor with the Rever-

Co. Lit. 339.  
Plov. 418.  
Bracebridge  
ver. Cook.

Plov. 419,  
420.  
3 Leon. 111.

Cro. Jac. 275.  
1 Bulf. 118.  
Plott ver.  
Sleep.

Godb. 2.

tioner

sioner will not work a Merger of the Term, because by the Intermarriage the Term is cast upon the Husband by Act of Law, without any Concurrence or immediate Act done by him to obtain the same; and therefore in such Case the Law will preserve the Term in the same Plight as it gave it to the Husband, till he by some express Act destroys or gives it away.

Co. Lit. 358. b.  
Plow. 418. b.

But where the Husband himself is Lessee for Years, and intermarries with the Lessor, this merges his own Term, because he thereby draws to himself the immediate Reversion, in Nature of a Purchase by his own voluntary Act, and so undermines his own Term; whereas in the other Case, the Term being existing in the Feme till the Intermarriage, is not thereby so drawn out of her, or annexed to the Freehold, as to merge therein; because that Attraction, which is only by Act of Law consequent upon the Marriage, would, by merging the Term, do wrong to a Feme Covert, and so take the Term out of her, tho' the Husband did no express Act to that Purpose, which the Law will not allow; but in such Case, if the Feme should survive, and have Dower of those Lands, this seems a Merger of her Term for a third Part, at least, because now she hath the Term and Freehold both in her own Right, and then the Accession of the Freehold must *pro tanto* merge and drown the Term.

Co. Lit. 358.  
Plow. 418. b.  
420. a.

So also in Case where the Lessee for Years makes the Lessor Executor, the Term is not merged, because cast upon him without any Act or Concurrence of his, as a Consequence of his being made Executor; and therefore the Act of Law, which cast it upon him, shall preserve it in the same Manner as if he had been a Stranger, without any Regard to the immediate Freehold he had in his own Right, which was only accidental.

Moor, pl. 157.

But if a Feme Executrix takes Husband, and the Husband after purchases the Reversion, and dies, yet the Feme surviving shall not have the Term to any other Purpose but as Assets to pay Debts; for as to any Right of her own therein, the Term is extinct by such Purchase of the Husband, because that was his own express voluntary Act, and therefore amounts to a Disposition of the Term by the Merger wrought thereupon; and so it was held by all the Justices.

Ero. Tit.  
Leases 63.  
Tit. Surrender  
52.  
3 Leon. 111,  
112.  
Plow. 419. b.  
420. a.

So if one who hath a Lease for Years as Executor purchase the Inheritance, this merges the Term, because the Purchase was his own express Act; nay, Baron Clerk held, that tho' the Inheritance in such Case had descended on the Executor, that this likewise would merge the Term, which, how far it is Law, may be a Question; but as well in the Case of the Purchase as of the Descent, all agree that the Term would not be extinct as to Creditors, much less in Case where the Lessor is only made Executor of the Lessee for Years; tho' Plow. seems to insinuate, that even in that Case the Term is suspended during the Life of the Lessor; for he says, that after his Death the Term shall be revived.

3 Leon 157,  
158.  
Ero. Tit.  
Leases 58.

Land was given to the Husband and Wife, and to the Heirs of the Husband; the Husband makes a Lease for Years, and dies, the Wife enters and intermarries with the Lessee; and it was holden that his Term was not extinct, because the Entry of the Wife put a total Interruption to the Interest of the Lessee, and avoided the Term intirely as to herself, because she was in of the Freehold by Survivorship Paramount the Lease; and then the Lease cannot take Place again till after her Death against the Heirs of the Husband, and whether she will outlive the Term or not is uncertain; so that during her Life, the Lessee had no Interest, but only a bare Possibility, which cannot be touched or hurt by the Intermarriage, but continues just as it was before.

## (S) Of Surrenders of Leases for Years: And herein,

## 1. Of Surrenders in Fact or Express: And herein again,

## 1. By what Words such Surrender may be made.

IT will not be here necessary to enter into a particular Inquiry concerning the Nature of a Surrender, or of the several Words whereby such Surrender may be made, it being sufficient to say in general, that a Surrender is a Yielding up of an Estate for Life, or Years, to him who hath the immediate Estate in Reversion or Remainder, wherein the Estate for Life, or Years, may drown by mutual Agreement.

So that any Form of Words, whereby such an Intent and Agreement of the Parties may appear, will be sufficient to work a Surrender; and the Law will direct the Operation and Construction of the Words accordingly, without the precise or formal Mention of the Word *Surrender* in the Conveyance; but then the Party, who would have the Benefit of such Conveyance to work as a Surrender, must plead it by the very Words *Sursum reddidit*, because that only can properly describe the Operation of the Conveyance as a Surrender; and whoever would take Advantage of a Thing in Pleading, must determine it to that particular Species of Operation whereof he would so have the Advantage; therefore if Lessee for Life, or Years, say to the Lessor that his Will is, that the Lessor shall enter into his Lands, and shall have the same, or is content that the Lessor shall have again the Land, and by Virtue thereof the Lessor enters into the Land, this is a sufficient Surrender; so if the Lessee say to him in the Reversion or Remainder, that he will occupy the Lands no longer, or that I surrender to you such Lands, &c. and he in the Reversion or Remainder thereupon enters into the Land, these were sufficient and effectual Surrenders at the Common Law; but if such Words had been spoken privately by the Lessee, or by a Stranger, and not by way of Address to him in Reversion or Remainder, this could not amount to a Surrender, because there could appear no mutual Agreement of the Parties for that Purpose.

So if Lessee for Years Remise, Release, Discharge, and for ever Quit-claim to his Lessor all his Right, Title and Estate in or to such Lands; this has been held to amount to a Surrender, because a Lease for Years consisting only in Contract, these Words are sufficient to dissolve that Contract, and let in the Reversioner; but such Words, in Case of a Lease for Life, would not amount to a Surrender, because that being an Estate created by Livery, must be defeated by Act of equal Notoriety, or express Words of Conveyance of the Freehold, which the before-mentioned Words are not, but rather applicable to a Thing which lies only in Grant; but of that *Quere*; for it hath been adjudged, that if Tenant for Life Grant, Surrender and Release to him in the Reversion, that this was sufficient, and so would have been tho' there had not been the Word *Surrender*, because the Word *Grant* would operate as a Surrender after the Conveyance executed; and that such Surrender, tho' without Notice or express Agreement of the Surrenderee, would be good till actual Disageement thereto.

But now by the Statute of Frauds and Perjuries it is provided, That no Leases, Estates or Interests, either of Freehold or Terms for Years, shall be surrendered, unless it be by Deed, or Note in Writing, signed by the Party who makes such Surrender, or some other lawfully au-

Co. Lit. 337. b.  
2 Vent. 206.  
3 Mod. 298.  
Perk. Sect.  
584.

Perk. Sect.  
607, 608.  
Cro. Eliz.  
156, 488.  
1 Leon. 179,  
280.  
2 Leon. 50.  
2 Rol. Abr.  
497.  
2 Vent. 206.  
3 Mod. 301.

Dyer 251. pl.  
91, 93.  
Cro. Eliz. 2.  
Cro. Jac. 169.  
1 Lev. 144.  
1 Keb. 807.

3 Mod. 321.  
2 Vent. 206.  
Show Par Ca.  
150.  
3 Lev. 284.  
Thompson  
ver. Lea. b.

thorized thereunto, or by Act and Operation of Law; so as Surrenders in Law, or implied Surrenders, remain as they did at Common Law, if the Lease, which is to draw on such Surrender, be in Writing pursuant to that Statute.

## 2. Upon what Estate such Surrender may operate.

*Cro. Eliz.* 173.  
1 *Leon.* 303.  
*Owen* 97.  
*Perry* ver.  
*Allen.*  
1 *Leon.* 323.

*Popb.* 30.  
*Co. Lit.* 218. b.  
*Cro. Eliz.* 302.  
2 *Vent.* 326.

It appears by the Definition before given of a Surrender, that the same is a Yielding up of an Estate for Life, or Years, to him in the immediate Reversion or Remainder; but here a Question may arise, what Estate in the Reversion or Remainder will be susceptible of such Surrender; for if the Estate in Reversion or Remainder be but for Years, it seems a great Doubt in the Books, whether a Lease for Years in Possession may be surrendered, so as to merge and drown therein; and it is commonly said, that Years cannot drown in Years; therefore where Lessee for twenty Years made a Lease for ten Years, and the Lessee for ten Years surrendered to his Lessor, this has been held to be no Surrender, so as to merge the ten Years in Possession, but only to transfer them by way of Assignment or Accession to the Number of Years then left in the Lessor; because they held, that Years could not drown in Years; but the contrary to this has been held with some Clearness, and seems to be now settled, that such Surrender is good, and shall merge the first Term; wherein they agreed, 1. That if the Term in Reversion were greater than the Term in Possession, that the greater would merge the Lessor, as ten Years may be surrendered and merge in twelve or fourteen Years. 2. It was held by *Gawdy*, *Fenner* and *Popham*, that tho' the Reversion were for a less Number of Years, yet the Surrender would be good, and the first Term drowned; as if one were Lessee for twenty Years, and the Reversion expectant thereupon were granted to one for a Year, who granted it over to the Lessee for twenty Years, that this would work a Surrender of the twenty Years Term, as if he had taken a new Lease for a Year of his Lessor; for the Reversionary Interest, coming to the Possession, drowns it, and the Number of Years is not material; for as he may surrender who hath the Reversion in Fee, so he may to him who hath the Reversion for any lesser Term; and therefore *Popham* held, that where Lessee for twenty Years makes a Lease for ten Years, and the Lessee for ten Years surrenders to his Lessor, viz. the Lessee for twenty Years, that this is good, and the Lessor shall have so many of the Years as were then to come of his former Term of twenty Years, that is, as it seems, so many Years as were to come of his Reversion shall now be changed into Possession; and he held further, that if such Lessee for twenty Years had made such Lease for ten Years, and then granted over the Reversion for ten Years only, viz. no longer than the Lease for ten Years was to continue, and such Lessee for ten Years had attorned, then the Grantee of the Reversion should have the Rent and Services, and the Grantor the Residue of the twenty Years; and that the Lessee for ten Years might surrender to the Grantee of the Reversion for ten Years, and he thereby would have in Possession so many Years as were then to come of his Reversion; and if he had a lesser Term in the Reversion than the Lessee himself had in the Possession, it should go to the Benefit of the first Termor for twenty Years, who was his Grantor; for the Term in Possession is quite gone and drowned in the Reversion, to the Benefit of those who have the Reversion thereupon, having Regard to their Estate in the Reversion, and not otherwise; to all which *Fenner* agreed; and it appears by the Case of *Cook* and *Fountain* *supra*, to be taken for clear Law, that a Lease for Ninety-nine Years might be drowned by his Acceptance of a Lease from the Reversioner even for one Year.

But now, whether a Lease for Years in Possession may be surrendered, so as to be merged in a Lease in Remainder, be the Term in Remainder greater or lesser than the Term in Possession, seems to be no where settled; indeed my Lord *Coke* says, that if there be *A.* Lessee for twenty Years, Remainder to *B.* for ten Years, and *B.* release all his Right to *A.* that here *A.* hath an Estate for thirty Years, for one Chattel cannot drown in another, and Years cannot be consumed in Years; but whether if *A.* had granted and surrendered his Estate and Term to *B.* it would have been merged, does not appear; and *Perkins* holds, that if a Lease for Life be of Lands, the Remainder to a Stranger for Years, and the Lessee for Life surrenders his Estate to him in the Remainder for Years, it cannot take Effect as a Surrender, because an Estate for Life cannot drown in an Estate for Years; which Reason seems to prove, that an Estate for Life cannot be surrendered to or merge in a Reversion, if it be only for Years; *ideo Quære.*

### 3. Of Surrenders in Law, or implied Surrenders: And herein,

#### 1. With Regard to Leases in Possession.

As to the Surrender in Law of Leases in Possession, this is wrought by Acceptance of a new Lease from the Reversioner, either to begin presently, or at any Distance of Time, during the Continuance of the first Lease; and the Reason such Acceptance of a new Lease amounts to a Determination and Surrender of the first is, because otherwise the Lessee would not have the full Advantage he hath contracted for by Acceptance of the second Lease, if the first should stand in the way, and consume any of these Years comprized in the second Lease; for which Reason, and to enable the Lessor to perfect and make good his second Contract, the Lessee must be supposed to wave and relinquish all Benefit of the first; therefore if Lessee for thirty Years takes a new Lease, tho' but for three Years, and to begin ten Years hence, yet this is presently a Surrender and a Determination of the whole first Term of thirty Years, because thereby he admits the Lessor's Power to make such Lease, which, if the first should stand in the Way, would be void, because the Lessee had the Lands already for a Term of a much larger Duration; and tho' such second Lease be made to him *in futuro*; and at Common Law, tho' it were even by Parol, yet it would be a present Surrender of the first Lease, because the Admittance of the Lessor's Power to make such a Lease, which is the Cause of the Surrender, is then at the Time of the Contract made for such second Lease, and therefore the Operation of it, to cause a Surrender of the first, must be then presently too, or not at all; and it cannot be a Surrender of the last twenty Years, and remain good for the first ten Years, because that would make a Fraction and Severance of the Lease, which at first was entire, and passed by one intire Contract, and therefore cannot either by any Surrender in Law, or even by any express Surrender, be curtailed and divided; the Consequence of which is, that such Acceptance of a new Lease being a present Surrender of the first, the Lessor may enter and take the Profits for the whole thirty Years, saving only the three Years comprized in the second Lease. Another Reason perhaps of such Surrender may be, because the Lessor, having already made a Lease for thirty Years, cannot, during the Continuance of that Term, make any other Lease to transfer the Possession; but yet having the Reversion expectant upon that Term, he may transfer that for any lesser Time, or to begin at any Distance he thinks fit; and then if the second Lease be by Deed, it may as well be supposed to carry

Bro. Tit.  
Leases 14.  
Dyer 93. pl.  
28.  
Perk. Sect.  
617.  
3 Leon. 244.  
5 Co. 11.  
Cro. Eliz. 521.  
605.  
2 Rol. Abr.  
495.

carry the Reversion, the Union whereof with the Possession, tho' for never so short a Time, will, as has already appeared, merge the Possession; and tho' the second Lease, which may be supposed to carry the Reversionary Interest, is not to commence till ten Years hence, yet the first Lessee has the Interest and Right thereof in him immediately, and then Possession and Reversion being inconsistent in one Person at one and the same Time, the one must merge and drown the other.

*Dyer* 140.  
2 *Roll. Abr.*  
495.

A Husband, seized of Lands, made a Lease for ninety Years by Indenture, and after enfeoffed certain Persons, and took an Estate to him and his Wife in Tail, and after the Termor took a new Lease by Parol of the Husband for eighteen Years only, to begin presently; then the Husband died, and his Wife evicted the Termor; and it was held she lawfully might, for the first Lease was surrendered and drowned in Law by the Acceptance of the second, and then the Wife's Estate, by Survivorship, came in Paramount the second Lease; and tho' the second Lease, which was the Cause of the Surrender of the first, was voidable by the Wife after her Husband's Death, yet the Surrender of the first, wrought by the Acceptance thereof, was absolute and present.

1 *Bendl. pi.*  
59.  
1 *And.* 32.

One let Lands to *A.* for Life and twenty Years over, and after let the same Lands to *B.* for forty Years, to commence after the Death of *A.* and the End of the said twenty Years; then *B.* intermarries with *A.* and *A.* dies; and *B.* the Husband, hath the Term for twenty Years, yet his Term of forty Years is not surrendered by it, because that was not begun, but was a future *Interesse Termini*, to begin wholly after the first Lease ended, so there was no Union at all of the Terms.

3 *Bulf.* 203. 4.  
1 *Roll. Rep.*  
387.  
2 *Roll. Abr.*  
497, 498.  
2 *Mod.* 176

If Lessee for Years makes a Lease to his Lessor for all but a Day, this is clearly no Surrender of his Lease, because the Day disjoins the Union and prevents the Merger, which would have followed if the Lease had been for the whole Term; for then the Lessor would have had the whole Estate entire in him, as he had before he made the Lease, and consequently the Lease would be merged and drown in the Reversion.

3 *Leon.* 30.

Lessee for Twenty-one Years took a Lease of the same Lands for forty Years, to begin immediately after the Death of *J. S.* it was held in this Case, that this was not any present Surrender of the first Term, because *J. S.* might wholly outlive that Term, and then there would be no Union to work a Surrender; and it being *in Equilibrio* in the mean Time, whether he will survive it or not, the first Term shall not be hurt till that Contingency happens, for if *J. S.* die within the first Term, then what remains of it is surrendered and gone by the taking Place of the second.

*Wheat.* 94, 139.  
*Lord Treasurer and Barton.*

A Man makes a Lease for one Hundred Years, the Lessee makes a Lease for twenty Years, rendering Rent, with Clause of Re-entry, and after grants his Reversion to the first Lessor, he shall neither have the Rent nor Re-entry, because the Reversion, to which it was annexed, is extinct and gone by way of Surrender; otherwise it would be, if one make a Lease for Years, rendering Rent, and after grants the Reversion for Life, or Years, to which an Attornment is had, and after such Grantee surrenders; yet the Grantor shall have again the Rent, because it was once a Rent incident to the Reversion, which by the Surrender is restored whole again as it was before.

*Flow.* 107.  
*Co. Lit.* 218. b.

If one makes a Lease for forty Years, and the Lessee takes a new Lease for twenty Years, upon Condition, that if he does not do such an Act, that the Lease shall be void; and after he breaks the Condition, whereby the second Lease is avoided, yet the Surrender of the first continues, for that was absolute by Acceptance of the second, and the Condition was only annexed to the second Lease; so if the Lessor had granted the Reversion to the Lessee upon Condition, and after the Condition were broken, yet the Surrender of the Term would continue, because the Condition was annexed only to the Grant of the Reversion

sion, and moved from the Lessor as his Terms of the Lessee's Enjoyment of such Grant; but the Surrender, which is wrought by Acceptance of such Grant, and moves from the Lessee himself, was absolute; and the Diversity is, when the Lessor grants the Reversion to the Lessee upon Condition, and when the Lessee grants or surrenders his Estate to the Lessor upon Condition; for a Condition annexed to a Surrender may revert the particular Estate, because the Surrender itself is conditional.

So if such second Lease were by Baron seised in Right of his Wife, and after the Baron died, and the Feme avoided the second Lease, yet the Surrender of the first, by Acceptance thereof, is absolute.

Lessee for Life made a Lease for Years, rendering Rent, and after surrenders to the Lessor upon Condition, then the Lessee for Years takes a new Lease for Years of the Lessor, and after the Lessee for Life performs the Condition, and evicts the Lessee for Years, who re-enters, and the Lessee for Life brings Debt for the first Rent reserved; and it was ruled, that it was not maintainable; for the Lease out of which it was reserved is determined and gone; for tho' the Surrender of the Tenant for Life, which made the Lessee for Years immediate to the first Lessor, and so enabled him to make such Surrender, was conditional, yet the defeating of the Estate for Life, by Performance of the Condition, cannot defeat the Estate of the Lessee for Years, which was absolute, and well made, and then the Rent reserved thereon is gone likewise.

If one be Lessee for Life or Years, and take a new Lease of the same Lands, tho' such second Lease be void for any Defect in the making or Execution of it, as if it were for Life, to begin at a future, &c. yet it is a Surrender of the first Lease; for the Acceptance of the Indenture in the Contracting and Agreement to have a new Lease, makes a Surrender of the first Lease before the Livery is made; and therefore tho' that be void, yet it cannot set up the first Lease again, which was before surrendered; and such Contract for a new Lease is a good Evidence to a Jury of a Surrender.

But if such second Lease were void for Want of Power in the Lessor to make it, then notwithstanding such Admittance of the Lessee the first Lease would not be surrendered; therefore where one made a Lease for forty-one Years by Indenture 14 Nov. 1616. to A. to commence from the *Annunciation* which should be Anno 1619. and after, the same Year, by another Indenture bearing Date 3 Dec. made a Lease to B. for ninety-nine Years, to commence from the *Annunciation* then last past, by Virtue whereof B. entered and was possessed, and then the Lessor by another Indenture 16 Nov. 1617. made another Lease of the same Lands to A. to commence from 17 Nov. 1619. for forty-one Years, who accepted thereof, and after the Commencement of his Term A. entered and was possessed, and made his Will, and his Executors let to the Plaintiff, &c. and the only Question was, if the Acceptance of the second Lease by A. had determined, discharged, or extinguished the first Lease, so as to let in the intermediate Lease to B. and it was adjudged, that it had not; because by the Lease to B. for ninety-nine Years, and his Entry, the Lessor had but a Reversion, and could not by his Contract after with A. give any Interest to A. and the first Lease to A. was good as a future *Interesse Termini*, to take Effect in Possession when the Time came, and thereby *pro tanto* to defeat the Lease for ninety-nine Years to B. and if it had not been for the Lease to B. there had been no Question but that the first Lease to A. had been by such Acceptance of the second Lease surrendered and gone; but that intermediate Lease, being for so great a Number of Years, disables him, during that Time, to contract for any lesser Number of Years, as the Lease for forty-one Years was.

If A. lets to B. for ten Years, who lets to C. for five Years, C. cannot surrender to A. by reason of the intermediate Interest of B. but in such

Dyer 140.  
Pl. 43.  
2 Rol. Abr  
495.

Cro. Eliz. 264:  
Brewster and  
Sir Thomas  
Parrot.

Cro. Eliz. 873.  
Moor 636.  
1 Keb. 285.

Hutton 104.  
Watt and  
Maidwell.

Perk. Sect. 604.



Case *B.* may surrender to *A.* and after so many Years *C.* likewise, because then his Lease for five Years is become immediate to the Reversion of *A.*

## 2. With Regard to Leases in futuro.

*Co. Lit.* 358.  
*5 Co.* 11.  
*10 Co.* 53.  
*Cro. Eliz.* 522,  
 605.  
*Perb.* 9.  
*2 Rol. Abr.*  
 496.

Surrenders in Law of Leases *in futuro*, or future Interests ; and these can no otherwise be surrendered ; for an express Surrender of such future Lease or Interest is not good ; therefore if one makes a Lease for Years, to begin at *Michaelmas* next, this future Interest cannot by any express Surrender be merged, because there is no Reversion wherein it may drown ; for till the Entry the Lessee hath no Possession, and by Consequence there can be no Reversion wherein that Possession may drown ; but yet if such Lessee before *Michaelmas* take a new Lease for Years, either to begin presently, or at *Michaelmas*, this is a Surrender in Law of the first Lease presently ; because thereby he presently admits the Lessor's Power to make such Lease, which if the first Lease should stand he could not do ; and since such Lessee hath contracted for a new Interest, inconsistent with the first, his Acceptance of such new Interest waves and dissolves the first, because the Contract whereby it was made was intire, and therefore the whole first Lease is surrendered presently.

*2 Rol. Abr.*  
 494, 495.

Lessee for Years, to begin presently, cannot till Entry or Waiver of the Possession by the Lessor merge or drown the same by any express Surrender, because till Entry there is no Reversion wherein the Possession may drown ; but if the Lessee had entered, and assigned his Estate to another, such Assignee before Entry might have surrendered his Estate to the Lessor ; because by the Entry of the Lessee the Possession was severed and divided from the Reversion, which Possession, being by the Assignment transferred to the Assignee, may without any other Entry be surrendered, and drown in the Reversion.

## 3. With Regard to the Thing itself so surrendered.

*Cro. Eliz.* 875.  
*Minor* 636.  
*Cro. Jac.* 84,  
 177.  
*2 Rol. Abr.*  
 496.

As to the Nature of the Thing surrendered, herein we must observe, that the Acceptance of a new Lease, which will work a Surrender of the first, ought to be of something of the same Nature and Kind with the first ; otherwise there can be no Surrender of the first ; because there is no Inconsistency but that both may stand together ; therefore if Lessee for Years accepts a Grant of a Rent, Common, Estovers, Hербage, or the like, for Life or Years, out of the same, or if such Lessee for Years accepts of a Lease of the same Lands at Will only, all these amount to a Surrender and Determination of the first Lease ; because they admit the Lessor's Power to deal or contract for the Lands, or a certain Charge out of it, which being inconsistent with the Interest of the Lessee under the first Lease, dissolve and destroy it.

*Hutt* 105.  
*Cro. Jac.* 84.

So where Lessee for sixty Years of an Advowson did, after the Church became void, take a Presentation to himself of the Lessor, and was admitted, instituted, and inducted, this was adjudged to be a Surrender of his Lease ; for by the Acceptation of the Parsonage he thereby gives a new Interest for Life in that which was the chief Fruit of his Lease, and consequently such Interest, being inconsistent with his Interest under the first Lease, amounts to a Determination and Surrender thereof.

*Cro. Jac.* 77.  
*2 Rol. Abr.*  
 496.  
*1 R. Rep* 83.  
*Godb* 419, 425. *2 Rol. Rep.* 357, 361.

But if Lessee for Years of a Park accepts a Grant of the Office of Park-keeper of the same Park for Life or Years, this is said to have been adjudged no Surrender of the Lease for Years ; because such Office is colla-



teral to the Land, and not any ways issuing out of it; and yet *Coke* and *Dodderidge* thought, that whether he had the Office of Park-keeper first, or the Lease for Years of the Park itself first, that the Accession of the other to it would merge and drown the first, for the Inconsistency that a Man should be Park-keeper to himself; *ideo Quære.*

So where one made a Lease for ninety-nine Years of a Manor, and after made the Lessee Bailiff of the same Manor for twenty-one Years, this was adjudged to be no Surrender of his first Lease: 1. Because the Bailiff, as such, had no Interest in the Lands, but an Authority only. 2. Because the Bailiwick was no Part of the Thing demised, but of another Nature; for the Bailiff, as such, is a meer Servant, and all he doth is for the Benefit, and in the Name of his Master: So if such Lessee of a Manor were made Surveyor or Steward for Life, this would not determine his Lease; because in these Capacities he is only a Servant, and acts in the Name of his Master, and therefore no Inconsistency therein with his having a Lease of the Manor.

But where Lessee for Years of a House or Castle accepted a Grant of the Custody thereof for Life or Years, this was adjudged a Surrender thereof; because the Custody is of the same Thing which was leased, and a Man cannot be Keeper to himself.

If Lessee for Years of Lands accepts a new Lease by Indenture of Part of the same Lands, this is a Surrender for that Part only, and not for the Whole; because there is no Inconsistency between the two Leases for any more than that Part only which is so doubly leased; and tho' a Contract for Years cannot be so divided or severed, as to be avoided for Part of the Years, and to subsist for the Residue, either by Act of the Party, or Act in Law, yet the Law itself may be divided or severed, and he may surrender one or two Acres, either expressly, or by Act in Law, and yet the Lease for the Residue stand good and untouched; because here the Contract for the Residue remains intire; whereas in the other Case, the Contract for the Whole would be divided, which the Law will not allow.

### (T) Leases, when determined by cancelling the Deed.

AS to Leases for Years, owing their Existence to the Deed or Indenture whereby they are created, so that the Cancelling or Destruction thereof shall destroy and avoid the Lease, a Diversity seems to be taken in the Books between such Things as lie in Livery, and may be executed by actual Entry, and such Things as lie only in Grant, whereof no actual or manual Occupation can be had; therefore if one had made a Lease for Years, at Common Law, of Lands or Houses by Deed or Indenture, and rear, raise, or cancel it, yet this would not destroy the Continuance of the Lease itself; because such Lease of Lands or Houses lying in Manurance and actual Occupation might at first have been made by Parol only, without any Deed or Indenture; and therefore such Deed or Indenture being not of the essence of the Lease, the Destruction or Cancelling thereof shall not defeat or destroy the Lease or Interest of the Lessee; because his actual Entry into the Land, and Continuance of the visible Possession and Occupation thereof, gives sufficient Sanction and Notoriety to the Contract, as to the Interest of the Lessee in the Lands and Houses themselves, tho' thereby the Deed itself, and all Co-

venants,

*Cro. Jac.* 84.  
177.  
*Nov* 12.  
2 *Rel. Abr.*  
496.

*Dyer* 200.  
pl. 62  
*Cro. Jac.* 177  
2 *Rel. Rep.*  
357.  
2 *Rel. Abr.*  
498  
*Fijb* versus  
*Campion.*

*Bro. Tit.*  
*Lease* 6, 16  
*Cro. Car.* 399.  
1 *Fon.* 355.  
*Moor* 35  
pl. 116.

venants, which had their Existence only by the Deed, are defeated and avoided ; but if the King made a Lease of such Lands or Houses by Letters Patent, which are Matter of Record, if the Letters Patent and Inrollment are destroyed or cancelled, the Lease itself falls to the Ground ; because these Letters Patent and Inrollment, which were of the Essence of the Creation and Continuance of the Lease, are destroyed and lost : So if a common Person had made a Lease for Years, or a Grant for Years, of 'Tithe, Common, Advowsons, or other Things which lay meerly in Grant, in such Cases the Cancelling or Destruction of the Deed, whereby they were created and subsisted, must necessarily destroy the Interest of the Grantee likewise ; because such Deed was of the very Essence of the Deed or Grant, without which it could not have been made at first, nor can subsist afterwards, such Deed being the only Evidence of the Contract, which could not be executed by any actual Possession or manual Occupation ; but now, since the Statute of Frauds and Perjuries, which makes all Leases for above three Years to have only the Force and Effect of Leases at Will, unless they be in Writing, and signed by the Party, &c. the Deed or Writing whereby such Lease is made seems to be of the same Essence of the Lease itself ; and therefore the Cancelling or Destruction of that seems to destroy and avoid the Lease itself, because it destroys all Evidence allowed by Law for the Support thereof ; tho' in such Case, Chancery frequently sets up the Lease again, or decrees the Party to execute a new one for the Residue of the Term, which is not against the Prohibition of the Act, because there was once a good and effectual Lease made pursuant to the Statute.

29 Car. 2.  
cap. 3.

And tho' that Statute excepts Leases not exceeding the Term of three Years, yet not absolutely even those ; for it goes on, ' not exceeding the ' Term of three Years from the making thereof, whereupon the Rent ' reserved to the Landlord during such Term shall amount unto two third ' Parts at least of the full improved Value of the Thing demised, and ' that no Leases, Estates, or Interests, either of Freehold or Terms for ' Years, or any uncertain Interest, not being Copyhold or customary ' Interest of, in, to, or out of any Messuages, Manors, Lands, &c. shall ' be assigned, granted, or surrendered, unless it be by Deed or Note in ' Writing, signed by the Party so assigning, granting, or surrendering the ' same, or their Agents thereunto lawfully authorised by Writing, or by ' Act and Operation of Law.'

# Legacies.

(A) What a Legacy properly is.

(B) Where a Legacy shall be said to be well given : And herein,

1. What Words make a good Bequest.
2. What shall be sufficient Description of the Person to take.
3. What shall be sufficient Description of the Thing given, and what shall be said to be bequeathed.

(C) What shall be an Ademption or Extinguishment of a Legacy.

(D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

(E) Of Legacies vested or lapsed : And herein,

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Life-time of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.
2. Where a Legacy shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.

(F) Of Conditional Legacies, and how far the Condition must be complied with, otherwise the Legacy will be forfeited.

(G) Of Specific and Pecuniary Legacies, and the Difference between them.

(H) Of abating, refunding, and giving Security for that Purpose.

(I) Of Residuary Legacies and Legatees.

(K) Of the Payment of Legacies : And herein,

1. What shall be a good Payment, and to whom to be made.
2. At what Time a Legacy is to be paid.
3. Where the Legatee shall have Interest, and Maintenance in the mean Time.

(L) Of the Executor's Assent to a Legacy.

(M) Legacies, in what Court, and how properly recoverable.

## (A) What a Legacy properly is.

*Swinb.* 17.  
*Godolph.* 271.  
(a) The Word  
Devise is spe-  
cially appro-  
priated to a

**A** (a) Legacy is defined a Gift or Bequest of a (b) particular Thing by Testament, in which an Executor is (c) named, or by a Writing in Nature thereof, called a Codicil, and in which no Executor is named.

Gift of Lands, the Word *Legacy* to a Gift of Chattels; tho' both are used promiscuously. *Godolph.* 271. (b) For if a Man dispose or transfer his whole Right or Estate upon another, this, according to the Civil Law, is called *Hereditas*, and he to whom it is transferred is termed *Heres*; but by our Law he only is called *Heir*, who succeeds to Lands and Tenements. *Godolph.* 271-2. (c) But tho' a Writing, in which a Person expresses his Mind to grant such and such Things after his Death, cannot be called a Testament, unless an Executor is named, yet it is of Force and Effect sufficient to pass what he therein declares, and Administration shall be granted, with the said Writing or Codicil annexed, to the next of Kin, and such Administrator is obliged to observe the Directions of such Writing, and pay the Legacies as far as he has Assets. *Vide Tit. Executors and Administrators.*

*Swinb.* 22.  
*Preced. Cham.*  
269, 300.

A *Donatio Causa Mortis* is a Gift *in presenti*, to take Effect *in futuro* after the Party's Death, and is in Nature of a Legacy, and waits upon the Death of the Testator, and is ambulatory and open till his Death, and may therefore be revoked, as a Will may, but has no Dependence on the Will; and therefore by a general Revocation of all former Wills seems not to be revoked, without added, and all Gifts, Legacies, &c. But if one just before his Death give any Money, or other Goods, to another absolutely, this is not a *Donatio Causa Mortis*, because not revocable; otherwise if he had said, *This shall be yours, if I die*, or any Thing to that Purpose.

*Cro. Jac.*  
345-6.  
2 *Bull.* 207.  
*Godb.* 246.  
but *vide* now  
the Statute  
29 Car. 2. and *Tit. Wills and Testaments.*

If one by his Will in Writing devise a certain Legacy in Money, and afterwards says to his Executor, *I have by my Will given such particular Legacies, I would have you increase the same to such a Sum*, this by the Civil Law is termed *Commissum Fidei*, and a good Legacy.

2 *Leon.* 119.

If a Man covenants with *J. S.* to pay him 20*l.* and afterwards by Will he devises to him 20*l.* in Discharge of the said Covenant, this is not a Legacy suable in the Spiritual Court, but remains still a Debt, recoverable at Common Law.

2 *Leon.* 119.  
*Davies* and  
*Percie's Case*;  
& *vide infra*  
Letter (M).

But if *A.* covenants with *J. S.* that he will pay 20*l.* a-piece to *B. C.* and *D.* and afterwards he devises 20*l.* a-piece to *B. C.* and *D.* in Discharge of this Covenant, these are good Legacies, and recoverable in the Spiritual Court, the Covenant in this Case being with a Stranger, and therefore *B. C.* and *D.* have no Remedy, but by applying as Legatees.

## (B) Where a Legacy shall be said to be Well given : And herein,

## 1. What Words create a good Bequest.

*Godolph.* 281.  
2 *Vern.* 467.

**H**ERE we must observe, that altho' in Grants and Deeds of Gift the Law requires a set Form of Words, yet in last Wills and Testaments, which are presumed to be made at the Time when the Testator is *inops Concilii*, the Law regards chiefly the Intention of the Testator, and

and therefore any Words, which manifest his Intention to create or give a Legacy, will be sufficient for that Purpose.

As if a Man by his Will says, *I do give, bequeath, devise, order or appoint to be paid, given or delivered; or My Will, Pleasure or Desire is, that he shall have or receive, or keep or retain; or I dispose, or assign, or leave such a Thing to such a one; or Let such a Person have such a Thing; these, or the like Words, are sufficient to create a good Bequest.* Godolph. 281.

So if the Testator says, *I depute such a Thing to A. B. or I assign such a Thing to C. D.* these are good Bequests or Legacies. Godolph. 282. Where it is said, that a

Legacy may be given by Signs, Becks, or Nods, by the Head, Hands, or Eyes, or by shewing a pleased or displeased Countenance, or by other Motion of the Body; because the Law regards more the Meaning and Intention, than the Words of the Testator. Godolph. 282-3.

So if a Man by Will gives 100 l. besides the Cloak, &c. this is a good Bequest of the Cloak, &c. as well as of the 100 l. Godolph. 282.

So if a Man says, *Out of the 100 l. which I bequeathed A. I give B. 50 l.* this is a good Bequest of the 50 l. to B. because only a false Demonstration in an immaterial Circumstance, which shall not vitiate the Legacy; but in this Case A. takes nothing; for Words of Diminution shall never be construed to give a Legacy by Implication. Godolph. 282.

But if the Demonstration be totally false, as if the Testator says, *I bequeath to A. the 100 l. which I have in my Chest,* and there is not any Money in the Chest, the Legacy is void. Godolph. 282.

If the Testator says thus, *If my Son A. marries B. let not my Executor give him 100 l.* these Words, on A.'s not marrying B. are said to be sufficient to give him the 100 l. Godolph. 283.

If a Legacy be given by the Testator to the Son of one who is indebted to him, and the Testator adds these Words, *I should or would leave him more, if his Father had paid me what he owes me,* it is held, that if afterwards that Son happens to be his Father's Executor, he is by these Words freed from that Debt, which his Father owed the Testator. Godolph. 284.

If there be a Devise of a Personal Thing to A. for Life, directing him at his Death to give it to B. this amounts to a Devise of the Use of it only to A. for Life, Remainder to B. 2 Vern. 467.

A. devises his Land to B. in Fee, paying 400 l. whereof 200 l. to be at the Disposal of his Wife, in and by her last Will and Testament, to whom she shall think fit to give the same; these Words vest an absolute Interest in the Wife, so that tho' she dies intestate, her Administrator shall have the 200 l. 2 Vern. 181. Robinson ver. Dufgale; &c. vide Hob. 9.

If a Man gives Legacies to his Children, to be paid at Twenty-one or Marriage, and if any of them die before Twenty-one or Marriage, the Legacy of such Child to be disposed to two or more of the Children then living, in such Manner as his Wife (whom he made Executrix) should think fit, and one of the Children dies under Age, and unmarried, the Mother (a) may appoint such Legacy to any one of the other Children, and it will be good. 2 Vern. 513. Thomas and Thomas.

(a) But if an Executor has a general Power to distribute a Sum of Money amongst Children at Discretion, and he makes an unreasonable or indiscreet Disposition, it will be controuled in a Court of Equity. 2 Vern. 513. — As where a Man having two Daughters, one by a former Wife, and another by his second Wife, devised his Estate to his Wife, to be distributed between his Daughters as his Wife should think fit, and she having given 1000 l. to her own Daughter, and but 100 l. to the other, the Court decreed an equal Distribution. 1 Vern. 355. Cragrave and Perrott; & vide 2 Vern. 421. S P.

If a Man devise 40 l. to be paid *7. S.* by him to be disposed of in such Manner as, the Testator should, by a private Note, acquaint him with, and dies without such Appointment, this is said to be a good Bequest to the Party. 2 Chan. Ca. 198. Martin and Clerk.

But it has been held, if A. gives all his Goods, Plate, and Furniture at E. to A. his Wife for Life, and declares that he will dispose thereof after the Death of A. by a Codicil, and makes A. Residuary Legatee of all Pasch. 1730. Davers and Gibbs, decreed.

all other his Personal Estate, then makes two Codicils, but takes no Notice of the Goods, Plate and Furniture at *F.* and makes his Wife one of his Executors, that the Wife should not have the absolute Interest in the Goods, Plate and Furniture at *F.* but that it should be distributed after her Death as an indisposed Interest, and she to have her Widow's Part thereof only.

2 Vern. 155.  
*Wareham and Brown.*

If one devise his Land for Payment of his Debts and Legacies, and devises 400*l.* a-piece to two of his Sisters, and to his third as much as his Executor shall think fit; the third shall have 400*l.* also, and be made equal to her other Sisters, if the Estate will hold out.

## 2. What Shall be a sufficient Description of the Person to take.

*Dyer* 177.  
*Co. Lit.* 112. b.  
*Preced. Chan.*  
470. But in  
2 Vern. 105.  
where a Man  
devised 20*l.*  
a-piece to all  
the Children

It seems agreed, that if a Man devises Legacies to all his Children and Grand-children, that this extends only to those who were in *esse* at the Time when the Will was made, for then the Will speaks, and none born after are to be let in, unless there had been future Words in the Will, *to all his Children or Grand-children which should be born or be living at his Death.*

of his Sister; it is there said to have been decreed, that a Child born after the Will, and before the Death of the Testator, should take, the Word *Children* comprehending all.

2 Vern. 710.  
*Musgrave*  
ver. *Parry.*

If a Man devise the Surplus of his Estate to his Grand-children living at his Death, Grand-children born after his Decease shall not take; for if he had so intended it, he would not have restrained it to Children living at his Death.

2 Vern. 405.  
*Weid and Bradbury.*

If one devise the Surplus of his Personal Estate to the Children of *A.* and *B.* and neither of them has a Child at the Time of making the Will, or the Death of the Testator, the Devise is executory, and shall extend to any Children that *A.* and *B.* shall afterwards have; and the Children of each shall take *per Capita*, and not *per Stirpes*, they claiming in their own Right, and not as representing their Parents.

2 Vern. 106.

If *A.* devise 1500*l.* in Trust for the Children of *B.* and *B.* has only one Child, and several Grand-children, the Child only shall take, and the Grand-children shall not come in for Shares; but if *B.* had not a Child living, the Grand-children might have taken by the Name of Children.

2 Vern. 431.  
*Necil and Nevil* de-  
creed.

If a Legacy of 500*l.* is given to the eldest Son of *A.* to be begotten, to place him out Apprentice, and *A.* has a Son born after the Testator's Death, the Legacy shall be paid him tho' not born in the Testator's Life, and tho' it was given to him for a particular Purpose.

2 Chan Rep 1.  
*Bretton* ver.  
*Bretton.*

If Money is devised to younger Children, where there are divers Daughters, and a Son, who by Birth is a younger Child, but is Heir at Law to a considerable Estate of Inheritance, he shall not be considered as a younger Child, so as to take by the Devise.

1 Vern. 35.  
*Dancers* ver.  
*Earl of Clarendon.*

A Man, by Will, devised all his Goods in such a House to *G.* for Life, and after his Decease to the Heir of *J. S.* and the Point was, whether he that was Heir of *J. S.* should take these Goods as Devisee, and the said Goods to go to his Executors, altho' such Heir die in the Life-time of *G.* or whether he who was Heir to *J. S.* at the Time of *G.*'s Death should have them; and tho' it was urged, that those Goods were only the Furniture of the Capital House; yet my Lord Chancellor was of Opinion, that they absolutely vest in him that was Heir of *J. S.* at the Time of his Death, and decreed accordingly.

2 Vern. 546.

The Duke of Bolton, by Will, devised in these Words, *viz. Item, I give and bequeath unto such of my Servants, as shall be living with me*

at the Time of my Death, one Year's Wages; per Lord Keeper, Stewards of Courts, and such who are not obliged to spend their whole Time with their Master, but may also serve any other Master, are not Servants within the Intention of the Will; but I will not narrow it to such Servants only that lived in the Testator's House, or had Diet from him.

A. gave Legacies of 15 *l.* a-piece to each of his Relations of his Father and Mother's Side, and gave the Surplus of his Personal Estate to B. and made C. his Executor; the Executor paid 15 *l.* to the Testator's Cousin German, and 15 *l.* a-piece to her four Children; and the Court allowed the Payment to the Children, and would not restrain the Devise to the Relations within the Statute of Distributions. 2 Vern. 351.  
Jones and  
Beale.

But notwithstanding this Case, it seems the established Doctrine of the Court of Chancery, to make the Statute of Distributions the Rule and Measure of such general Devise; as where A. devised all his Real and Personal Estate for the Use of his Relations, without specifying any in Particular, or using any other Words; and it was agreed to be the Rule of the Court, in the Construction of such Devises to Relations, that those, who by the Statute of Distributions would be intitled to the Personal Estate in Case he had died Intestate, should, upon such general Devises, be let into the same Proportions only; and my Lord Chancellor said, he thought it the best Measure for setting Bounds to such general Words, and that it had been often ruled accordingly in this Court. Preced. Chan.  
401. Roach  
ver Ham-  
mond.

### 3. What shall be a sufficient Description of the Thing given, and what shall be said to be bequeathed.

Godolphin says, that in order to find out the Testator's Meaning, with respect to the Things he intended to give away, it is necessary chiefly to Regard the (a) Time when the Will is made, for it is a Presumption of Law that the Testator's Mind was not altered, unless it otherwise appear by sufficient Evidence; therefore, says he, if a Father bequeath to a Son (who is a Student) all his Books, and afterwards buys other Books, the Books so bought pass not. Godolph. 272.  
(b) But in  
another  
Place he  
says, that  
this Rule  
must be un-  
derstood as

the Testator makes use of Words in the present Tense or future Tense, and that if it be doubtful, whether they refer to the Time past or to the Time to come, they shall be understood to relate unto the Time that is to come; and that therefore if a Man devise his Corn indefinitely, it shall be understood all such as he hath at the Time of his Death. Godolph. 274.  
be doubtful,  
it shall be

But it seems clear, both by our Law and the Civil Law, that a Devise of all a Man's Personal Estate passes whatever he died possessed of, and not that only which he had at the Time of making his Will; for the Personal Estate being transient and fleeting, and, from the Necessity of Dealing and Traffick, liable to daily Alterations; if the contrary Resolution should prevail, it would put Men under the Difficulty of making a new Will every Day, and create the greatest Perplexity imaginable. Swinb. 418.  
1 Salk. 237.  
& vide Tit.  
Devise Let-  
ters (B) and  
(H).

Also it hath been determined in Chancery, that if a Man devises to his Wife all his Personal Estate, at a Place called W. all his Personal Estate, as Coaches, Horses, &c. there at the Time of his Death shall pass, tho' not there at the Time of making the Will, the Personal Estate being fluctuating and varying until the Time of the Testator's Death. 2 Vern. 688.

But where a Man devised to his Niece all his Goods, Chattels, Household-Stuff, Furniture, and other Things which then were or should be in his House at the Time of his Death; and some Time after died, leaving about 265 *l.* in ready Money in the House; and it was decreed, that this ready Money did not pass, for by the Words *other Things*, shall be intended Things of like Nature and Species of those before-mentioned. Abr. Eq. 201.  
Trafford and  
Berrige.

2 Vern. 538.  
Gayre and  
Gayre.

If a Man devise his House, and all his Goods and Furniture therein, to his Wife for Life, and after her Decease, to his Son R. and his Heirs, except his Pictures, which he gives to his Sons A. and B. and he has Pictures in Boxes as well as those hung up in the House, and likewise Pictures at his Death which he had not at the Time of making his Will; and it is proved in the Cause that he had Skill in Pictures, and frequently bought Pictures and sold them again; the Exception of the Pictures shall extend as well to the Pictures hung up as Furniture as to those in Boxes, and as well to those in the House, at the Time of the Will, as to those bought in after the Will made.

### (C) What shall be an Ademption or Extinguishment of a Legacy.

Swinb. 522,  
526.

**S**Winburne distinguishes between the Ademption and Translation of a Legacy; the first, he says, is the Taking away a Legacy before bequeathed, which may be done by an express Revocation thereof, or it may be done secretly and by Implication, as by giving away or voluntarily alienating the Thing devised. Translation of a Legacy is the Bestowing of the same upon another, which is likewise an Ademption; and therefore there may be an Ademption without a Translation, but there can be no Translation without an Ademption.

Swinb. 522.

The Ademption of a Legacy is no more to be presumed than the Revocation of the Testament, unless it be proved; and therefore if the Testator bequeaths all the Corn in his Barn, and lives after the making of his Will till all the Corn is spent, and other Corn is put in the Place thereof, this spending of the Corn is no Ademption of the Legacy, and therefore the Legatary shall have such Corn as is found in the Barn when the Testator dieth, unless the Corn found in the Barn at the Death of the Testator be greater in Quantity than was the Corn at the Time of the Will made, for so much is due, but not a greater Quantity than was the first.

Swinb. 522.

So if the Testator bequeath a Ship, and afterwards, by Piece-meal, repairs and renews the same, so that there remaineth nothing of the old Ship but only the bottom Tree, here is no Ademption of the Legacy, but the Legatee may recover the whole Ship.

Swinb. 523-4.

If a Man bequeath a House, which afterwards he voluntarily pulls down, or which is blown down by the Wind, or is consumed by Fire, and afterwards he erects a new House where the old House stood; *Swinburne* is of Opinion, that the Legatee in neither of these Cases can have the new House, it being a general Rule of the Civil Law, that a House bequeathed being destroyed, if the Testator build another in the same Place, the Legacy is extinguished, unless the Meaning of the Testator were otherwise.

Swinb. 523.

But if the Testator do bequeath an House, and afterwards, by Piece-meal, repair the same, so that there is no Part of the old Matter or Stuff remaining, the Will of the Testator is not hereby presumed to be changed; and therefore the Legatary may recover the House so repaired, for it is deemed to be the same House still in Law.

Swinb. 524.

Also if the Testator, being constrained by Necessity, as for the Payment of his Debts, supplying himself or his Family with Food and Necessaries, &c. alienate the Thing bequeathed; this is no Ademption of the Legacy, and therefore is the Executor bound to redeem the same, or to pay the just Value thereof to the Legatary.



So if the Thing bequeathed be not fully alienated, as if it be pledged or pawned, the Legacy is not thereby extinguished; and therefore the Executor in this Case is bound to redeem the same, and to restore it to the Legatary, or to pay the Price thereof, if he suffer it to be forfeited. *Swinb. 525.*

If a Legacy be given to one Person, and afterwards in the (a) same Will the same Thing is given to another Person, this is Ademption of the Legacy as to the first Person, for the utmost Constancy shall be presumed in the Testator till the contrary appears; and therefore in this Case they shall divide the Legacy between them. *Swinb. 528.*

another, this would be no Ademption, unless it appeared the Testator's Intention that so; as if he had said, *that which I did bequeath to A. I give B. these or the like Words* away the Legacy. *Swinb. 529.* (a) So if by Testament he had given it to one Person, and by Codicil to it should be wholly take

If a Man bequeaths a Legacy in these Words, *viz. I give to my Niece A. 500l. which my Sister B. hath now in her Hands of mine, as by Bond appears;* and after the Money is paid in, and ten Years after Payment thereof the Testator dies, yet the Legacy is good though the Security is altered; for by the Words, no more is intended but that the Legacy should be as sure as he could make it. *Raym. 335. Pawlet's Case.*

So where a Man devised in the following Manner, *viz. I give and devise to A. my good and only Uncle, the Sum of 500l. that is to say, that Bond and Judgment he gave me for 400l. and 100l. in Money, and makes his Wife Executrix, and desires her to be kind and assisting to his Uncle, that he might live as became a Gentleman;* the Uncle some Time after sold an Estate, and with the Money paid off 320l. and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining 80l. and some Time after the Testator died, and the Uncle, having Notice of this Will, brought his Bill for this Legacy of 500l. For the Executrix it was insisted that this was a specifick Legacy of that particular Bond and Judgment, and they being cancelled and altered before the Testator's Death, was an Ademption of the Legacy as to so much; and besides, they urged that this Payment of the 320l. amounted to a Release, so that he could only be intitled to the Residue. On the other Side it was insisted, that the Diversity is where the Money is voluntarily paid in by the Person who owes it, and where the Testator sues for and recovers it; in the first Case the Legacy continues still good, because the Money only comes home to the Personal Estate; but in the other Case, the Testator suing for it, shews that he intended to make it his own, and therefore would not leave it to the Legatee to recover; and the Justice of the Uncle ought not to prevent the Affection of the Nephew, and no Alteration of his Intention appeared. My Lord Keeper was clear of the same Opinion, and decreed the 80l. Bond to be delivered up, and the Residue of the Legacy to be paid. *Abr. Eq. 302. Orme and Smith. 2 Vern. 681. S. C.*

One by Will devised thus: *Item, I give and bequeath to my Granddaughter Mary Ford (the Plaintiff) the Sum of 40l. being Part of a Debt due and owing to me for Rent from G. M. she allowing what Charges shall be expended in getting the same. Item, I give and bequeath unto my Grandsons A. and B. the Rest and Residue of what is due and owing to me from the said G. M. which is about 40l. to be equally divided between them, they allowing Charges as aforesaid.* After the Testator received the whole Debt owing for Rent from G. M. and for the Plaintiff, it was insisted that there was a Difference between a specifick and pecuniary Legacy; that tho' the Disposing of a specifick Legacy might be an Ademption of it, yet this being a pecuniary Legacy, the paying the Money to the Testator would be a Loss of it. On the other Side was insisted upon the Difference between a voluntary and compulsory Payment, that tho' the first was no Ademption, yet the second was, and that the Testator obliged G. M. to pay in the Money; but my Lord Chancellor was of Opinion, *Abr. Eq. 302. Ford and Fleming.*

Opinion, that there was no Foundation for the Difference taken in the Books between a voluntary and compulsory Payment, for the latter might be with an Intent to secure the Legacy at all Events, and decreed the Plaintiff the 40 *l.* Legacy.

*Swinb.* 530.

If a Man bequeath 100 *l.* to a Man, and in the same Testament gives him 100 *l.* without taking Notice of the first 100 *l.* the second Disposition is understood to be but a Repetition of the former, and all but one Legacy, unless it appears that the Testator intended him 200 *l.* in all.

*Preced. Chan.*  
263. *Hoskins*  
and *Hoskins.*

*A.* devises to his younger Son 750 *l.* and afterwards buys him a Cornet of Horse's Commission, and paid 650 *l.* for it; and it was proved to be intended this 650 *l.* should be discounted out of the Legacy, and that he would strike so much out of his Will as soon as the Accounts came from *London* to him, but died before they came, without altering his Will; and it was held, that this Money paid for the Commission should go in Diminution of the Legacy, and be taken in Payment and Satisfaction of so much.

<sup>2</sup> *Vern.* 115.  
*Fenkins* and  
*Powel*, and  
there the

If *A.* by Will devise 200 *l.* to his Daughter, and afterwards on her Marriage gives her more than that Sum, this is an Extinguishment of the Legacy.

Case of *Elkin Head* cited, where Payment in the Testator's Life-time was adjudged a Satisfaction of the like Sum devised.

<sup>1</sup> *Vern.* 95.  
*Husbands* ver.  
*Husbands.*

So where the Testator directed that 400 *l.* should be laid out in finishing a House which he was building, and living after the making of the Will to expend a greater Sum in that Service, it was decreed against the Heir at Law, that this was an Extinguishment and Satisfaction of the 400 *l.* altho' the House was not compleatly finished at the Testator's Death.

### (D) Where a Legacy shall be presumed to be a Satisfaction of a Debt or Duty owing from the Testator.

*Abr. Eq.* 203.  
<sup>1</sup> *Salk.* 155.  
<sup>2</sup> *Salk.* 508.  
<sup>2</sup> *Vern.* 177,  
258, 298.

THE Intention of the Testator being the prevailing Rule to go by in the Construction of Wills, it has been from thence established as Doctrine, that wherever a Person, by his Will, gives a Legacy as great or greater than the Debt he owes to the Legatee, that such Legacy should be a Satisfaction of the Debt, on the Presumption that a Man must be intended just before he is bountiful, and that his Intent is to pay a Debt, and not to give a Legacy.

<sup>2</sup> *Vern.* 111.  
*Bloyes* and  
*Bloyes* cited  
to have been  
adjudged.

As where a Man by Marriage Settlement provides 400 *l.* for Daughters, and having two Daughters, by Will gives them 200 *l.* a-piece for their Portions, without taking Notice of the Settlement; and it was held, that the 200 *l.* a-piece should be a Satisfaction of the Portion by the Settlement.

<sup>1</sup> *Vern.* 498.  
*Preced. Chan.*  
240. *S. C.*  
*Brown* ver.  
*Danison.*

So where a Man had prevailed on his Wife to join in selling 7 *l.* 10 *s.* *per Ann.* of her Jointure, and after 6 *l.* 10 *s.* *per Ann.* more, and having given two several Notes, that his Executor should pay her the said two several Sums during Life, he after makes his Will, and thereby gives her 14 *l.* *per Ann.* during Life, out of certain Lands; and this was held to be a Satisfaction of the Notes.

So where one settles his Estate on Trustees, to be sold for Payment of his Debts, with Power of Revocation, then he marries a Daughter, gives her a Portion, and covenants that the Husband shall have the Estate 1500*l.* cheaper than any other; after he, by Will, revokes the Settlement, gives the Husband 1500*l.* and dies; and this Legacy was held to be in Satisfaction of the 1500*l.* secured by the Settlement. *Preced. Chan. 158. Bromley ver. Jeffereys*

So if *A.* by Marriage-Articles, agrees to leave his Wife 800*l.* and her Jewels, &c. but it is declared, that notwithstanding the Articles, she should not be debarred of any Thing he should give her by Will; and *A.* by Will, makes a Disposition of his whole Estate among his Children, &c. and gives his Wife 1000*l.* The Wife must wave the Articles, or the Will, for she cannot have both; for his making a Disposition of the whole Estate, shews that he intended that every Part should be performed. *2 Vern. 555. Niemo ver. Niemo.*

So where a Child, intitled by his Father's Marriage-Articles to a Share of his Father's Personal Estate, has a Legacy given to him by the Will of his Father; and it was held, that if he will have the Legacy, he must wave the Benefit of the Articles. *2 Vern. 556*

So where a Freeman of *London* made his Will, and devised Legacies to his Children more than their Orphanage Parts would amount to, without taking any Notice whatsoever of the Custom; and it was held by the Master of the *Rolls*, that these Legacies should be a Satisfaction of their Orphanage Shares, to which they were intitled by the Custom in the Nature of a Debt; and that the Legacies should not come out of the Testamentary or dead Man's Part, because it is held in this Court, that they shall not take both by the Will and the Custom too; but where such Legacies are less than their Orphanage Shares, whether they shall be *pro tanto* a Satisfaction, he was in great Doubt, and sent it to the City to certify, tho' he seemed rather to think they should in that Case take both, especially if none of the Devisees in the Will were thereby disappointed. *Tvin. 1709. Nicholls ver. Nicholls.*

But tho' the Cases on this Head have prevailed thus far on the Circumstances attending them, and the (a) Intention of the Testator, yet as a Legacy is a Gift or Gratiuity, it is to receive the most favourable Construction; and therefore if it be less than the Sum due, payable on a (b) Contingency or future Day, on these and the like Circumstances it will be construed an additional Bounty, and not a Satisfaction. (a) That in all these Cases the Intention of the Party ought to be the Rule.

*1 Salk. 508.* (b) Tho' the Contingency does actually happen, and the Legacy thereby become due, yet it shall not go in Satisfaction of the Debt, because a Debt which is certain, shall not be merged or lost by an uncertain and contingent Recompence; for whatever is to be a Satisfaction of a Debt ought to be so in its Creation, and at the very Time it is given, which such contingent Provision is not. *Preced. Chan. 295.*

As if *A.* give a Bond to *B.* her Servant, to pay her 20*l.* *per Ann.* Quarterly, for her Life, free from Taxes; and by Will, without taking Notice of the Bond, gives 20*l.* *per Ann.* for her Life, payable Half-yearly, but not paid free of Taxes; *B.* shall have both the Annuities, for that, by the Will, not being so advantageous as the first, cannot be presumed a Satisfaction. *2 Vern. 478. Atkinson ver. Webb. Preced. Chan. 236. S. C. and the Reasons there given, because the second Annuity being payable Half-yearly, and charged on Land, by which it will be liable to Taxes, cannot be so advantageous.*

So where *A.* on his Marriage covenanted to purchase and settle a Jointure of 20*l.* *per Ann.* on his intended Wife, and if he died before such Purchase or Settlement made, she should have 300*l.* out of his Estate for her own Use; the Marriage was had, and the Husband died before any such Settlement was made; but by his Will he devised to his Wife 330*l.* for her Life, with Power to dispose of 30*l.* Part thereof, at her Death; and it was held, 1. That she had a Right to 300*l.* and Interest, *2 Vern. 506. Perry ver. Perry.*

Interest, and that the Executor could not now be at Liberty to settle 20 *l.* *per Ann.* as the Testator might have done. 2. That she should have the 330 *l.* as an additional Bounty and Provision for the Wife.

2 Vern. 258.  
Duffield and  
Smith.

By a Marriage Settlement, in Case of Failure of Issue Male, a Remainder of the Estate was limited to Daughters, until they should raise 3000 *l.* for Portions; there was Issue of the Marriage a Son and two Daughters; the Father devised 700 *l.* a-piece to the Daughters, and died; the Son afterwards made his Will, and devised to the Daughters to the amount of 7000 *l.* without any Mention of its being in Lieu or Satisfaction of any Thing due to them, and gave his Land to his Heirs Males, and died without Issue; and it was held clearly that the Father's Legacy could be no Satisfaction, not being adequate in Value; besides, the Father had a Son then living, and it was altogether contingent and uncertain whether 3000 *l.* would ever arise and become payable or not, and therefore it was but reasonable that the Father should make some certain Provision for his Daughters; but as to the Son's Legacy of 7000 *l.* it was by two Lords Commissioners, against *Rawlinson*, decreed a Satisfaction; but upon an Appeal to the Lords the Decree was reversed; for the Daughters being Heirs at Law, and disinherited, there was no Ground for the Court to make a strained Construction to their Prejudice, in Favour of a voluntary Devisee.

1 Salk. 155.  
Cuthbert ver.  
Peacock.  
2 Vern. 593.  
S. C.

*H.* owed his Niece *A.* 100 *l.* by Bond, and having two other Nieces *B.* and *C.* makes his Will, and bequeaths 300 *l.* to his Niece *A.* and to his two other Nieces 200 *l.* a-piece; after that he borrowed another 100 *l.* of his Niece *A.* and being indebted to her in 200 *l.* died; and to prove that the 300 *l.* should go in Satisfaction of the Debt, it was insisted on as a Rule in Equity, that where a Testator, being indebted, gives his Debtee a Legacy greater than his Debt, it shall go in Satisfaction; for a Man shall be intended to be just before he is kind; otherwise where a Legacy is less, for that is neither to be just nor kind, and shall not be taken to go in Satisfaction of any Part. But *per Cowper*, Lord Chancellor, it might be as good Equity to construe him to be both just and kind, if he intended to be both, that if any Part of this 300 *l.* be applied to the Payment of the Debt, as for so much it is not a Gift; whereas a Legacy must be taken to be a Gift or Gratuity, and there being Assets, and some (*a*) Proofs of the Testator's greater Kindness to *A.* than his other Nieces, his Lordship decreed her the whole 300 *l.* over and above her Debt.

(a) But whether any Parol Evidence ought to be admitted in those Cases, *vide Tit. Evidence.*

*Preced. Chan.*  
314.

If a Legacy of 100 *l.* is given to *A.* by *J. S.* and another of 50 *l.* by *J. D.* and of both Wills *A.*'s Father is made Executor, who having by a Marriage Settlement Power to charge his Land with 2000 *l.* for Portions, devises 1000 *l.* equally between his Daughters; by devising it to them equally, according to the Marriage Settlement, he shews that he intended them an equal Benefit, and therefore the 1000 *l.* shall not be in Satisfaction of the Legacies given *A.*

2 Salk. 508.  
*Cranner's*  
*Case.*

*A.* indebted to *B.* 50 *l.* left him a Legacy of 500 *l.* and made him Executor, and after the making of his Will borrowed 150 *l.* more of him; and the Master of the *Rolls* held, that the Legacy should be a Satisfaction of both Debts; but *Harcourt*, Lord Chancellor, reversed his Decree, and held, that in those Cases, if a Legacy be less, it shall not be a Satisfaction. So if the Thing given be of a different Nature, as Land, it shall not go in Satisfaction of Money; so if the Legacy be upon Condition, for by the Breach he may be a Loser, whereas the Will intended it for his Benefit.

*Trim.* 1729.  
*Crompton ver.*  
*Sale.*

*A.* by Will, gave six several Annuities for Lives, three of 10 *l.* each, and three of 5 *l.* each, to be paid out of his Personal Estate, and gave all the Rest of his Real and Personal Estate to *E.* his Wife, whom he made

sole

sole Executrix; the Annuitants were his Sisters and their Children; and about two Years after the Wife makes her Will, and gives two Annuities of 5 *l.* each to two of the 5 *l.* a-year Annuitants in her Husband's Will, but gives them to them and their Heirs, in case they happen to over-live such a one, who by her Husband's Will had 10 *l.* *per Ann.* for Life; she likewise gives another Annuity of 10 *l.* *per Ann.* to one and her Heirs, and another of 5 *l.* to another and her Heirs, who had each of them the like Annuities for Life by the Husband's Will; but in the Disposition of these Annuities she takes no Manner of Notice of her Husband's Will, or that they had any Annuities thereby given them; and the only Question was, whether the four Annuities given to the Persons in Fee, by the Wife's Will, should be taken to be only in Satisfaction of the like Annuities for Life, given to the same Persons by the Husband's Will; and it was argued that they should, because the Husband's Annuities being payable only out of his Personal Estate, and the Wife being his Executrix, she was in the Nature of a Debtor for them; and wherever a Person, by his Will, gives a Legacy as great or greater than the Debt he owes to the Legatee, it has always been taken to be a Satisfaction of the Debt. But *per* Lord Chancellor, this Doctrine has already been carried too far, and he would never carry it further; for tho' it is true, a Man ought to be just before he is bountiful, and therefore shall be presumed to pay a Debt rather than give a Legacy to the same Person, when it is the same Sum, or more, than he owes him; yet why may he not be both just and bountiful when there are Assets to answer both, as in the present Case; and there can be no Pretence to say, that the two first Annuities of 5 *l.* each can be a Satisfaction of the like Annuities given by the Husband, because they are given upon the Contingency of over-living such a-one, which has not yet happened, and possibly never may; and then shall the Annuities for Life, which are certain, be extinguished, by giving the same Persons Annuities in Fee, on a Contingency that may never happen; and if that be so, as to these Annuities, there is no Reason to imagine the Wife had a different Intention as to the others, or that she intended two of them should go in Satisfaction of the like Annuities given by her Husband, and the other two not; and the Cases where a Legacy has been held to be a Satisfaction of Debt, are where the Debt was owing by the same who gave the Legacy; but if such Legacy be given upon a Contingency, or to take Place at a future Day, it is no Satisfaction of the Debt; and therefore in the principal Case it was decreed, that the Annuities given by the Wife were distinct additional Annuities, and not an Enlargement only of the Husband's Annuities from an Interest for Life to an Interest in Fee, as it was urged to be, and therefore should go in Satisfaction of those Annuities; which the Court held they should not, but that the Annuitants should take both.

## (E) Of Legacies vested or lapsed : And herein,

1. Where it shall be a lapsed Legacy by the Legatee's dying in the Life-time of the Testator, and where in such Case it shall vest in another Person, to whom it is limited over.

*Abr. Eq.* 296,  
297.

**I**T seems by the Rule of the Civil Law, and by the Cases on this Head, that if a Legacy be devised to *J. S.* and he dies in the Life-time of the Testator, that the Legacy is lapsed, there being no such Person to take at the Time when the Will is to take Effect.

*2 Vern.* 521.  
*Elliot and*  
*Davenport.*

So where *A.* by Will, reciting that *B.* owed him 400 *l.* gave and bequeathed that 400 *l.* to him, provided he out of the 400 *l.* paid several Sums in the Will mentioned to his Wife and Children, and the Rest and Residue he freely and absolutely gave to him, and willed and required the Executor to deliver up the Security immediately upon his Death, and not to claim or meddle with the Debt, or any Part thereof, but to give such Release or Discharge, as *B.* his Executors or Administrators, should require or think fit ; *B.* died in the Life-time of the Testator ; and it was held, that the Money directed to be paid the Wife and Children was well devised ; but as to the Residue devised to the Debtor himself, that it was a lapsed Legacy, he dying in the Life-time of the Testator ; altho' it was admitted, that if the Testator had said, *I forgive such a Debt*, or that *my Executor shall not demand it*, or *shall release it*, that would have been a good Discharge of the Debt, tho' the Debtor died in the Life-time of the Testator.

*Abr. Eq.* 296.  
*Burnet and*  
*Holgrave.*

*A.* devised an Estate to his Wife for Life, and after to the Plaintiff, his Niece, and her Heirs, upon Condition and to the Intent that she pay 400 *l.* to such Person, as his Wife by her Will in Writing, or any other Writing, should direct and appoint, and dies ; the Wife after marries a second Husband, and then makes a Will in Writing, and thereby, reciting the Power given her by her former Husband's Will, appoints the 400 *l.* to be paid to her Husband, his Executors or Administrators, and that when he shall have fully received the 400 *l.* he shall pay 100 *l.* out of it to *B.* 50 *l.* to *C.* and 50 *l.* to *D.* and makes her Husband her Executor ; and then goes on, and says, that she has published this her last Will and Testament in the Presence of three Witnesses ; and the Husband subscribed that he does approve of this Will ; afterwards the Husband died before her, and makes her Executrix of his Will and Residuary Legatee ; then *B.* and *C.* die, both intestate, and afterwards the Wife dies, and the Defendants take out Administration to her, with the Will annexed, and also Administration to *B.* and *C.* and the Question was, whether this Appointment being made by Will, and the Appointee dying before the Appointor, this should be in the Nature of a Legacy, and so the Appointment void, the Testatrix surviving the Nominee ; and my Lord Keeper held, that if it was a Thing purely Testamentary, it would be plainly a lapsed Legacy, but that in this Case the 400 *l.* was not in its own Nature Testamentary, but they take as Nominees, and it is but the Execution of a Trust ; and decreed the Money to be paid.

*2 Vern.* 466-7.  
*Charles ver.*  
*England.*  
*Preced. Chan.*  
200. *S. C.*

So where *E.* made her Will, and devised in these Words, *I give unto my loving Kinsman R. H. the Sum of 300 *l.* one 100 *l.* Part whereof, he doth owe me, which I intend to give to my Cousin S. H. his youngest Daughter ; but my Will and Desire is, that he will give the said 300 *l.* to his Daughter S. H. at the Time of his Death, or sooner, if there be Occasion, for her better Advancement and Preferment ;* the Testatrix at the Time of making her Will was in *England*, and it happened that *R. H.* died in *Ireland*, eight

Days

Days before the Death of the Testatrix; afterwards *S. H.* died, at the Age of sixteen, and unmarried, and the Plaintiff was her Administrator; and it was decreed at the *Rolls*, and affirmed by my Lord Chancellor, that the Words *I desire, or I will*, amount unto an express Devise, and that the 100*l.* Bond to the Testatrix should be assigned to the Plaintiff, and the 200*l.* paid him, with Interest, from the Time of exhibiting the Bill; altho' it was insisted upon, that a Benefit was designed *R. H.* and that he was not a bare Trustee; for he was to have the Interest of the 300*l.* for his Life, unless his Daughter had Occasion for it before his Death, which she had not.

But if the Testator gives his Sister 350*l.* upon Condition that she, at or before her Death, give to her Children 200*l.* thereof, and the Sister dies in the Life-time of the Testator, the whole Legacy is lapsed; altho' it was insisted, that if the Devise had been only of the Interest of the 200*l.* to the Testator's Sister for Life, and the Principal to the Children, that had been a good Devise to the Children as to the 200*l.* and it would not have been lost by the Mother's dying in the Testator's Life-time, and the Intention of the Testator in this Case amounted to as much; but it was adjudged *ut supra*, the Court taking it, that being a Devise of Money, the absolute Property vested in the first Legatee: *Square.*

But however a Legacy may become void or lapsed by the Legatee's dying in the Life-time of the Testator, yet it is plain, that if in such Case there be a Limitation over to another, that the Limitation over is good, tho' the first Legatee die in the Life-time of the Testator; as where *A.* devised 500*l.* a-piece to his two Grandchildren by Name, and if either of them die, his Share to go to the Survivor; one of them died in the Life-time of the Testator; and it was held, that his Share should go to the Survivor, and was not a lapsed Legacy.

So if *A.* devise 1500*l.* a-piece to the four Children of *J. S.* by Name, to the Sons to be paid at their Age of twenty-one Years, and to the Daughters at eighteen, or Days of Marriage; and in Case one or more of the afore said Children shall happen to die before his, her, or their respective Legacy or Legacies shall become due, then such Legacy or Legacies shall go to the Survivors of them; and in Case three should die, then the Survivor to take the whole; if one of the Children dies in the Life-time of the Testator, the Survivors shall take that Share, and it shall not be a lapsed Legacy.

So where a Legacy of 50*l.* was given to *A.* at Twenty-one, or Marriage, and 50*l.* to *B.* at Twenty-one, or Marriage, and in the Close of the Will the Testator added, *If any Legatee dies before his Legacy is payable, the same shall go to the Brothers and Sisters of such Legatee*; *A.* dying in the Life-time of the Testator, it was adjudged no lapsed Legacy, but that it should go to the Brothers and Sisters.

So where a Man devised to *A.* and *B.* the two Daughters of his Brother *G.* to be paid within a Year after the Death of his Wife, *viz.* 50*l.* to *A.* and 50*l.* to *B.* if they shall be both alive at the Time of Payment, but if either of them should die before, then the said 100*l.* to the Survivor of the said two Daughters; one of the said two Daughters died in the Life-time of the Testator; and the only Question was, whether the surviving Daughter should have the whole 100*l.* or only the 50*l.* and *Rawlinson* and *Hutchins*, Lords Commissioners, were clearly of Opinion, that she should have the whole 100*l.* they said, that by the first Clause of the Will it is a joint Devise to them of the 100*l.* in which Case, if the Will had gone no farther, if one had died, it would have survived to the other; then the *viz.* that comes after is only a Severance of it, in Case they should both live to the Time of Payment, which they did not; and then the last Clause of the Will, in Case either died before the Time of Payment, is a new Substantive Devise of the whole 100*l.* to the Survivor; and decreed accordingly.



*Abr. Eq.* 243.  
*Trin.* 1730.  
*Hunt and*  
*Berkley.*

So where one made his Will, and, after several Legacies, gave and devised all the Rest, Residue, and Remainder of his personal Estate to three Persons, whom he thereby made his Executors, one of them died in the Life-time of the Testator; and the only Question was, whether the two surviving Executors should have the whole, or whether the third Part should be distributed, according to the Statute, amongst the next of Kin; and the Master of the Rolls, on Time taken to consider of the Case, and citing most of the Authorities, both out of the Civil and Common Law, was of Opinion, and decreed accordingly, that the two surviving should take the whole.

## 2. Where a Legacy Shall be said to be vested or lapsed, being to be paid at a future Time, to which the Legatee did not arrive.

This Distinction is laid down in

*Dyer* 59.

1 *Leon.* 177.

*Swinb.* 311,

313.

*Off. Ex.* 347.

*Godb.* 182.

2 *Vent.* 342.

*Cloberie's*

*Case.*

2 *Chan. Cases*

155.

2 *Salk.* 415

*Carth.* 52.

1 *Vern.* 462.

2 *Vern.* 673.

*Preced. Chan.*

21.

*Eq.* 294,

21.

*Pasch. 7 Anna,*

*Strick ver.*

*Hudson, in*

*Chan.*

2 *Vern.* 673.

*Stapleton ver.*

*Cheele.*

2 *Salk.* 415.

*Snell and*

*Dee.*

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The Rule and Distinction which hath obtained in these Cases, and which is agreeable to the Rule of the Civil Law, is, that if a Legacy be devised to one generally, to be paid or payable at the Age of Twenty-one, or any other Age, and the Legatee dies before that Age, yet this is such an Interest vested in the Legatee, that it shall go to his Executor or Administrator; for it is *debitum in presenti*, tho' *solvendum in futuro*, the Time being annexed to the Payment, and not to the Legacy itself; but if a Legacy be devised to one at Twenty-one, or if, or when he shall attain the Age of Twenty-one, and the Legatee dies before that Age, the Legacy is lapsed; and tho', says my Lord *Coxeper*, this Distinction was at first introduced upon very slender Reasons, and probably upon no other but from a constant Willingness in the Civil Law to stretch in Favour of a particular Legatee against the Residuary Legatee, who went away with the whole Surplus of the personal Estate; yet it being the Rule of the Ecclesiastical Courts, it is fit that the same Rule should be observed in Chancery, as this Court has now a concurrent Jurisdiction with the Ecclesiastical Courts in Matters of this Nature, and therefore there ought to be a Conformity in their Resolutions, that the Subject might have the same Measure of Justice, in which Court soever he sued.

*Pasch. 7 Anna,*  
*Strick ver.*  
*Hudson, in*  
*Chan.*

2 *Vern.* 673.  
*Stapleton ver.*  
*Cheele.*

2 *Salk.* 415.  
*Snell and*  
*Dee.*

*Abr. Eq.*  
295 6.  
*Orslow ver.*  
*South.*

But if Legacies are given to Children, and if any die, their Legacies to survive, yet after Twenty-one, or Marriage, there shall be no Survivorship, tho' the Words are general.

So if a Legacy of 50*l.* is devised to *J. S.* when of the Age of sixteen Years, and Interest in the mean Time, to be paid Quarterly, this is a Legacy vested, and shall go to the Representative of the Legatee, because it carries Interest.

But if *A.* devise in these Words, *viz. I give 100 l. a-piece to the two Children of J. S. at the End of ten Years after my Decease*, and the Children die within the ten Years, this is a lapsed Legacy, and is so in all Cases where the Time is annexed to the Legacy itself, and not to the Payment of it; tho' it was objected, that this differed from the Case where a Man devises 100*l.* to *J. S.* at his Age of twenty-one; because it is a Contingency whether he will attain to that Age; but the Expiration of the ten Years is inevitable.

So where one being possessed of a very considerable Estate, Part in *Jamaica*, and Part in *England*, and being himself residing in *Jamaica* made his Will, and thereof several Executors, some for his Estate in *Jamaica*, and others, residing in *England*, for his Estate here, and, amongst other Things, devised in these Words, *viz. I give and bequeath to J. S. now under the Custody of R. D. the Sum of 2000 l. at the Age of twenty-one Years, to be paid by my Executors in England*, and devised all



the Rest and Residue of his Estate to the Plaintiff, and died. 7. S. having attained his Age of eighteen, made his Will, and thereby devised this Legacy, and all his Estate, to the Defendant ; and my Lord Chancellor held this a lapsed Legacy, and that it was a vain Endeavour in the Defendant's Counsel to construe it a present Legacy, and therefore vested by the Word *now*, because it was a plain Description of the Condition of the Legatee, *viz. now* under the Custody of, &c. for otherwise they must stop at *now*, which would be playing with the Words ; and tho' the Word *paid* was made Use of, yet it was plainly intended a Designation of the Persons by whom the Legacy was to be paid, *viz. by his Executors in England*, which was proper, he having two Sets of them.

Where Legacies or Portions charged on the real Estate are vested, or shall sink in the Inheritance, for the Benefit of the Heir at Law, *vide Title Heir and Ancestor.*

## (F) Of Conditional Legacies, and how far the Condition must be complied With, otherwise the Legacy Will be forfeited.

**I**F a Legacy be given on Condition not to dispute the Will, and the Legatee commences a Suit, whereby he disputes the Validity of the Will, yet this is no (a) Forfeiture of the Legacy, if there was *probabilis* (a) If the Lord of a Copyhold

Manor comes to a Copyholder, and requires him to do his Services, and the Copyholder answers, if they are due, he will do them, but it shall be tried at Law first, whether they are due or not ; this is no Forfeiture, being no wilful Refusal. 1 *Roll. Abr.* 506. 1 *Roll. Rep.* 429. 3 *Bulf.* 80, 268. 4 *Co.* 21. b.

But what we are here chiefly to consider is, how far Conditions, annexed to Legacies which restrain Marriage, are to be performed, and how, and in what Case, the Neglect or Non-performance of them will forfeit the Legacy.

And here we must observe as a general Rule, that all Conditions in Restraint of Marriage are to be considered strictly, being prejudicial to Society, as they hinder the Propagation of the Species.

Therefore by our Law, as also by the Civil Law, a Devise upon Condition not to marry, or not to marry a Person of such a Profession or Calling, is void, whether there be a Limitation over, or not ; for (b) every Person ought to be at Liberty to marry when he pleases ; and therefore Conditions restrictive of that Power are against Law, and void.

queathed by a Man to his Wife for so many Years, if she shall remain a Widow so long, this is a good conditional Bequest, because of the particular Interest every Husband has in his Wife's remaining a Widow ; for thereby she will the better take Care of the Concerns of his Family, in Respect of which he may well allow her a Maintenance for that Time, to cease when she removes herself into the Interest of another Family. *Godolph. Orph. Leg.* 45. — But if a Stranger give a Legacy upon such Condition, it is not good ; for there is no more Reason for restraining a Widow from marrying, than a Maid. *Godolph.* 46. — Where a Man devised, after Debts and Legacies paid, the Surplus of his Estate to his Wife and his Son John, equally betwixt them, and adds, *whom I make my Executors*, and farther wills, that she should continue his true Widow ; but if she marry again, *my Will is, she shall render the Right of being my Executrix to my Son Roger, to be Partner with his Brother John in the Executorship* ; and it was held, that by the Wife's marrying again, she had as well lost her Share of the Surplus, as her Right to the Executorship 2 *Vern.* 308 *Barton versus Barton.*

*Swinb* 267. Also by the Civil Law, a Gift or Devise upon Condition not to marry (a) If one be appointed Executor or Legatee, upon Condition he marry with the Consent and Approbation of another, and if he marry against their Consent, that the Executorship or Legacy shall go to another; yet he shall have the Executorship or Legacy: But in this Case it is said, that he is bound to ask Consent, and to marry; for both these Parts of the Condition are lawful, tho' the Part is not, that restrains him from marrying against the Consent of another. *Godolph* 46.

*Swinb* 267-8. But tho' Conditions which restrain Marriage generally are void, yet both by our Law and the Civil Law, a Condition, that restrains Marriage as to Time, Place, or Person, is good; as not to marry before Twenty-one, not to marry at *Tork*, not to marry a Papist, &c.

2 *Chan. Ca.* 22, 158. But the prevailing Distinction in the Courts of Equity as to this Matter is, between such Conditions as are good, and bind the Legatee, and such as are only *in Terrorem*; as to which it is clearly agreed, that if a Legacy be given to a Person upon Condition that he or she marry with the Consent of *J. S.* that in such Case the Condition is only *in Terrorem*, and the Legatee does not forfeit, tho' the Marriage was without such Consent; but if in this Case the Legacy had been limited over to another, the Marriage without Consent had been a Forfeiture; and the Reason hereof is, not only from the Intention of the Testator appearing more strongly in the latter, than in the first Case, but also because the Courts cannot in this Case relieve against the Forfeiture, without doing an Injury to the Person to whom it is limited over.

1 *Vent.* 199. the Parties themselves might not be so learned, and therefore it would be some Terror to them to venture to break it; and without this Distinction, Strangers Executors might run away with a great Part of a Man's Estate from his Children.

1 *Vern.* 20. the same Distinction; and there said, that tho' a Lawyer may know it to be no Forfeiture, not being limited over, yet

1 *Chan.* 58. If by Lease 9000 *l.* is secured for a Feme Sole, in case she marries not contrary to the Liking of *A.* and if she doth, then for such Person as *A.* shall nominate, and for Want of such Nomination, for *A.* and she marries without the Consent of *A.* yet he cannot dispose of the Lease otherwise than for her Benefit; for it would be the most unreasonable Thing imaginable, that his Giving or Refusing his Consent should have any Influence in an Affair that was to turn so much to his own Advantage.

1 *Fleming and Watgrave.* 2 *Vern.* 573. S. C. cited; and there said, that there may be a Difference between a Condition that a Person shall not marry without Consent, and where it is that the Party shall not marry against Consent.

1 *Vent.* 199. If *A.* devise a Messuage, &c. to *B.* his Wife for Life, Remainder to *C.* his Grand-daughter in Tail, upon Condition that she marry with the Consent of his Wife and *D.* and *E.* or the major Part of them, and if she marry without their Consent, or die without Issue, the same to remain to *F.* and her Heirs; and *C.* marries without the Consent of any of them, who, as soon as they hear of it, declare their Dislike to the Marriage, but afterwards consent to it; yet *C.* shall not be relieved in Equity, for the subsequent Assent cannot divest the Estate which was before vested in *F.* neither can there be any collateral Averment that the Condition was intended only *in Terrorem*.

2 *Vern.* 580. *A.* devised 300 *l.* to *B.* her Daughter, and that if she married under Twenty-one, without Consent of the Executors, or major Part of them, the Legacy to go to the Children of her Sister, the Wife of *C.* and made *C.* and two others Executors; *B.* being at the House of *C.* there marries his Son, by a former Wife, with his Privy, being under Twenty-one; *B.* and her Husband bring a Bill for the Legacy, *C.* in Favour of his other Children, insists that the Legacy is forfeited; the other Executors confessed they had Notice of the Courtship, and did not contradict or disapprove

disapprove of it, and the 300*l.* was decreed the Plaintiff's, there being, at least, a tacit Consent.

*A.* devised to his Daughter *M.* 100*l.* to be paid by his Executors upon her Day of Marriage, or Age of Twenty-five Years, which should first happen, upon Condition that she should marry with the Consent of such and such Persons; and if she married without their Consent, then to have 50*l.* only, and no more, and gave the Residue of his Personal Estate to the Defendants; *M.* married the Plaintiff, without such Consent, before she was twenty; and it was held by the Master of the *Rolls*, that this was more than a Clause *in Terrorem*, and that the Devise of the Surplus of the Personal Estate was a Devise over of the 50*l.* on *M.*'s Disobedience. *Abt. Eq. 11. Anon ver. Horner*

One, by Will, devised 1300*l.* to his Daughter *A.* to be paid at her Age of Twenty-one Years, and if she died without Issue before Twenty-one, then to go over to *B.* provided that if she married before Twenty-one, without Consent of certain Persons, then to go over to *C.* She did marry before Twenty-one, without such Consent, and upon a Bill brought by *B.* it was decreed that *A.* should give Security, &c. for the Money, if she died before Twenty-one without Issue; and the Master of the *Rolls*, who heard the Cause, said the Law was now settled accordingly, but the Decree was so ordered as to serve both Contingencies, *viz.* that upon her Marriage before Twenty-one, without Consent, the Money should go to *C.* yet so that if she died before Twenty-one without Issue, it should go to *B.* according to the Devise. *Mich. 1688. Pawlett and Dogget in Cas.*

*A.* by Will, gave Portions to his Daughters, without mentioning any Time of Payment, upon Condition that they married with the Consent of his Wife; and if any married without such Consent, her Portion to go over; on a Bill brought by the Daughters for their Portions, it was decreed accordingly, but on Security to refund in case the Condition should be broken; for it was held, that tho' the Marriage without Consent was but a Condition subsequent, yet the Court could not relieve against the Forfeiture, by reason of the Devise over, altho' it was admitted to be a hard Condition, no Time being limited, but goes to a Marriage at any Time, even after the Age of Twenty-one Years. *2 Vern. 452. Aston and Aston.*

The Defendant's Father devised to him, who was his Heir at Law, all his Lands, &c. (except such and such Parts,) charged with the Sum of 2500*l.* to his Daughter (since married to the Plaintiff) at her Age of Twenty-one Years, or Marriage, which should first happen; and devised the excepted Lands, in Trust, to be sold for the Payment of his Debts, provided that if his said Daughter should marry in the Life-time of her Mother, without her Consent first had in Writing, then 500*l.* Part of the said 2500*l.* should cease, and should be applied towards Payment of his Debts charged on the said excepted Lands, and appoints his Wife to be Guardian of his said Daughter, and makes her Executrix, and dies; the Daughter attains her Age of Twenty-one Years, and without the Consent or Privity of her Mother intermarries with the Plaintiff, who was a Gentleman of some Estate, and called to the Bar, but had made no Settlement or Provision for his Wife; and therefore the Defendant, the Heir at Law, refused to raise or pay any Part of his Sister's Portion; and insisted likewise, that by her Marriage without her Mother's Consent, 500*l.* Part of her Fortune, was become forfeited; whereupon the Plaintiffs brought their Bill to have the whole Portion raised by Sale of the Land charged therewith. *Per Lord Keeper*, this is a Portion to be raised out of Lands, and therefore to be considered as Land; and tho' it be to go towards Payment of Debts on Breach of the Condition, and there appear one Hundred and twenty Creditors concerned, yet none that are in Danger of losing their Debts; and it is then to be considered as it stands upon the Condition itself, and therefore the Plaintiff must have her whole Portion, for the Testator has appointed two Periods *Abt. Ea. 112; 113. King ver. Withers.*

of Time to intitle her to it, *viz.* Marriage, or the Age of Twenty-one; and as she has attained that Age, it becomes a vested and settled Interest in her, not to be devested by the Marriage without the Consent of the Mother, for that Consent cannot, in any Reason, be carried farther than during her Minority.

*Preced. Chan.*  
562. *Semphill*  
*ver. Bayly.*  
Decreed in  
the Dutchy  
Court by  
*Lechmere*  
Chancellor,  
and *King*  
*C. J.* against  
the Opinion  
of Justice  
*Dormer.*

*A.* having Issue three Daughters *B. C.* and *D.* devised 1000*l.* to be paid to *B.* at the Age of Twenty-one, or Marriage, upon Condition that she married with the Consent of his Executors; and likewise devised to her several Messuages, &c. upon the like Condition, and after several other Legacies and Bequests he devised the Residue of his Estate to his Executors, for the Benefit of his Children; *B.* married, against the Consent of the Executors, a Person who made his Addressee to her in her Father's Life-time, which the Father knew, and was dissatisfied at; she had likewise Notice given her by the Executors of her Father's Will, and that by marrying without their Consent she would be in Danger of forfeiting her Legacy; and that they could not approve of that Match, because they knew that her Father disliked it in his Life-time; yet it was held, that there being no express Limitation over, the Devise of the Residue being after Debts and Legacies paid, that the Condition was only *in Terrorem*, and that the Marriage, without Consent, did not amount to a Forfeiture of the Legacy, &c.

### (G) Of Specifick and Pecuniary Legacies, and the Difference between them.

2 *Chan. Ca.*  
25, 171.  
1 *Vern.* 31.  
2 *Salk.* 416.  
(a) But tho'  
a Specifick  
Legatee has

A Specifick Legacy is a Gift or Bequest of a particular Thing, such as the Testator's Horse, Cow, &c. and differs from a Pecuniary Legacy, or a Sum of Money, in that the Legatee is not, in case of Deficiency of Assets, to (a) abate in Proportion, as Pecuniary Legatees must do.

a Preference, and is not to abate in Proportion with other Legatees, where the Estate falls short, as to the Payment of Debts, yet he cannot in any Case have more than the Testator could or did devise to him; and therefore where a Freeman of London devised a Lease for Years to *J. S.* who was evicted of a Moiety thereof by the Widow claiming it by the Custom; and it was held, that the Specifick Legatee should have no Satisfaction for this Eviction out of the Surplus, the Testator having Power to dispose only of a Moiety. 2 *Vern.* 111.

2 *Vern.* 688.  
*Sayer* and  
*Sayer.*  
*Preced. Chan.*  
392. *S. C.*  
*Preced. Chan.*  
393.

So if a Man devise his Personal Estate at *W.* this is as much a Specifick Legacy, as if he had enumerated the several Particulars of it; and tho' the other Legacies fall short, yet the Legatee must have this Specifick Legacy intire.

But if the Testator devise his Personal Estate at *A.* and his Personal Estate at *B.* and then devises a Legacy out of his Personal Estate, and has no Personal Estate but what lies in those two Places, the Pecuniary Legacy must be paid out of these Specifick Legacies thus particularly devised.

*Preced. Chan.*  
393-4.

So if after several Specifick Legacies the Testator devises a Pecuniary Legacy, or Sum of Money, out of all his Personal Estate whatsoever; in this Case the Pecuniary Legacy shall come out of the Estate at large.

If a Horse, or Term for Years, which is specifically devised to another, be taken in Execution by Creditors on a Judgment obtained, (as they may be) the Specifick Legatee shall have Recompence in Equity against the Executors, or Residuary Legatees, for the Value, who are to have nothing till after the Debts and Legacies paid.

7. S. having 4000*l.* secured to him by Bond in the Names of *A.* and *B.* in Trust for himself, devised it to his Daughter, (now married to the Plaintiff) and made her Residuary Legatee, and by the same Will devised a Lease he had in Farm to *R. D.* and there not appearing Assets at his Death to pay his Debts, this Farm devised to *R. D.* was sold for Payment of Debts; afterwards, by Decree of this Court, the 4000*l.* was adjudged to be Assets to pay Debts, and was brought into Court, there to remain for that Purpose; the Plaintiff proposed to have what remained of the 4000*l.* paid out of Court to him, all Debts being (as it was said) paid, and the Defendant *R. D.* opposed it till he had first had a Satisfaction out of it for the Value of the Farm devised to him, and sold for the Payment of Debts; the Court held, that the Devise of this Sum of Money was a Specifick Legacy, and therefore *R. D.* can have but a proportionable Part of the Value of his Specifick Legacy out of it.

*Alr Eq. 298.*  
*Lord Castl-*  
*ton ver. Lord*  
*Harbourn.*

## (H) Of abating, refunding, and giving Security for that Purpose.

**P**ecuniary Legatees shall abate in Proportion to the Deficiency of Assets; and therefore if the Ecclesiastical Court go about to compel an Executor to pay a Legacy without Security to refund, a Prohibition will be granted; for tho' an Executor may pay a Legacy without such Caution or Security, yet he is not obliged to do it.

*Cro. Eliz. 467.*  
*Moor 413.*  
*Owen 72.*  
*Allen 40.*

So if a Man devise several Legacies, as 100*l.* to one, and 50*l.* to another, &c. there altho' he directs the Legacy of 100*l.* to be paid in the first Place, yet if the other Legacies fall short, then the Legatee of the 100*l.* must make a portionable Abatement of his Legacy.

*1 Vern. 31.*  
*Brown and*  
*Allen.*

So if a Legacy be given to Executors for Care and Pains, yet this shall give such Legacy no Preference, but the Executors must abate in Proportion.

*2 Vern. 434.*  
*Fretwel and*  
*Stacey.*

As to Refunding and Abating, it seems clear, that Creditors may compel Legatees in Equity to refund when Assets become deficient, altho' there was no Provision made for refunding at the Time the Legacies were paid.

*1 Vern. 94.*  
*2 Vent. 358,*  
*360.*  
*2 Vern. 205.*

So where *A.* being indebted to *B.* made *C.* his Executor, and *C.* wasted the Estate, and died, having devised several Legacies, and made *D.* Executor, which Legacies *D.* paid, and *B.* having exhibited a Bill against *D.* the Executor of *C.* for his Debt due from the first Testator, and against the Legatees in the Will of *C.* to compel them to refund their Legacies, there not being sufficient Assets of the first Testator, it was decreed accordingly; (a) for a Creditor may follow the Assets in Equity, in whose Hands soever they come.

*1 Vern. 162.*

(a) *2 Vern.*  
*205. laid*  
*down as a*  
*Rule.*

Also one Legatee may compel a Pecuniary Legatee to refund where the Assets become deficient, tho' there was no Provision made for Refunding, altho' he hath still Remedy against the Executor, and may compel him to pay it out of his own Purse, if he voluntarily paid away the Assets to the other Legatees.

*1 Chan. Ca.*  
*136, 248.*  
*2 Chan. Ca.*  
*132.*  
*1 Vent. 360.*

But it seems to be agreed, that an Executor who voluntarily pays a Legacy, or assents to the Devise thereof, cannot, either in Favour of other Legatees or Creditors, compel the Legatee to refund, but that in such Case he must bear the Loss himself.

*2 Chan. Ca. 9,*  
*145.*  
*1 Vern. 90,*  
*453, 460.*  
*2 Vern. 207.*

But

1 *Chan. Ca.*  
136.  
2 *Vern.* 205.

But it is said, that if an Executor pays out the Assets in Legacies, and afterwards Debts appear, of which he had no Notice at the Time of Payment of the Legacies; or if he had been compelled by a Decree in Equity to pay Legacies, that in these Cases he may, by Bill in Equity, compel the Legatees to refund, altho' he took no Caution or Security for that Purpose.

### (I) Of Residuary Legacies and Legatees.

*Vide Tit.*  
*Executors and*  
*Administrators.*

THE Testator's making his Will, and appointing an Executor, is a Disposition of all his Personal Estate, after Debts and Legacies paid, to such Executor, without more Words; but if the Testator appoints, that after his Debts and Legacies paid *J. S.* shall have the Surplus, or what remains; then is *J. S.* Residuary Legatee, and may sue for and recover such Surplus or Residue, and is alio, upon the Executor's Refusal to prove the Will, intitled, from his Interest therein, to Administration, with the Will annexed.

*Carth.* 52. *per*  
*Curiam.*

If a Residuary Legatee die before the Debts are satisfied, so that it doth not appear to how much the Surplus will amount, yet the Executor or Administrator of such Legatee shall have the whole Residue of the Personal Estate which remains over, &c. and not the Executor of the first Testator.

*Palm.* 409.

Also if there be a Residuary Legatee, and the Executor omits Part of the Testator's Effects out of the Inventory, or undervalues those which he puts in, the Residuary Legatee may file a Bill of Discovery against him before he has paid the Testator's Debts.

*Abr. Eq.* 305.  
*Lord Castle-*  
*ton ver. Lord*  
*Fanshawe.*

If a Man devise all the Rest and Residue of his Personal Estate, after Debts and Legacies paid, to *J. S.* and several of the Creditors are barred by the Statute of Limitations, who notwithstanding bring Actions against the Executor, and he refuses to plead the Statute of Limitations, yet Equity will not, in Favour of *J. S.* to whom the Surplus is devised, compel the Executor to plead the Statute.

### (K) Of the Payment of Legacies: And herein,

#### 1. What shall be a good Payment, and to whom to be made.

*Preced. Chan.*  
228.

AN Executor, in the Payment of a Legacy, ought to be careful that he takes a proper Receipt, or has sufficient Vouchers of the Payment; and the rather, because it is held to be such an equitable Demand as is not (a) barred by the Statute of Limitations.

(a) 1 *Vern.*  
256. — But  
where after

Length of Time a Legacy was presumed to have been paid, *vide* 2 *Vern.* 21, 484.

1 *Chan. Ca.*  
245.

Also an Executor ought to be careful that he pay it to the proper Hand that has Authority to receive it, and that without a Decree or Order of a Court of Equity he cannot pay it to the (b) Father, or any other Relation of an Infant.

(b) Where a  
Father li-  
belled in the  
Spiritual Court that his Childrens Legacies, being Infants, might be paid to him, and a Prohibition granted. *Gidd.* 243.

As where a Legacy of 100*l.* was devised to an Infant of about ten Years of Age, the Executor paid this Legacy to the Father, and took his Receipt for it; when the Infant came of Age, the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately, but however would not have him trouble the Executor about it, for that he would give it him; upon this the Son rested satisfied for about fourteen or fifteen Years, and he and his Father carried on a Joint-Trade together, and then became Bankrupts; and upon a Commission taken out against the Son, this Legacy, among other Things, was assigned for the Benefit of his Creditors; and the Plaintiff, the Assignee of the Commission, brought his Bill against the Executor, to have an Account and Payment of the Legacy; and for the Defendant it was insisted, that this would be an extream Hardship on him, if he should be obliged to pay it over again; that he had already fairly and honestly paid it to the Father whilst he was in good Circumstances, and if Application had been made sooner, he might have had his Recompence over against the Father; that the Father was by Nature Guardian to his Children, and such Payments to him have formerly been allowed good, tho' now indeed this Court has thought good to extend its Care farther for such Children, and disallowed such Payments; but the Circumstances of this Case were such, that the Defendant, it was hoped, would not be answerable again for it. My Lord Chancellor said, that if the Father had not made his Son such Promise of Recompence, and the Son had acquiesced all that Time, the Case might have been more doubtful; but this Promise of his Father drew him to forbear applying to the Executor sooner, and since his Father had not, nor could now make good his Promise, being a Bankrupt likewise, the Reason of the Son's Forbearance was at an End; and he thought the Rule of this Court, in not suffering Parents to receive their Childrens Legacies, was founded on very good Reason; and therefore left this Case might hereafter be cited as a Precedent, when the Circumstances attending it were forgotten, and to discountenance and deter others from paying such Legacies to the Parents, (tho' he did not deny the Hardships of this particular Case) he decreed against the Executor, which was affirmed on a Rehearing.

*Abr. Eq. 300.*  
*Doyly ver.*  
*Tollferry.*

If a Legacy be given to a Feme Covert, it must be paid to the Husband; also where a Legacy was given to a Feme Covert who lived separate from her Husband, and the Executor paid it to the Wife, and took her Receipt for it, yet on a Bill brought by the Husband, he was decreed to pay it over with Interest.

*2 Vern 261.*

Also it hath been adjudged, that if Husband and Wife are divorced *a mensa & thoro*, and a Legacy is left to her, the Husband alone may Release it.

*1 Rol. Abr. 343.*  
*2 Rol. Abr. 301.*

*Moor 665. Cro. Eliz. 908. Noy 45. 1 Rol. Rep 426. 3 Bulf. 264. Moor 683. 1 Salk. 115.* — But a Person may by Deed or Will give any Thing in Trust for the separate Use of a Feme Covert, and this shall be out of the Power of her Husband. *2 Vern. 659.*

A Legacy of 1000*l.* was given to one, after the Death of her Mother, when she should attain the Age of Twenty-one Years; and the Defendant was appointed Trustee for the Raising and Payment thereof out of certain Lands; the Legatee was drawn into an improvident Match with one who soon after became a Bankrupt, and the Commissioners assigned all his Effects, and gave him a Certificate of his Conformity; and the Assignees brought a Bill against the Trustee for this 1000*l.* who insisted that the Assignees could be in no better Condition than the Husband, and that if he were Plaintiff he could not prevail without making a suitable Provision on his Wife; and that this Legacy being liable to a double Contingency, *viz.* the Death of the Mother, and the Legatee's Arriving at the Age of Twenty-one Years, at the Time of the Bankruptcy, was not such an Interest as could be assigned. The Court held, that tho'

*Abr. Eq. 54.*  
*Jacobson ver.*  
*Peer Williams.*



both Contingencies have since happened, yet those being since the Assignment of the Bankrupt's Estate, and since a Certificate of his having conformed himself in every Thing to the Acts, he was now discharged as a Bankrupt; and this Legacy could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined.

## 2. At what Time a Legacy is to be paid.

*Godolph. Orph. Leg. 272.* By the Civil Law, Executors have a Year's Time, from the Death of the Testator, to pay Legacies; and in Conformity to the Civil Law, the same Rule hath been taken up, and is now followed, in the Court of Chancery.

*2 Vern. 31, 199, 283.* If a Legacy is given to a Child, payable at Twenty-one Years, and the Child dies before, tho' his Administrator shall have the Legacy, yet he must wait for it till such Time as the Child, if he had lived, would have come to the Age of Twenty-one.

*Abr. Eq. 299, 300. Laundry and Williams.* But where *A.* by Will, gave a Legacy to *B.* at Twenty-one, and if he died before Twenty-one, then to the Plaintiff; *B.* died before Twenty-one; and the only Question was, whether the Plaintiff was intitled to the Legacy presently, or must wait till *B.* if he had lived, would have been Twenty-one; and on Time taken to consider of it, my Lord Chancellor was of Opinion, the Plaintiff was intitled to the Legacy presently;

(a) For this (a) but that where a Legacy is given to one to be paid at Twenty-one, vide *1 Leon. 277-8.* so as to be an Interest vested in him presently, tho' not payable till Twenty-one, if the Party dies before that Age, his Executors or Administrators shall not have it till the Legatee, if he had lived, would be *1 And. 33.* Twenty-one Years of Age. *2 Rol. Rep. 134.*

*2 Vern. 431. Nevil and Nevil.* A Legacy of 500*l.* was given to the eldest Son of *A.* to be begotten, to place him out Apprentice; *A.* had a Son born after the Death of the Testator, and on a Bill brought by him for the Legacy, it was decreed to be paid, tho' before such Time as he was fit to be placed out Apprentice.

*2 Vern. 620. Moor and Godfry.* If Legacies are given to *A. B.* and *C.* being the Testator's three Co-heiresses, to be paid at their respective Marriages, and if any of them die, her Legacy to go to the Survivors; and one of them dies unmarried, the Survivors shall not receive her Legacy before their respective Marriages, for the Condition, tho' not again repeated, shall go to the Whole, as well to what accrued by Survivorship as to the original Devise.

## 3. Where the Legatee shall have Interest and Maintenance till the Legacy is paid.

*2 Salk. 415.* If a Legacy be devised generally, it is regularly to carry Interest from the Expiration of the first Year after the Death of the Testator; but if the Legatee, being of full Age, neglects to (b) demand it at that Time, *vide* *1 Vern. 251, 262.* (b) That a he cannot have Interest but from the Time of the Demand.

Legacy differs from a Debt, and must be demanded, otherwise the Legatee not intitled to Interest. *Poph. 104.*—So tho' a Bond was given for Performance of the Will. *1 Leon. 17.*

*2 Salk. 415.* But it is said, that if a Legacy be devised generally, and no Time ascertained for the Payment, and the Legatee be an Infant, he shall be paid Interest from the Expiration of the first Year after the Testator's Death, tho' no Demand be made, because no Laches shall be imputed to him.



Also it is said in *Salk.* that a Legacy left payable at (a) a certain Day, must (as it seems without Demand) be paid with Interest from that Day, and that the Interest allowed is 5 *l.* per Cent.

*1 Salk. 415-6. per Lord Cowper. (a) But in Preced. Chan.*

161. it is held, that tho' a Legacy be devised to be paid at a certain Time, yet it shall not carry Interest but from a Demand made; otherwise of a Debt.

The Plaintiff had a Legacy devised to him, payable within a Year after the Death of the Testator, who was his Half-Brother; the Plaintiff knew nothing of the Legacy, nor of the Testator's Death, till the Executor published it in the *Gazette*, and then he demanded his Legacy of the Defendant the Executor; and the only Contest was, whether the Plaintiff should have Interest from the Time the Legacy should have been paid; and the Court would not give any Interest, not so much as from the Time of the Bill exhibited, nor would they give Costs even out of the Assets, but the bare Legacy.

*Preced. Chan. 11. Knap and Powell.*

If a Father devise Legacies or Portions to his Daughters, or younger Children, to be paid or payable at their respective Ages of Twenty-one Years, or any other Time certain, without making any Provision for their Maintenance in the mean Time, and die, in this Case they shall have Interest for their Portions, from his Death, till paid, because the Father was obliged to have provided for them, if he had lived; but if such Portions had been devised to them by a Stranger, to be paid or payable at such an Age, their Legacies should not carry Interest in the mean Time, because he, being a Stranger, was under no such Obligation to provide for them.

*Abr. Eq. 301. Attorney General ver. Thompson, that the Court of Chancery hath a Discretionary Power of awarding Maintenance to Children. 1 Chan. Ca 60.*

So where a Father, by his Will, gave 2000 *l.* a-piece to his two Daughters, payable at Twenty-one, and charged on Land and Personal Estate, and the Personal Estate being exhausted in Debts, my Lord Chancellor held they should have a reasonable Maintenance out of the Real Estate until their Legacies became payable, and allowed them 80 *l.* per Ann. each.

*Abr. Eq. 301. Conway and Longville.*

## (L) Of the Executor's Assent to a Legacy.

ALTHO' the Testator disposes of Goods and Chattels, and Sums of Money, to Legatees, yet they all pass to the Executor, and he has them in Nature of a Trustee, and he alone has a (b) Title in Law to them, and nothing passes to the Legatee, nor can any Legatee take any Thing to him devised without the Executor's Assent; for were it otherwise, it might be in the Power of a Legatee to subject an Executor to a *Devastavit*, which would discourage all Persons from taking upon them the Office of an Executor.

*Godolph. Orph. Leg. 148. Off. Ex. 27. (b) And therefore if a Legatee takes Possession of the Thing devised without the Assent of the Executor, he may have an Action of Trover against him. Dyer 254. Keilw. 128.*

But this Matter of Assent is only (c) a perfecting Act for the Security of the Executor, for it is the Will of the Testator which gives the Interest to the Legatee, and therefore the Law does not require any exact Form in which it is to be made. Hence any Expression or Act done by the Executor, which shews his Concurrence or Agreement to the Thing demised, will amount to an Assent.

*Off. Ex. 29. Godolph. 148. Plow. 525. (c) And is like an Attornment of a Tenant to the Grant of*

a Reversion. *March 157.*—And therefore a small Matter will amount to an Assent. *1 Vern. 90, 460. 2 Vent. 358.*—And which Legatee may compel the Executor to do in the Spiritual Court, *March 157.*

As

Plov. 53.  
5 Co. 29.  
4 Co. 18.  
March 138

As if the Executor says to the Legatee, *I wish you Joy of the Thing devised to you, or I am content that you have it according to the Will*; or if one offers the Executor Money, or seems willing to purchase a Horse, &c. devised to *J. S.* and the Executor directs him to the Legatee; or if the Executor himself offers the Legatee Money for the Horse, &c. these and the like Acts amount to an Assent.

Hill. 5 Ann.  
Beckett and  
Ball.

Hence it hath been held, that if a Specifick Legacy be devised, as three Gowns, &c. and the Legatee takes Money in Satisfaction of them, that this amounts, first, to a Consent of the Executor to the Legacy, or Devise of them, and then it is a Sale of them by the Legatee or Devisee to the Executor for the Money *eo instanti*.

March 136.  
Cro. Jac. 614,  
615.  
2 Vent. 360.  
(a) If the

Executor deliver to the Legatee the Goods bequeathed to him, to re-deliver them to him again at such a Day, this is a good Assent, and the Words of Re-delivery are void. 1 Leon. 130, 131.

March 136.  
8 Co. 96.

If *A.* devise a Term to *B.* for Life, Remainder to *C.* and the Executor assents to the Devise to *B.* this will amount to an Assent to the Devise over to *C.* and vest the Interest in him accordingly.

10 Co. 47.  
Plov. 520.  
Dyer 367.  
Cro. Eliz. 223.  
2 Co. 37.

If one is himself both Executor and Devisee, and he enters generally, without Claim or Demonstration of Election, he shall have the Thing devised as Executor, which is the first and general Authority, unless he elects to take it as Devisee.

1 Lev. 25.  
Garret and  
Lister.

As where a Man, possessed of a long Term for Years, devised it to his Wife for Life, Remainder to Trustees for his Son's Life, &c. and made his Wife Executrix; and it was held, that the Wife took the Term wholly as Executrix, in the first Place, till she agreed to the Devise; but it being proved that she said, *she would take the Term according to the Will*, it was held by the Court to be a sufficient Assent.

1 Lev. 25.

So in a like Case, where the Wife said, *that the Son was to have the Estate after her*, and this was resolved to be a sufficient Assent.

5 Co. 29  
Cro. Eliz. 602.  
March 136,  
8 Co. & vide  
Tit. Executors  
and Admini-  
strators.

An Executor may assent before Probate of the Will, and if there be two or more Executors, the Assent of any one of them will be sufficient; also it is said, that an Infant Executor may assent, especially if he be above the Age of seventeen Years.

Comb. 437-S.  
Hawart ver.  
Warry ad-  
judged on a  
Special Ver-  
dict.

If a Man devise a Term to a Child *in ventre sa mere*, provided it be a Son, and if not a Son, to *J. S.* and the Child happens to be a Daughter, tho' the Executor assents, yet the Daughter cannot take, because here is a Condition precedent that never happened, and the Executor's Assent is not material where there is no Devise.

### (M) Legacies, in What Court, and how properly recoverable.

vid Tit Ju-  
risdiction of  
the Courts Ec-  
clesiastical,  
and Tit. Exe-  
cutors and Ad-  
ministrators.

IT is clearly agreed, that the Ecclesiastical Court having Jurisdiction over all Testamentary Matters, that as incident thereto, they have Conuzance of Legacies, and that it is the only proper Court where Legacies are to be sued for and recovered, except in those Cases where the Courts of Equity claim a concurrent Jurisdiction with them.

But this Jurisdiction is confined to Gifts of Goods and Chattels; and therefore if a Man, by Will, give Lands to be sold for Payment of Debts or Legacies, these Legacies cannot be sued for in the Ecclesiastical Courts, but only in a Court of Equity, because it is not a Legacy meerly of Goods and Chattels, but arises originally out of Lands and Tenements.

*Dyer* 151.  
*Palm.* 120.  
*Cro. Jac.* 279,  
364.  
*Cro. Car.* 16.  
*2 Rol. Abr.*  
285.  
*2 Mod.* 90.

But if a Rent be devised out of a Term for Years, the Ecclesiastical Courts may hold Plea thereof, for the Term for Years being only a Chattel is Testamentary, and consequently the Rent devised thereout.

*Cro. Jac.* 279.  
*1 Brown.* 34.  
*1 Bulf.* 153.  
*1 Sid.* 279.  
*1 Lev.* 179.  
*2 Keb.* 8.

If the Legatee takes a Bond from the Executor for Payment of the Legacy, and afterwards sues him in the Spiritual Court for the Legacy, a Prohibition will be granted; for by the taking the Obligation, the Nature of the Demand is changed, and it becomes a Debt or (a) Duty recoverable in the Temporal Courts.

*Yelv.* 38.  
*Goodwyn* and  
*Goodwyn*, and  
a Prohibition  
granted  
accordingly.

(a) That by giving a Bond for Payment of a Legacy at a certain Day it thereby becomes a Duty, and is not to be considered as a Legacy. *2 Vern.* 31. — But by Justice *Doddridge*, an Obligation given for Payment of a Legacy does not totally destroy the Nature thereof, but the Legatee has it still in his Election either to sue for it in the Temporal or Ecclesiastical Court. *2 Rol. Rep.* 160

Also altho' the Temporal Courts do not directly take Cognizance of Legacies, so as to allow of an Action for the Recovery of them, yet may the Executor make himself liable to an Action at Common Law, as by his Promise of Payment; in which Case an *Assumpsit* will lie.

*1 Sid.* 45.  
*Raym.* 23.

As where in *Assumpsit* the Plaintiff declared that J. S. devised a Legacy to him, and made the Defendant Executor, and the Plaintiff intending to sue him for the Legacy, the Defendant, in Consideration of Forbearance, promised to pay him; the Defendant pleaded divers Bonds and Judgments, and *Nul assets ultra*; upon which the Plaintiff demurred, and had Judgment without Argument; for it is not material whether he had Assets or no, for he is charged upon his own Promise, in Consideration of Forbearance, and a Forbearance of Suit for a Legacy is a sufficient Consideration.

*2 Lev.* 3.  
*1 Vent.* 120.  
*S. C. Davis*  
and *Reyners*.

And altho' the Spiritual Court, having Jurisdiction of Wills and Testaments, have, as incident thereto, Jurisdiction of Legacies, yet if a Temporal Matter be pleaded in Bar of an Ecclesiastical Demand, they must proceed in the Ecclesiastical Court according to the Common Law, otherwise they will be prohibited.

*1 Rol. Abr.*  
298, 299.  
*Hob.* 12.  
*12 Co.* 65.  
*Hetley* 87.  
*2 Inf.* 608.  
*1 Sid.* 161.

Therefore if Payment be pleaded in Bar of a Legacy, and there is but one Witness, which the Ecclesiastical Court will not admit, because their Law requires two Witnesses, there the Temporal Courts will prohibit them, because it is a Matter Temporal that bars the Ecclesiastical Demand.

*Cro. Eliz.* 88,  
666.  
*1 Show.* 158,  
173.  
*1 Vent.* 291.  
*Richardson*  
and *Desborough*

adjudged. *4 Mod.* 285. *2 Salk.* 547. *Shotton* and *Friend* adjudged. *Carth.* 142. S. C. adjudged. — But it is not sufficient Ground for a Prohibition to suggest that the Spiritual Court objected to the Credibility of a Witness, nor to suggest that the Plaintiff had only one Witness to prove the Fact, unless that he alleged that he offered such Proof, and it was refused for Insufficiency. *Carth.* 143-4.

It is holden by my Lord Chief Justice *Holt*, that a Devisee may maintain an Action at Common Law against a Ter-tenant for a Legacy devised out of Land; for where a Statute, as the Statute of Wills, gives a Right, the Party by Consequence shall have an Action at Law to recover it.

*2 Salk.* 415.  
*Ewer* and  
*Jones*.  
*6 Mod.* 26.  
*S. P. per Holt*,  
and 279. S. P.  
*per Tawfden*  
Justice.

## Libel.

1 Hawk. P.C.

193.

5 Mod. 165.

(a) It is

termed *Li-*

*bellus famosus*

*seu infama-*

*toria scriptura*, and from its pernicious Tendency has been held a publick Offence at the Common

Law; for Men not being able to bear the having their Errors exposed to publick View, were found

by Experience to revenge themselves on those who made Sport with their Reputations; from whence

arose Duels and Breaches of the Peace; and hence written Scandal has been held in the greatest

Detestation, and has received the utmost Discouragement in the Courts of Justice. *Lamb. Sax. Law*

64. *Bratt. lib. 3. cap. 36. 3 Inst. 174. 5 Co. 125.*

**A** Libel is (a) defined a malicious Defamation, expressed either in Printing or Writing, or by Signs, Pictures, &c. tending either to blacken the Memory of one who is dead, or the Reputation of one who is alive, and thereby exposing him to publick Hatred, Contempt and Ridicule.

and from its pernicious Tendency has been held a publick Offence at the Common Law; for Men not being able to bear the having their Errors exposed to publick View, were found by Experience to revenge themselves on those who made Sport with their Reputations; from whence arose Duels and Breaches of the Peace; and hence written Scandal has been held in the greatest Detestation, and has received the utmost Discouragement in the Courts of Justice. *Lamb. Sax. Law* 64. *Bratt. lib. 3. cap. 36. 3 Inst. 174. 5 Co. 125.*

But for the better Understanding the Nature of this Offence, I shall consider,

### (A) What shall be said a Libel: And herein,

1. How far it is necessary that it should be in Writing.
2. What Degree of Defamation will amount to a Libel.
3. What Certainty in the Matter and Application will make it a Libel.
4. Whether any Proceedings in a Court of Justice will amount to a Libel.
5. Whether any Thing of this Kind can be justified.

### (B) Who shall be said a Libeller: And herein,

1. Who shall be said the Author or Composer of a Libel.
2. Who the Publisher.

### (C) The Offenders how punished.

### (A) What shall be said a Libel: And herein,

1. How far it is necessary that it should be in Writing.

5 Co. 125.

**T**HIS Species of Defamation is usually termed *written Scandal*, and thereby receives an Aggravation, in that it is presumed to have been entered upon with Coolness and Deliberation, and to continue longer, and propagate wider and farther than any other Scandal.

But it is clearly agreed, that not only written or printed Scandal come within the Notion of a Libel, but also may be applied to any Defamation whatsoever, expressed either by Signs or Pictures; as by fixing up a Gallows at a Man's Door, or elsewhere, or by Painting him in a shameful or ignominious Manner, as by exposing a Man and his Wife by a Skimmington or Riding, tho' a special Custom is alledged for such Practice.

And since the chief Cause, for which the Law so severely punishes all Offences of this Nature, is a direct Tendency of them to a Breach of publick Peace, by provoking the Parties injured, and their Friends and Families, to Acts of Revenge, which it would be impossible to restrain by the severest Laws, were there no Redress from publick Justice for Injuries of this Kind, which, of all others, are most sensibly felt; and since the plain Meaning of such Scandal, as is expressed by Signs or Pictures, is as obvious to common Sense, and as easily understood by every common Capacity, and altogether as provoking as that which is expressed by Writing or Printing, why should it not be equally Criminal?

## 2. What Degree of Defamation will amount to a Libel.

As every Person desires to appear agreeable in Life, and must be highly provoked by such ridiculous Representations of him, as tend to lessen him in the Esteem of the World, and take away his Reputation, which, to some Men, is more dear than Life itself: Hence it hath been held, that not only Charges of a flagrant Nature, and which reflect a Moral Turpitude on the Party, are libellous, but also such as set him in a scurrilous ignominious Light; for these equally create ill Blood, and provoke the Parties to Acts of Revenge and Breaches of the Peace.

Hence it hath been held, that Words, tho' not scandalous in themselves, yet if published in Writing, and tending in any Degree to the Discredit of a Man, are libellous, whether such Words defame private Persons only, or Persons employed in a publick Capacity; in which latter Case they are said to receive an Aggravation, as they tend to scandalize the Government, by reflecting on those who are intrusted with the Administration of publick Affairs, which doth not only endanger the publick Peace, as all other Libels do, by stirring up the Parties immediately concerned in it to Acts of Revenge, but also have a direct Tendency to breed in the People a Dislike of their Governors, and incline them to Faction and Sedition.

As where a Person delivered a Ticket up to the Minister after Sermon, wherein he desired him to take Notice, that Offences passed now without Controul from the Civil Magistrate, and to quicken the Civil Magistrate to do his Duty, &c. and this was held to be a Libel, tho' no Magistrates in particular were mentioned, and tho' it was not averred that the Magistrates suffered those Vices knowingly.

A Gunsmith published an Advertisement in a common News-Paper, that he had invented a short Kind of Gun that shot as far as others of a longer Size, and that he was made Gunsmith to the Prince of Wales; and B. another Gunsmith, counter-advertised, *That whereas*, &c. reciting the former Paragraph, *he desired all Gentlemen to be cautious, for that the said A. durst not engage with any Artist in Town, nor ever did make such an Experiment, except out of a Leather Gun, as any Gentleman might be satisfied at the Cross Guns in Long-Acre, the said B.'s Horse.* And the Court held, that tho' B. or any other of the Trade, might counter-advertise what was published of A. yet that that should have been done without any general Reflections on him in the Way of his Business; that the Advice to *all Gentlemen to be cautious*, was a Reflection on his Honesty,

Honestly, as if he would deceive the World by a fictitious Advertisement, and the Allegation, that he would not engage with an Artist, was setting him below the rest of his Trade, and calling him a Bungler in general Terms, and not relative to the precedent Matter, and that the Words *except out of a Leather Gun*, was charging him with a Lye, the Word *Gun* being vulgarly used for a Lye, and *Gunner* for a Lyar; and that therefore these Words were libellous, and gave Judgment accordingly; and herein the Court held, that Words, tho' not scandalous in themselves, yet being published in Writing, and tending any way to the Party's Discredit, were actionable, and that all Words were to be construed *secundum Subjectam Materiam*, and to be understood by the Court in the same Sense that others do.

But tho' every Species and Degree of Calumny and Detraction of this Kind are deemed odious in the Eye of the Law, and punishable either by Civil Action or Criminal Prosecution, in most Cases, at the Election of the Party injured; yet the Court of King's Bench, whose Jurisdiction herein is founded upon the Necessity of preventing Quarrels and ill Blood, and which deals with this Offence as of dangerous Consequence to, and destructive of the Peace of the Nation, always exercises a discretionary Power in granting an Information for an Offence of this Nature, and will, in many Cases, leave the Party to his ordinary Remedy;

(a) As in the Case of *the King versus Knight, Trin. 9 Geo. 2.* in B. R. where the Party, as where the Application is made (a) after a great Length of Time; so (b) where the Matter complained of as a Libel happens to be true; so (c) where the Granting the Information would be a Discouragement to learned Inquiries; or (d) where the Matter complained of was intended for Reformation, not Defamation.

after two Terms, three Sessions, and one Assizes applied, the Court refused to grant an Information, tho' it was agreed, had the Application been recent, an Information would have been granted. (b) As in the Case of an Apothecary, who personated Dr. *Crow*, wrote in his Name, and took a Fee, which being published in a common Advertisement, a Motion was made for an Information against the Publisher; but the Truth of what was advertised being made out, the Court left the Prosecutor to his ordinary Remedy. *Hill. 8 Geo. 1. The King versus Bickerston.* (c) As for publishing in a News-paper, that *Ward's* Pill and Drop had done great Mischief in twelve several Cases, and that they were a Compound of Poison and Antimony, &c. *8 Geo. 2. The King versus Roberts.* (d) As where a Person in a private Letter to the Party expostulates with him about some Vices, of which he apprehends him guilty, and desires him to refrain from them, or where a Person sends such Letter to a Father, in relation to some Faults of his Children, which are said to be not at all libellous, being Acts of Friendship, not designed for Defamation, but Reformation. *2 Brownl. 151-2.* But such Matters published in a News-Paper, tho' the Pretence be Reformation, is, it seems, libellous, as was agreed *9 Geo. 2. The King ver. Knight.*

*The King ver. Enes, 5 Geo. 2.* in B. R. So where a Man advertised in a publick News-paper, that his Wife had eloped from him, and cautioned all Persons from trusting her, and an Information for a Libel being moved for, it was denied, because it was the only Way the Husband could take to secure himself.

*The King ver. Fenmeaur, Pasch. 8 Geo. 2.* in B. R. So where it was advertised in one of the Daily Papers, that Lady *Mordington* kept an Assembly in *Moor-fields*, and it being counter-advertised, by my Lord's Order, that the Person calling herself Lady *Mordington* was an Impostrix, and that there was no such Person except his Wife, who always lived with him; the Court refused to grant an Information; for tho' she be called an Impostrix, yet that relates to her as assuming the Title of Lady *Mordington*, and which she is alledged not to have any Right to; and therefore in this Respect may well be called an Impostrix.

*The King ver. Bayley, Hill. 8 Georg. 2.* in B. R. A Writing was directed to General *Wills*, and the four principal Officers of the Guards, to be presented to his Majesty for Redress; the Paper contained the Defendant's Case, that he furnished the Guard at *Whitehall* with Fire and Candle, for which the Government owed him 350 *l.* that he obtained a Warrant for his Money, and Captain *Carr* (the Prosecutor) told him, that if he would assign the Warrant, he would procure him the Money; the Warrant was assigned, and the Money paid

to Carr, who refused paying it to the Defendant ; and the Question was, if an Information should be granted ; and the Court held it no Libel, but a Representation of an Injury, drawn up in a proper Way for Redress, without any Intention to alperse the Prosecutor ; and tho' there be a Suggestion of a Fraud, yet that is no more than what is in every Bill in Chancery, which was never held libellous, if relative to the Subject Matter.

Here it may be proper to insert the remarkable Case of Parson *Prick*, *Cro. Jac.* 90, who in a Sermon recited a Story out of *Fox's Martyrology*, that one *Greenwood*, being a perjured Person, and a great Persecutor, had great Plagues inflicted on him, and was killed by the Hand of God ; whereas in Truth he was never so plagued, and was himself present at that Sermon ; and he thereupon brought his Action upon the Case, for calling him a perjured Person ; and the Defendant pleaded Not guilty ; and this Matter being disclosed upon the Evidence, *Hray* Chief Justice delivered the Law to the Jury, that it being delivered but as a Story, and not with any Malice or Intention to slander any Person, he was not guilty of the Words maliciously, and so was found not guilty.

### 3. What Certainty in the Matter and Application will make it a Libel.

It seems to be now agreed, that not only Scandal expressed in an open and direct Manner, but also such as is expressed in Allegory and Irony amounts to a Libel, and that the Judges are to understand it in the same Manner as others do, without any strained Endeavours to find out Loopholes, or to palliate the Offence, which in some Measure would be to encourage Scandal ; as where a Writing in a taunting Manner, reckoning up several Acts of publick Charity done by one, says, *You will not play the Jew, nor the Hypocrite*, and so goes on, in a Strain of Ridicule, to insinuate, that what he did was owing to his Vain-glory ; or where a Writing, pretending to recommend to one the Characters of several great Men for his Imitation, instead of taking Notice of what they are generally esteemed famous for, pitched on such Qualities as their Enemies charge them with the Want of ; as by proposing such a one to be imitated for his Courage, who is known to be a great Statesman, but no Soldier, and another to be imitated for his Learning, who is known to be a great General, but no Scholar, &c. which Kind of Writing is as well understood to mean only to upbraid the Parties with the Want of these Qualities, as if it had directly and expressly done so.

And from the same Foundation it hath also been resolved, that a defamatory Writing expressing only one or two Letters of a Name, in such a Manner that from what goes before, and follows after, it must needs be understood to signify such a Person in the plain, obvious, and natural Construction of the Whole, and would be perfect Nonsense if strained to any other Meaning, is as properly a Libel as if it had expressed the whole Name at large ; for it brings the utmost Contempt upon the Law, to suffer its Justice to be eluded by such trifling Evasions ; and it is a ridiculous Absurdity to say, that a Writing, which is understood by every the meanest Capacity, cannot possibly be understood by a Judge and Jury.

But it is said, that no Writing whatsoever is to be esteemed a Libel, unless it reflect upon some particular Person ; and that a Writing full of obscene Ribaldry, without any kind of Reflection on any one, is not punishable at all by any Prosecution at Common Law, but the Author may be bound to his good Behaviour, as a scandalous Person of evil Fame.

*5 Co.* 125.  
That a Libel  
may be as  
well by De-  
scriptions  
and Circum-  
locutions as  
in express  
Terms.  
*Poph.* 252.  
*Hob.* 215.  
*1 Hawk. P.C.*  
193-4.

*1 Hawk. P.C.*  
194. *Hurt's*  
Case.

*1 Hawk. P.C.*  
195.

Porb. 252,  
254.

2 Mod. 68.  
*The King* ver.  
Baxter.

*The King* ver.  
Othorne, Trin.  
5 Geo. 2. in  
B. R.

But a Scandal published of three or four, or any one or two of them, is punishable, at the Complaint of one or more, or all of them.

The Defendant was charged in an Information with writing a Libel against the Protestant Religion and Bishops, *Inuendo* the Bishops of England; he was found guilty; and in Arrest of Judgment it was offered, that the Bishops libelled were not *English* Bishops, nor could the *Inuendo* support such Construction; but the Court took upon them to understand the Libel in that Sense, and over-ruled the Exception.

An Information was prayed for publishing a Paper containing an Account of a Murder on a *Jewish* Woman and her Child, by certain *Jews* lately arrived from *Portugal*, and living near *Broadstreet*, because the Child was begotten by a Christian; and the Affidavit set forth, that several Persons mentioned therein, who were recently arrived from *Portugal*, and lived in *Broadstreet*, were attacked by Multitudes in several Parts of the City, barbarously treated, and threatened with Death, in case they were found abroad any more; and it was objected, that no Information could be granted in this Case, because it did not appear who in particular the Persons reflected on were; and for this was cited *The King* versus *Orme*, Trin. 11 H. 3. where an Indictment was exhibited for a Libel called *The Ladies Invention*, and alledged to be to the Scandal of several Ladies unknown, and after Verdict for the King Judgment was arrested, because it did not appear who the Persons reflected on were; *sed per Cur.* admitting that an Information for a Libel may be improper, yet the Publication of this Paper is deservedly punishable in an Information for a Misdemeanor, and that of the highest Kind; such Sort of Advertisements necessarily tending to raise Tumults and Disorders among the People, and inflame them with a universal Spirit of Barbarity against a whole Body of Men, as if guilty of Crimes scarce practicable, and wholly incredible; and in this Case was cited the Case of *The King* and *Franklin*, where tho' only the Words *Ministers* were used in the Libel, yet by suitable Averments in the Information, and Proof made of them to the Jury, they found those Ministers to be Ministers of State to his present Majesty, and the Defendant guilty.

#### 4. Whether any Proceedings in a Court of Justice will amount to a Libel.

Dyer 285.  
2 Inst. 228.  
Yelv. 117.  
2 Bull. 269.  
Godb. 340.  
Palm. 145,  
188.  
1 Vent. 23.  
1 Hawk. P.C.  
194.

It seems to be clearly agreed, that no Proceeding in a regular Course of Justice will make the Complaint amount to a Libel; for it would be a great Discouragement to Suitors to subject them to publick Prosecutions, in respect of their Applications to a Court of Justice; and the chief Intention of the Law in prohibiting Persons to revenge themselves by Libels, or any other private Manner, is to restrain them from endeavouring to make themselves their own Judges, and to oblige them to refer the Decision of their Grievances to those whom the Law has appointed to determine them.

Therefore it hath been resolved, that no false or scandalous Matter contained in (a) a Petition to a Committee of Parliament, or in (b) Articles of the Peace exhibited to Justices of Peace, are libellous.

(a) 1 Lev. 240.  
1 Sid. 414.  
2 Keb. 832.  
(b) 4 Co. 14.

1 Hawk. P.C. 194.

Moor 627.  
1 Hawk. P.C.  
195.

Also it is held, that no Presentment of a Grand Jury can be a Libel, not only because Persons who are supposed to be returned without their own seeking, and are sworn to act impartially, shall be presumed to have proper Evidence for what they do, but also because it would be of the utmost ill Consequence any way to discourage them from making their

Inquiries



Inquiries with that Freedom and Readiness which the publick Good requires.

Also it is holden by some, that no Want of Jurisdiction in the Court to which such a Complaint shall be exhibited will make it a Libel; because the Mistake of the Court is not imputable to the Party, but his Counsel; but herein it is said by *Hawkins*, that if it shall manifestly appear from the whole Circumstances of the Case, that a Prosecution is intirely false, malicious, and groundless, and commenced not with a Design to go thro' with it, but only to expose the Defendant's Character, under the Shew of a legal Proceeding, there can be no Reason why such a Mockery of publick Justice should not rather aggravate the Offence than make it cease to be one, and make such Scandal a good Ground of an Indictment at the Suit of the King, as it makes the Malice of their Proceeding a good Foundation of an Action on the Case at the Suit of the Party, whether the Court had a Jurisdiction of the Cause or not.

2 *Keb.* 852.  
4 *Co.* 14  
1 *Hawk. P.C.* 194.

### 5. Whether any Thing of this Kind can be justified.

It seems to be clearly agreed, that in an Indictment or Criminal Prosecution for a Libel the Party cannot justify that the Contents thereof are true, or that the Person upon whom it is made had a bad Reputation; since the greater Appearance there is of Truth in any malicious Invective, so much the more provoking it is; for, as my Lord *Coke* observes, in a settled State of Government the Party grieved ought to complain for every Injury done him, in the ordinary Course of Law, and not by any Means to revenge himself by the odious Course of Libelling, or otherwise.

5 *Co.* 125.  
*Hob.* 255.  
*Moor* 627.  
1 *Hawk. P.C.* 194.

Also it seems now settled, that no Scandal in Writing is any more justifiable in a Civil Action brought by the Party to vindicate the Injury done him, than in an Indictment or Information at the Suit of the Crown; for tho' in Actions for Words the Law, thro' Compassion, admits the Truth of the Charge to be pleaded as a Justification, yet this Tendernefs of the Law is not to be extended to written Scandal, in which the Author acts with more Coolness, and Deliberation gives the Scandal a more durable Stamp, and propagates it wider and further; whereas in Words Men often in a Heat and Passion say Things which they are afterwards ashamed of, and tho' they seem to act with Deliberation, yet the Scandal sooner dies away, and is forgotten; and therefore from the greater Degree of Mischief and Malice attending the one than the other, the Law allows the Party to justify in an Action for Words, tho' not for written Scandal; from whence it follows, that the only Favour Truth affords in such a Case is, that it may be shewn in Mitigation of Damages in an Action, and of the Fine upon an Indictment or an Information.

*The King ver. Roberts, Mich.*  
8 *Geo.* 2. in  
*E. R.* Agreed  
*per Cur.* in a  
Case for publishing a Libel on Mr. *Branley*, Recorder of *Warwick*.

(B) Who

## (B) Who shall be said a Libeller : And herein,

## 1. Who shall be said the Author or Composer of a Libel.

9 Co. 59.  
Moor 813.  
Lamb's Case. It has been already observed, that a Libel may be expressed not only by Printing or Writing, but also by Signs or Pictures ; but it seems that some of those Ways are essentially necessary ; and it is laid down in *Lamb's Case*, that every Person convicted of a Libel must be the Contriver, Procurer or Publisher thereof.

Carth. 405.  
5 Mod. 163.  
to 167. The  
King ver.  
Paine. It hath been strongly urged, that he who writes a Libel, dictated by another, is not guilty of the Composing and Making thereof, because it appears that another is the Author or Contriver ; but herein the Court held, that the Writing being the essential Part of a Libel, the Reducing it into Writing, in the first Instance, was a Making, and differed from a Transcribing ; and, according to the Report of this Case,

(a) But in Carth. 406. it is said, that he who dictated cannot be indicted for this Libel, because he did not write it, and that therefore if the Writer could not, the Crime would go unpunished. in 5 Mod. it was held, that if (a) one dictates, and another writes, both are guilty of making it, for he shews his Approbation of what he writes. So if one repeats, another writes a Libel, and a third approves what is written, they are all Makers of it, as all who concur and assent to the doing of an unlawful Act are guilty ; and murdering a Man's Reputation by a Libel, may be compared to murdering a Man's Person, in which all who are present and encourage the Act are guilty, tho' the Wound was given by one only.

Carth. 407.  
2 Salk. 417.  
The King ver.  
Bear. Also it hath been held, that Transcribing and Collecting libellous Matter is highly Criminal, tho' it be not found that the Party composed or published it ; for his having it in Readiness for that Purpose when Occasion served, or its falling into such Hands after his Death as may publish it, might be injurious to the Government.

2 Salk. 419. It is said by *Holt* Chief Justice, that when a Libel appears under a Man's Hand-writing, and no other Author is known, he is taken in the Manner, and it turns the Proof upon him ; and if he cannot produce the Composer, it is hard to find that he is not the very Man.

2 Salk. 419. And it is said to have been resolved by the Court, that in Libels *Making* is the *Genus*, Composing or Contriving is one *Species*, Writing a second *Species*, and Procuring to be written a third *Species* ; and finding a Man guilty of Writing only, is finding him guilty of one Species of making.

2 Salk. 418. But yet in some Cases the Writing of a Libel may be a lawful or innocent Act, as by the Clerk that draws the Indictment, or by a Student who takes Notes of it, because it is not done *ad Infamiam* of the Party ; but abstractly considered, the Writing a Copy of a Libel is Writing a Libel, because such Copy contains all Things necessary to the Constitution of a Libel, *viz.* the scandalous Matter, and the Writing ; and it has the same pernicious Consequence, for it perpetuates the Memory of the Thing, and some Time or other comes to be published.

2. Who the Publisher.

It seems to be agreed, that not only he who publishes a Libel himself, but also he who procures another to do it, is guilty of the Publication; and it is held not to be material, whether he who disperses a Libel knew any Thing of the Contents or Effects of it or not, for that nothing would be more easy than to publish the most virulent Papers with the greatest Security, if the Concealing the Purport of them from an illeterate Publisher would make him safe in dispersing them.

And on this Foundation it hath been constantly ruled of late, that the buying of a Book or Paper, containing libellous Matter, in a Book-feller's Shop, is sufficient Evidence to charge the Master with the Publication, altho' it does not appear that he knew of any such Books being there, or what the Contents thereof was; and it will not be presumed that it was brought and sold there by a Stranger, but the Master must, if he suggests any Thing of this Kind in his Excuse, prove it.

The Reading of a Libel in the Presence of another, without knowing it before to be a Libel, or the Laughing at a Libel read by another, or the Saying that such a Libel is made of *J. S.* whether spoken with or without Malice, amounts not to a Publication of it.

Also it is held, that he who repeats Part of a Libel in Merriment, without any Malice or Purpose of Defamation, is no way punishable; but of this *Hawkins* makes a Doubt, for that Jest of this Kind are not to be endured, and the Injury to the Reputation of the Party grieved is no way lessened by the Merriment of him who makes so light of it.

But it seems to be agreed, if he who hath either read a Libel himself, or hath heard it read by another, do afterwards maliciously read or repeat any Part of it in the Presence of others, or lend or shew it to another, he is guilty of an unlawful Publication of it.

It is said by my Lord *Coke*, in the *Cafe de Libellis Famosis*, to have been resolved, that if one finds a Libel, (and would keep himself out of Danger) if it be composed against a private Man, the Finder may either burn it, or presently (a) deliver it to a Magistrate; but if it concern a Magistrate, or other publick Person, the Finder ought presently to deliver it to a Magistrate, to the Intent that by Examination and Industry the Author may be found out and punished.

strate was only punishable in the Star-Chamber, and that the bare having a Libel in one's Custody was no Offence. 1 *Vent.* 31. — But *vide* 2 *Salk.* 418. where it is said to be Evidence of his being the Author or Publisher.

It seems to be a Matter of Doubt, whether the Sending an abusive Letter, filled with provoking Language, to another, will bear an Action as for a Libel, because here is no Publication; but it seems to be clearly agreed, that the Sending such Letter, without other Publication, is an Offence of a publick Nature, and punishable as such, in as much as it tends to create ill Blood, and causes a Disturbance of the publick Peace; and if the bare Making of a Libel be an Offence, whether it be published or not, as it seemeth to be holden, surely the Sending of it to the Party reflected on must be a much greater Crime.

And on this Foundation the Court of King's Bench granted an Information against a Person for sending an abusive Letter to Mr. *Bernardiston*, therein calling him Rascal and Fool; altho' he swore that he wrote this to the Party himself, and never made it publick, being only a Piece of private Repentment; but the Court held, that this Method provoked Persons to Duelling, that the Writing and Sending was a good Publication, and that the Intent of the Party shall not be explained by himself.

9 Co. 59.  
Moor 627.  
1 Hawk. P. C.  
195.

*The King ver*  
*Nutt. Hill.*  
2 *Georg.* 2. so  
ruled on  
Evidence at  
*Guildhall, per*  
*Raymond Ch.*  
*Just.*

9 Co. 59.  
Moor 813.  
1 Hawk. P. C.  
196.

Moor 627.  
1 Hawk. P. C.  
196.

Moor 813.  
9 Co. 59.  
1 Hawk. P. C.  
195.

5 Co. 125.

(a) But it  
has been  
since said,  
that the not  
delivering it  
to a Magi-

4 *Inst.* 180.  
3 *Inst.* 174.  
*Hob.* 62, 215.  
12 Co. 34.  
*Poph.* 136.  
*Raym.* 201.  
1 *Lev.* 139.  
1 *Keb.* 931.  
1 *M.* 58.  
*Skin.* 123 4.

*The King ver.*  
*Pillborough.*  
*Mich.* 5 *Geo.* 2.  
in B. R.

1 *Sand.* 135.  
1 *Lev.* 240.  
1 *Sid.* 414.  
1 *Keb.* 832.

If one deliver a Paper full of Reflections on any Person, in Nature of a Petition to a Committee of Parliament, to any other Persons except the Members of Parliament, he may be punished as the Publisher of a Libel, in respect of such Dispersing thereof among those who have nothing to do with it.

1 *Hawk. P. C.*  
196. and the  
Authorities  
*supra.*

But it hath been held, that the bare Printing of a Petition to a Committee of Parliament, (which would be a Libel against the Party complained of, if it were made for any other Purpose than as a Complaint in a Course of Justice,) and Delivering Copies thereof to the Members of the Committee, shall not be looked upon as the Publication of a Libel, in as much as it is justified by the Order and Course of Proceedings in Parliament, whereof the King's Courts will take Judicial Notice.

### (C) The Offenders how punished.

*Gro. Car.* 175.

THERE can be no Doubt but that a Person who writes or publishes a Libel is subject to the Action of the Party injured, in which Damages shall be recovered; and that being convicted on an Indictment or Information, shall pay such Fine, and also suffer such Corporal Punishment, as to the Court, in Discretion, shall seem proper, according to the Heinousness of the Crime and the Circumstances of the Offender.

# Limitation of Actions.

(A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8.

(B) Of the Limitation of Real Actions pursuant to 32 H. 8. and 21 Jac. 1.

(C) Of the Limitation of Time in Regard to Actions on Penal Statutes.

(D) Of the Limitation of Time in Regard to Personal Actions, pursuant to the 21 Jac. 1. And herein,

1. Of Actions of Assault and Battery.
2. Of Actions of Slander.
3. Of Actions arising upon Contract and founded *in Maleficio*: And herein,

1. Of what Nature or Degree the Action must be so as to be barred by the Statute.
2. Whether a Trust or Equitable Demand be within the Statute.
3. At what Time the Right of Action shall be said to have accrued, before which the Statute can be no Bar.
4. In what Court the Demand must be made, or what Courts are bound by the Statute.

(E) Of the Exceptions in the Statute 21 Jac. 1. cap. 16. and what will save a Bar thereof: And herein,

1. What Actions are within the Savings of the Statutes.
2. Of the Exception in Relation to Infants, &c.
3. Of the Exception in Relation to Accounts between Merchants.
4. Of the Exception in Relation to Persons beyond Sea.
5. Where no Executor or Administrator to sue or be sued.
6. Where no Jurisdiction to sue on, or where hindered by some Authority.
7. Where the Suing out a Writ will save the Bar of the Statute.
8. Where a Debt barred by the Statute shall be said to be revived.

(F) Of the Manner of Pleading and Taking Advantage of the Statute of Limitations.

(A) Of

## (A) Of the Limitation of Actions at Common Law, and before the Statute 32 H. 8.

*(a) Bract. lib. 2. fol. 228.* IT seems that by the Common Law there was no stated or fixed Time as to the bringing of Actions; for tho' it be said by *(a) Bracton*, that *omnes Actiones in mundo infra certa tempora Limitationem habent*; yet my Lord Coke *(b)* says, that the Limitation of Actions was by Force of divers Acts of Parliament; also, says he, this general Position of *Bracton's* admitted of several Exceptions.

*Spelm. Gloss. 32.*

But we find that by the ancient Law there was a stated Time for the Heir of the Tenant to claim after the Death of his Ancestor, or else he lost his Land, according to the feudal Text, *Præterea si quis infeudatus major quatuordecim annis sua incuria, vel negligentia per ann. & diem steterit, quod feudi investituram a proprio Domino non peterit, transacto hoc spatio, feudum amittat & ad Dominum redeat.*

*Spelm. Gloss. Annus & dies 32, 33.*

The fixing upon this Period of a Year and a Day, upon several other Occasions, seems to have been deduced from this ancient Rule, and on this Occasion was pitched upon, because the Services appointed seem to be annually computed; and therefore the Feud was ordered to be taken up within such Time as such annual Services became due, or else it was lost and returned to the Lord; and the same Time that was appointed to the Tenant to claim from the Lord, was also appointed to make his Claim upon any Disseisor; and if no such Claim was made, the Disseisor, dying seised, cast the Right of Possession upon the Heir; and this was to keep the same Uniformity in Point of Time thro' the Law, as also that the Lord might be at a Certainty who he might take for his Tenant, and admit upon every Descent; and since the Heir of the Tenant anciently lost the whole Land, in case he did not take it up within Time, it was fit the Tenant should lose the Right of Possession in case he did not claim within the same Time upon the Disseisor, that the Heir of such Disseisor might be in Peace, in case the Person that had Right did not make his Claim upon him, and that from thenceforth the Lord might receive him into his Feud; and as upon the ancient Plan of feudal Constitution, if the Heir did not take up the Feud within a Year and a Day, a Desertion and Dereliction was presumed; so also if the Disseisee did not claim within the same Time, the Right of Possession was relinquished.

But for these ancient Limitations *vide Co. Lit. 14. b. 15. a. 2 Inst. 94, 95. 2 Rol. Abr. 111. Hale's Hist. of the Law 122. 2 Keb. 45.*

Before the 32 H. 8. certain remarkable Periods were fixed upon, within which the Titles upon which Men designed to be relieved must have accrued; thus in the Time of H. 3. by the Statute of *Merton*, cap. 8. at which Time the Limitation in a Writ of Right was from the Time of King Henry 1. by that Statute it is reduced to the Time of King Henry 2. and for Assises of *Mordauncester* they were thereby reduced from the last Return of King John out of *Ireland*, which was 12 *Johannis*; and for Assises of *Novel Disseisin* *a prima transfretatione Regis in Normaniam*, which was 5 Henry 3. and which before that had been *post ultimum reditum Henric' 3. de Britania*; and this Limitation was also afterwards by the Statutes *Westm. 1. cap. 39.* and *Westm. 2. cap. 46.* reduced to a narrower Compass, the Writ of Right being limited to the first Coronation of *Rich. 1.*

## (B) Of the Limitation of Real Actions pursuant to the 32 H. 8. and 21 Jac. 1.

THE Limitations above-mentioned being, as has been remarked, <sup>2 Inst. 95.</sup> set Periods, in Process of Time, of Necessity grew too large, whereby, as my Lord *Coke* observes, many Suits, Troubles and Inconveniences did arise; and therefore a more direct and commodious Course was taken, which was to indure for ever, and calculated so as to impose Diligence and Vigilancy in him that was to bring his Action, so that by one constant Law certain Limitations might serve both for the Time present and for all Times to come.

And this was effected by 32 H. 8. *cap.* 2. by which it is enacted, ' That no Person shall from thenceforth sue, have or maintain any Writ of Right, or make any Prescription, Title or Claim to or for any Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corodies, or other Hereditaments of the Possession of his or their Ancestor or Predecessor, and declare and alledge any further Seisin or Possession of his or their Ancestor or Predecessor, but only of the Seisin or Possession of his Ancestor or Predecessor, which hath been, or now is, or shall be seised of the said Manors, Lands, Tenements, Rents, Annuities, Commons, Pensions, Portions, Corodies, or other Hereditaments, within threescore Years next before the *Teste* of the same Writ, or next before the said Prescription, Title or Claim, so hereafter to be sued, commenced, brought, made or had.

And it is further enacted by the said Statute, *par.* 2. ' That no Manner of Person shall sue, have or maintain any Assise of *Mortuance*, *Cofenage*, *Ayle*, Writ of Entry upon Disseisin done to any of his Ancestors or Predecessors, or any other Action Possessory upon the Possession of any of his Ancestors or Predecessors, for any Manors, Lands, Tenements, or other Hereditaments, of any further Seisin or Possession of his or their Ancestor or Predecessor, but only of the Seisin or Possession of his or their Ancestor or Predecessor, which was or hereafter shall be seised of the same Manors, Lands, Tenements, or other Hereditaments, within fifty Years next before the *Teste* of the Original of the same Writ hereafter to be brought.

And it is further enacted, *par.* 3. ' That no Person shall sue, have or maintain any Action for any Manors, Lands, Tenements, or other Hereditaments, of or upon his or their own Seisin or Possession therein, above thirty Years next before the *Teste* of the Original of the same Writ hereafter to be brought.

And further, *par.* 4. ' That no Person shall hereafter make any Avowry or Cognizance for any Rent, Suit or Service, and alledge any Seisin of any Rent, Suit or Service, in the same Avowry or Cognizance in the Possession of any other, whose Estate he shall pretend or claim to have, above fifty Years next before the making of the said Avowry or Cognizance.

And it is further enacted by the said Statute, *par.* 5. ' That all Formedons in Reverter, Formedons in Remainder, and *Scire facias* upon Fines of any Manors, Lands, Tenements, or other Hereditaments, at any Time hereafter to be sued, shall be sued and taken within fifty Years next after the Title and Cause of Action fallen, and at no Time after the fifty Years passed.

Also by the said Statute, *par.* 6. it is enacted, ' That if any Person do sue any of the said Actions or Writs for any Manors, Lands, Tenements, or other Hereditaments, or make any Avowry, Cognizance, Prescription, Title or Claim, of or for any Rent, Suit, Service, or

other Hereditaments, and cannot prove that he or they, or his or their Ancestors or Predecessors were in actual Possession or Seisin of and in the same Manors, Lands, Tenements, Rents, Suits, Services, Annuities, Commons, Pensions, Portions, Corodies, or other Hereditaments, at any Time or Times (a) within the Years before limited and appointed in this present Act, and in Manner and Form as is aforesaid, if the same be traversed or denied by the Party, Plaintiff, Demandant or Avowant, or by the Party, Tenant or Defendant; that then, and after such Trial therein had, all and every such Person and Persons, and their Heirs, shall from thenceforth be utterly barred for ever of all and every the said Writs, Actions, Avowries, Cognizance, Prescription, Title or Claim hereafter to be sued, had or made, of and for the same Manors, Lands, Tenements, Hereditaments, or other the Premises, or any Part of the same, for the which the same Action, Writ, Avowry, Cognizance, Prescription, Title or Claim, hereafter shall be at any Time had, sued or made.

(a) In 8 Co. 65. the Statute is recited thus: That no Person or Persons shall hereafter make any Avowry or Conuzance for any Rent, Suit or Service in the same Avowry or Conuzance, in the Possession of his or their Ancestor or Predecessor, &c. above forty Years next before the making of the said Avowry or Conuzance.

*Note;* this Statute hath the usual Savings for Infants, Feme Coverts; Persons in Prison and beyond Sea.

In the Construction of this Statute it hath been holden, That in a (b) Formedon in Reverter or Remainder, or on a *Scire Facias*, on a Fine of such Nature, the Demandant need not mention the Statute in order to make out his Title, but the Tenant, if he would take Advantage of it, must plead it.

*Dyer* 315. b. pl. 101.  
(b) So in Avowry for Rent.  
*Moor* 3 t. pl. 102. 1 *Roll. Rep.* 50.

It has been held, that this Statute being in Restraint of the Common Law, ought to be construed strictly; and that therefore it does not extend to a Formedon in Descender, (c) *Cessavit* nor *Rescous*.

4 Co. 3.  
1 *And.* 16. *Lit. Rep.* 342.  
(c) Not to a *Cessavit* for two Reasons. 1. Because this Writ is not comprised within the Statute. 2. Because the Seisin of Services is not material nor traversable in this Writ. *Moor* 44. pl. 135.—Whether it extends to a Pension in the Spiritual Court, *vide* 3 *Keb.* 366, 392. 1 *Vent.* 265.

If A. by Deed indented, made a Feoffment in Fee to B. and his Heirs, rendering 10 s. *per Ann.* to A. and his Heirs, of which Rent A. or his Heirs, have not been seised within forty Years, yet the Heirs of A. may Distrain, &c. for the Statute must be intended in such Cases (d) only where before the Statute the Avowant was obliged to alledge a Seisin; and that was where the Seisin was so material, and of such Force, that tho' it was by Incroachment, yet it could not be avoided in an Avowry.

8 Co. 64. b  
Copper and Foster adjudged.  
1 *Brownl.* 169. S. C.  
(d) So this Statute extends not to a new Rent created by Act of Parliament. *Cro. Car.* 80, 81, 214. *Lit. Rep.* 42. *Hell.* 28, 36. 1 *Fon.* 233.

To a Bill in Chancery, to be relieved touching a Rent charged upon Lands by a Will, the Defendant pleaded the Statute of Limitations, and that there had been no Demand or Payment in forty Years; and it was held, that this Statute concerns only customary Rents between Lord and Tenant, and not any Rent that commences by Grant, or whereof the Commencement may be shewn.

2 *Vern.* 235.  
*Collins* and *Goodall*.

The Statute does not extend to the Services of (e) Esuage, Homage and Fealty, for a Man may live above the Time limited by the Act; neither doth it extend to any other Service which by common Possibility may not happen or become due within sixty Years, as to cover the Hall of the Lord, or to attend the Lord in the War, &c.

*Co. Lit.* 115. a.  
2 *Inst.* 95.  
4 Co. 10.  
*Bewil's Case.*  
8 Co. 65.  
9 Co. 36.  
3 *Lev.* 21.  
(e) But altho' Homage, Fealty and Esuage, be out of the Statute 32 H. 8. yet are they within the ancient Statute. 2 *Inst.* 96.

And



And where the Tenure is by Homage, Fealty and Eſcuage incertain, <sup>2 Inſt. 60.</sup> and by Suit of Court or Rent, or any other annual Service, the Seiſin of <sup>4 Co. 5. b.</sup> the Suit or Rent, or any other annual Service, is (a) a good Seiſin of the <sup>17. m. 42.</sup> Homage, Fealty or Eſcuage, or other accidental Services, as Wardſhip, <sup>2 R. 1. R. 7</sup> Heriot Service, or the like. <sup>392.</sup>

(a) That Seiſin of a ſuperior Service is a Seiſin of all inferior Services which are incident thereto. <sup>4 Co. 5. b.</sup> So Seiſin of Fealty is a ſufficient Seiſin of Homage and Eſcuage; for when the Tenant does Fealty, he ſwears to do all other Services <sup>4 Co. 5. a.</sup> — So Seiſin of Homage is a Seiſin of all other Services, as well inferior as ſuperior, becauſe in the doing thereof the Tenant takes upon himſelf to do all Services. <sup>4 Co. 5.</sup> — But Seiſin of one annual Service is no Seiſin of another annual Service; for in that Caſe it is the Folly of the Lord, if he hath not an actual Seiſin of the other Service it ſelf, when it becomes due yearly. <sup>4 Co. 9. a.</sup>

By the 1 Mar. cap. 5. it is enacted, ‘ That the 32 H. 8. cap. 2. ſhall not extend to any Writ of Right of Advowſon, *Quare Impedit*, or Affiſe of *Darrein Presentment*, nor *Jure Patronatus*, nor to any Writ of Right of Ward, Writ of Ravifhment of Ward for the Wardſhip of the Body, or for the Wardſhip of any Caſtles, Honours, Manors, Lands, Tenements or Hereditaments holden by Knights-Service, but that ſuch Suits may be brought as before the making the ſaid Act.

By the 21 Jac. 1. cap. 16. for quieting Mens Eſtates, and avoiding of Suits, it is enacted, ‘ That all Writs of *Formedon in Deſcender*, *Formedon in Remainder*, and *Formedon in Reverter*, at any Time hereafter to be ſued or brought of or for any Manors, Lands, Tenements or Hereditaments, whereunto any Perſon or Perſons now hath or have any Title, or cauſe to have or purſue any ſuch Writ, ſhall be ſued and taken within twenty Years next after the End of this preſent Seſſion of Parliament; and after the ſaid twenty Years expired, no Perſon or Perſons, or any of their Heirs, ſhall have or maintain any ſuch Writ of or for any of the ſaid Manors, Lands, Tenements or Hereditaments; and that all Writs of *Formedon in Deſcender*, *Formedon in Remainder*, *Formedon in Reverter*, of any Manors, Lands, Tenements, or other Hereditaments whatſoever, at any Time hereafter to be ſued or brought by Occaſion or Means of any Title, or Cauſe hereafter happening, ſhall be ſued and taken within twenty Years next after the Title and Cauſe of Action firſt deſcended or fallen, and at no Time after the ſaid twenty Years; and that no Perſon or Perſons that now hath any Right or Title of Entry into any Manors, Lands, Tenements or Hereditaments, now held from him or them, ſhall thereinto enter, but within twenty Years next after the End of this preſent Seſſion of Parliament, or within twenty Years next after any other Title of Entry accrued; and that no Perſon or Perſons ſhall at any Time hereafter make any Entry into any Lands, Tenements or Hereditaments, but within twenty Years next after his or their Right or Title, which ſhall hereafter firſt deſcend or accrue to the ſame; and in Default thereof, ſuch Perſons ſo not entering, and their Heirs, ſhall be utterly excluded and diſabled from ſuch Entry after to be made; any former Law, &c.

‘ *Provided*, That if any Perſon or Perſons, that is or ſhall be intituled to ſuch Writ or Writs, or that hath, or ſhall have ſuch Right or Title of Entry, be or ſhall be, at the Time of the ſaid Right or Title firſt deſcended, accrued, come or fallen, within the Age of one and twenty Years, Feme Covert, *Non compos mentis*, imprifoned, or beyond the Seas; that then ſuch Perſon and Perſons, and his and their Heir and Heirs, ſhall or may, notwithstanding the ſaid twenty Years be expired, bring his Action, or make his Entry, as he might have done before this Act; ſo as ſuch Perſon and Perſons, or his or their Heir and Heirs, ſhall, within ten Years next after his and their full Age, Diſcoverture, Coming of ſound Mind, Enlargement out of Priſon, or Coming into  
‘ this

‘ this Realm, or Death, take Benefit of and sue forth the same, and at  
 ‘ no Time after the said ten Years.

In the Construction of this Statute it hath been holden,

<sup>1</sup> *Salk.* 285. That the Possession of one Joint-tenant is the Possession of the other,  
 so far as to prevent this Statute.

<sup>1</sup> *Salk.* 285. That a (a) Claim or Entry to prevent the Statute of Limitations must  
 (a) And by be upon the Land, unless there be some special Reason to the contrary.

<sup>4</sup> & <sup>5</sup> *Ann.*

*cap.* 16. upon such Claim or Entry, an Action must be commenced within one Year next after the  
 making of such Entry and Claim, and prosecuted with Effect, otherwise of no Force to avoid the  
 Statute.

<sup>1</sup> *Lutw.* 781.

*Hunt and  
 Bourn.*

<sup>1</sup> *Salk.* 339.

<sup>2</sup> *Salk.* 422.

*S. C.*

<sup>2</sup> *Salk.* 421.

said to have  
 been twice so  
 ruled by *Holt.*

That if a Person be barred of his *Formedon*, he is not thereby hindred  
 to pursue his Right of Entry which afterwards accrues to him, no more  
 than a Person, who has several Remedies, and discharges one of them,  
 is excluded thereby from pursuing the others.

If *A.* has had Possession of Lands for twenty Years without Interrup-  
 tion, and then *B.* gets Possession, upon which *A.* is put to his Ejectment;  
 tho’ *A.* is Plaintiff, yet the Possession of twenty Years shall be a good  
 Title in him, as if he had still been in Possession; because a Possession  
 for twenty Years is like a Descent which tolls Entry, and gives a Right  
 of Possession, which is sufficient to maintain an Ejectment.

<sup>1</sup> *Salk.* 423.

That if one Tenant in common receives the whole Profits for twenty  
 Years, or more, yet this does not bar his Companion; for the Statute of  
 Limitations never runs against a Man but where he is actually ousted or  
 disseised.

*Moor* 410.

It has been ruled that Copyholds are within the Statute of Limitations,  
 because an Act made for the Preservation of the publick Quiet, and no  
 ways tending to the Prejudice of the Lord or Tenant.

*Comp. Incumb.*  
 429

But Ecclesiastical Persons are not bound by any of the Statutes of  
 Limitations, because it would be a Side-Wind to evade the Statutes made  
 to prohibit their Alienations.

### (C) Of the Limitation of Time in Regard to Actions on Penal Statutes.

All popular  
 Actions were  
 limited to a  
 certain Time  
 by 7 *H. 8*  
*cap.* 3. which  
 is repealed  
 by this Sta-  
 tute.

BY the 31 *Eliz. cap.* 5. *par.* 5. it is enacted, ‘ That all Actions, Suits,  
 ‘ Bills, Indictments or Informations, which shall be brought for any  
 ‘ Forfeiture upon any Statute Penal, made or to be made, whereby the  
 ‘ Forfeiture is or shall be limited to the Queen, her Heirs and Successors  
 ‘ only, shall be brought within two Years after the Offence committed,  
 ‘ and not after two Years; and that all Actions, Suits, Bills or Infor-  
 ‘ mations, which shall be brought for any Forfeiture upon any Penal Sta-  
 ‘ tute, made or to be made, except the Statutes of Tillage, the Benefit  
 ‘ and Suit whereof is or shall be by the said Statute limited to the Queen,  
 ‘ her Heirs or Successors, and to any other that shall prosecute in that  
 ‘ Behalf, shall be brought by any Person that may lawfully sue for the  
 ‘ same within one Year next after the Offence committed; and in De-  
 ‘ fault of such Pursuit, that then the same shall be brought for the  
 ‘ Queen’s Majesty, her Heirs or Successors, any Time within the two  
 ‘ Years after that Year ended; and if any Action, Suit, Bill, Indictment  
 ‘ or Information, shall be brought after the Time so limited, the same  
 ‘ shall be void: And it is provided, that where a shorter Time is limited  
 ‘ by any Penal Statute, the Prosecution must be within that Time.

By the 18 *Eliz. cap. 5. par. 1.* it is enacted, ' That upon every Information that shall be exhibited on any Penal Statute, a special Note shall be made of the very Day, Month and Year of the exhibiting thereof into any Office, or to any Officer which lawfully may receive the same, without any Antedate thereof to be made; and that the same Information be accounted and taken to be of Record from that Day forward, and not before; and that no Procefs be sued out upon such Information, until the Information be exhibited in Form aforefaid, &c. and that every Clerk, making out Procefs contrary to this Act, shall forfeit 40 s.

Also it is further enacted by 21 *Jac. 1. cap. 4.* ' That no Officer shall receive, file or enter of Record, any Information, Bill, Complaint, Count or Declaration, grounded on any Penal Statute, (being within the Provision of the said Statute of 21 *Jac.*) until the Informer or Relator hath first taken a (a) Corporal Oath before some of the Judges of the Court, that he believes, in his Conscience, the Offence was committed within a Year before the Information or Suit within the County where the said Information or Suit was commenced, &c.

(a) It hath been adjudged, that if an Officer receive an Information

without such previous Oath, that yet the Proceedings on it are not erroneous. *Cro. Car. 316. & vide 4 Inst. 272. 2 Inst. 192.* — But *Quare*, whether the Court on Motion will not set aside such Procefs, as having issued contrary to the Directions of the Statute. 1 *Salk. 376.*

In the Construction of these Statutes it hath been holden, That the 21 *Jac. 1. cap. 4.* does not extend to any Offence created since that Statute; so that Prosecutions on subsequent Penal Statutes are not restrained thereby, but that Statute is to them as it were repealed *pro tanto*.

That if an Offence prohibited by any Penal Statute be also an Offence at Common Law, the Prosecution of it, as of an Offence at Common Law, is no way restrained by any of these Statutes. *Hob. 270. 4 Mod. 144.*

That if an Information *tam quam* be brought after the Year on a Penal Statute, which gives one Moiety to the Informer, and the other to the King, it is nought only as to the Informer, but good for the King. *Cro. Car. 331. Cro. Jac 366. & vide Dalif. 60.*

That if a Suit on a Penal Statute be brought after the Time limited, the Defendant need not plead the Statute, but may take Advantage of it on the General Issue. *1 Show. Rep. 353.*

That the Party grieved is not within the Restraint of these Statutes, but may sue in the same Manner as before. *Cro. Eliz. 645. Ney 71.*

1 *Show. Rep. 354.* and *Carth. 233. S. P.* That where the Penalty is given to the Party alone, this is out of the Statute 31 *Eliz.* but *per Holt*, if given to the King and Party separately, it seems within the Statute; but hereof the other Judges doubted. *3 Leon. 237.*

It seems doubtful, whether a Suit by a common Informer on a Penal Statute, which first gives an Action to the Party grieved, and in his Default, after a certain Time, to any one who will sue, be within the Restraint of these Statutes. *1 Show. 353, 354.*

It has been held by three Judges, that the Suing out a *Latitat* within the Year was a sufficient Commencement of the Suit to save the Limitation of Time on a Penal Statute, because the *Latitat* is the Original of *B. R.* and may be continued on Record as an Original. But *Holt* held otherwise, for the Action being for a Penalty given by a Statute, the Plaintiff might have brought an Action of Debt by Original in *B. R.* because the Statute gives the Action; and he held, that there was a Difference between a Civil Action and an Action given by Statute; for in the first Case, the Suing out a *Latitat* within the Time, and continuing it afterwards, will be sufficient; but in the other Case, if the Party proceeds by Bill, he ought to file his Bill within Time, that it may appear so to be upon the Record it self. *Carth. 232. Culliford ver. Blandford. 1 Show. Rep. 353. S. C.*

*Trin. 3 Car. 2.*  
in C. B.  
*Greenwood*  
ver. *Scott.*

In Debt *qui tunc* on the Statute 1 H. 5. cap. 4. for Practising as an Attorney during the Time he was Under-Sheriff, and the Point was on the 31 Eliz. which limits Informers and Plaintiffs in Popular Actions to a Year; the Defendant in this Case was taken upon a *Testatum Cap.* that bore *Teste* 13 January, when his Office expired in November was Twelve-Month before, and so a Year and two Months after his Offence; but by Antedating the Original, and making it of Mich. Term before, it was brought within the Year; and North and Wyndham said it was well warranted by the Practice of the Court, and therefore they would make no Rule to stop the Filing of the Original; but Atkins was against it, and said it was nothing but a Practice to evade the Statute of 31 Eliz.

<sup>2</sup> Hawk P.C.  
<sup>272.</sup>

Serjeant Hawkins makes it a Question, whether the Clause in 31 Eliz. par. 4. by which it is enacted, *That nothing in the said Act contained shall extend to Champerty, King's Customs, or Forestalling, &c. but that every such Offence may be laid in any County; any Thing in the said Act to the contrary notwithstanding,* doth except the said Offences out of the above recited Clause, relating to the Time within which Suits on Penal Statutes must be brought; for the Words above-mentioned, viz. *but that every such Offence may be laid in any County,* seem to restrain the Generality of the precedent, which say, that nothing in the Act contained shall extend to such Offences.

## (D) Of the Limitation of Time in Regard to Personal Actions, pursuant to the 21 Jac. 1. And herein,

### 1. Of Actions of Assault and Battery.

BY the 21 Jac. 1. cap. 16. ' All Actions of Trespas of Assault, Battery, Wounding, Imprisonment, or any of them, shall be commenced and sued within four Years next after the Cause of such Actions or Suits, and not after.

<sup>1</sup> Salk. 206.  
<sup>5</sup> Mod. 74.

It seems, that if a Man brings Trespas for beating his Servant, *per quod servitium amisit*, this is not such an Action as is within this Branch of the Statute, being founded on the special Damage.

<sup>3</sup> Lev. 31.

If to an Action of Assault, Battery and Imprisonment, the Defendant pleads, as to the Assault and Imprisonment, the Statute of Limitations, without answering particularly to the Battery, otherwise than by using the Words *Transgressio predicta*, it is sufficient, for these Words are an Answer to the Whole.

<sup>2</sup> Salk. 423.  
*Blackmore*  
ver. *Tidderly.*  
<sup>6</sup> Mod. 240.  
S. C.

In Trespas for Assault and Battery, the Defendant pleaded *Non Culp. infra sex annos* by Mistake, and not according to the Statute, which is but four Years; and upon Demurrer it was adjudged an ill Plea; for if it be considered as at Common Law, there was no such Plea; if on the Statute, the Act is not pursued; and the Defendant could not take Issue on it, for *quod est Culp. infra sex annos* is an Issue immaterial, because it may be the Jury might find him Not guilty *infra quatuor annos*, but guilty *infra sex annos*.

2. Of Actions of Slander.

By the 21 Jac. 1. cap. 16. par. 3. it is enacted, ' That all Actions on  
' the Cafe for Words shall be commenced and sued within two Years  
' next after the Words spoken, and not after.

In the Construction of this Branch of the Statute it hath been  
holden,

That an Action of *Scandalum Magnatum* is not within the Statute.

*Lit. Rep.* 542.  
*3 Keb.* 645.

That it extends not to Actions for Slander of Title, for that is not  
properly Slander, but a Cause of Damage, and the Slander intended by  
the Statute is to the Person.

*Cro. Car.* 141.  
*Law* and  
*Harwood* ad-  
judged.

*Ley* 82. *Palm.* 530. 1 *Jer.* 196. S. C. adjudged.

That if the Words are of themselves actionable, without the Necessity  
of alledging special Damages, altho' a Loss ensues, yet in this Cafe the  
Statute of Limitations is a good Bar; but if the Words at the Time of  
the speaking of them are not actionable, but a subsequent Loss ensues,  
which intitles the Plaintiff to his Action, in such Cafe the Statute is  
no Bar.

1 *Sid.* 93.  
*Saunders* ver.  
*Edwards.*  
*Raym.* 61.  
S. C. & vide  
3 *Mod.* 111.  
S. C. cited.

As for calling a Woman Whore, by which the lost her Marriage seven  
Years afterwards, the Statute is no Bar; for it is not the Words, but the  
special Damage, which is the Cause of Action in this Cafe.

1 *Sid.* 95.  
1 *Salk.* 206.  
S. P. And  
that it was

incumbent upon the Plaintiff to prove the special Damage; otherwise the Action would not have  
laid for the Words.

Also for calling a Man Thief, and procuring him to be indicted and  
imprisoned for Felony, and the Defendant is found guilty of the Whole;  
the Statute in this Cafe seems no Bar, for the Action is not for Words  
barely, but is an Action upon the Cafe in Nature of a Conspiracy.

*Cro. Car.* 163.  
*Topfal* and  
*Edwards* ad-  
judged on  
the Branch  
of this Sta-

tute, that says, that for slanderous Words the Plaintiff shall have no more Costs than Damages, &c.

That if an Action for Words be founded upon an Indictment, or other  
Matter of Record, it is not within the Statute, but such Action may be  
brought at any Time.

1 *Sid.* 95.

In an Action for Words, the Defendant pleaded *non locutus est verba*  
*predicta infra duos annos*; and upon a special Demurrer it was objected,  
that it ought to have been *Non Culp. infra duos annos*; for as it is it may  
be, the Defendant spoke the substantial Words of the Slander, and yet did  
not speak all the Words; and yet the Plaintiff could not have a Verdict  
upon this Issue; as in an Action of Debt for 10*l.* if the Defendant says  
*Non debet* the 10*l.* without adding *nec aliquem inde denarium*, it would be  
naught; but the Court held the Cafes not alike; for in an Action of  
Debt, every Penny that stands in Demand is of equal Weight; but here  
the Action is founded upon the substantial Words only, and the *verba*  
*predicta* shall refer only to them; and it was held well enough.

1 *Keb.* 820,  
918.  
*Lydiat* and  
*Butler.*

### 3. Of Actions arising upon Contract, and founded in Maleficio: And herein,

#### 1. Of what Nature or Degree the Action must be, so as to be barred by the Statute.

By the 21 Jac. 1. cap. 16. par. 3. it is enacted, ' That all Actions of  
' Trespafs *Quare Clausum fregit*, all Actions of Trespafs, Detinue, Action  
' *sur Trover* and Replevin for taking away of Goods and Cattel, all  
' Actions of Account, and upon the Case, other than such Accounts as  
' concern the Trade of Merchandize, between Merchant and Merchant,  
' their Factors or Servants, all Actions of Debt grounded upon any  
' Lending or Contract without Specialty, all Actions of Debt for Ar-  
' rearages of Rent, and all Actions of Assault, Menace, Battery, Wound-  
' ing and Imprisonment, or any of them, which shall be sued or brought  
' at any Time after the End of the then Session of Parliament, shall be  
' commenced and sued within the Time and Limitation herein after ex-  
' pressed, and not after; that is to say, the said Actions upon the Case,  
' (other than for Slander) and the said Actions of Account, and the said  
' Actions for Trespafs, Debt, Detinue and Replevin for Goods or  
' Cattel; and the said Action of Trespafs *Quare clausum fregit* within  
' three Years next after the End of the then Session of Parliament, or  
' within six Years next after the Cause of such Actions or Suit, and not  
' after; and the said Actions of Trespafs of Assault, Battery, Wounding,  
' Imprisonment, or any of them, within one Year next after the End  
' of the then Session of Parliament, or within four Years next after the  
' Cause of such Actions or Suit, and not after; and the said Action  
' upon the Case for Words, within one Year after the End of the then  
' Session of Parliament, or within two Years next after the Words spoken,  
' and not after.

' Nevertheless, that if in any the said Actions or Suits Judgment be  
' given for the Plaintiff, and the same be reversed by Error, or a Ver-  
' dict pass for the Plaintiff, and upon Matter alledged in Arrest of Judg-  
' ment, the Judgment be given against the Plaintiff, that he take nothing  
' by his Plaint, Writ, or Bill; or if any the said Actions shall be brought  
' by Original, and the Defendant therein be outlawed, and shall after  
' (a) reverse the Outlawry, that in all such Cases the Party Plaintiff,  
' his Heirs, Executors or Administrators, as the Case shall require, may  
' commence a new Action, or Suit, from Time to Time, within a Year  
' after such Judgment reversed, or such Judgment given against the  
' Plaintiff, or Outlawry reversed, and not after.

(a) Whether  
reversed by  
Plea, or Writ  
of Error, not  
material,  
Cro. Car.

294-5.  
Winch 82.  
1 Jon. 312.

' *Provided*, That if any Person or Persons, that is or shall be intituled  
' to any such Action of Trespafs, Detinue, Action *sur Trover*, Replevin,  
' Actions of Accounts, Actions of Debt, Actions of Trespafs for Af-  
' fault, Menace, Battery, Wounding or Imprisonment, Actions upon the  
' Case for Words, be or shall be, at the Time of any such Cause of  
' Action given or accrued, fallen or come, within the Age of Twenty-  
' one Years, Feme Covert, *Non compos*, imprisoned, or beyond the Seas;  
' that then such Person or Persons shall be at Liberty to bring the  
' same Actions, so as they take the same within such Times as are before  
' limited after their coming to or being of full Age, discover of *sane*  
' Memory, at large, and returned from beyond the Seas, as other Persons  
' having no such Impediment should have done.

Here we shall consider and set down such Cases, about which there  
hath been any Contest, as to the Actions being grounded on a Contract

or Lending, as the Statute speaks, those by (a) Specialty, as all others of (a) But tho' a superior Nature, being plainly excepted out of the Statute. a Bond or Specialty be out of the Statute, yet it seems to be the Practice at this Day, where an Action is brought on a Bond of twenty Years standing, and on which no Interest has been paid for that Time, to admit the Defendant on a Plea of *solvit ad diem*, to give this Matter in Evidence, which, from the Length of Time, will be Presumptive Proof of Payment. — So in Chancery, an Obligee on a Bond of twenty Years standing was refused any Relief. 1 *Chan. Rep.* 78, 88, 106.

And to this Purpose it hath been adjudged, that an Action of Debt on the 2 *E. 6.* for not setting out Tithes, is not within the Statute, the Action being grounded on an Act of Parliament, which is the highest Record. *Cro. Car.* 513. *Talory and Jackson.* 1 *Sand.* 38. 2 *Sand.* 66.

1 *Sid.* 305, 415. 1 *Keb.* 95. 2 *Keb.* 462.

So it hath been adjudged, that an Action of Debt for the Arrearages of Rent reserved on a Lease by Indenture is out of the Statute, the Lease by Indenture being equal to a Specialty. *Hutt.* 109. *Freeman and Stacy.* 1 *Sand.* 38. S. C. cited.

2 *Sand.* 66. S. C. cited, and S. P. admitted; and there said, that the Statute extends to Rent reserved on Parol Leases only.

Also it hath been adjudged, that an Action of Debt for an Escape is not within the Statute, not only because it is founded in *Maleficio*, and arises on a Contract in Law, which is different from those Actions of Debt on a Lending or Contract mentioned in the Statute, but also because it is grounded on the 1 *R. 2. cap.* 12. which first gave an Action of Debt for an Escape, (b) there being no Remedy for Creditors before but by Action on the Case. 1 *Sand.* 37. *Fones ver. Pope.* 1 *Lev.* 191. S. C. adjudged. 2 *Keb.* 95. S. C. and 1 *Sid.* 305. S. C. where it is said, that an Action on the Case for an Escape is within the Statute; and by *Wyndham*, Debt upon a Tally is not within the Statute. (b) For this vide 2 *Inst.* 383. and Title *Escape*.

So it hath been adjudged, that this Statute cannot be pleaded to an Action of Debt brought against a Sheriff for Money by him levied on a *Fieri Facias*, because the Action is founded in *Maleficio*, as also upon the Judgment on which the *Fieri Facias* issued, which is a Matter of Record. 1 *Mod.* 245. *Cockram ver. Welby* 212. and 2 *Show.* Rep. 79. S. C.

It hath been adjudged, that an Action of Debt on an Award under the Hand and Seal of the Arbitrator, tho' the Submission was by Parol, is not within the Statute; for tho' in Strictness the Award cannot be said to be equal to a Specialty, yet by being under Hand and Seal it becomes Matter of that Notoriety, that it cannot be liable to any of the Inconveniencies the Statute was made to prevent; such as Perjury in Witnesses, and the Oppression of Defendants when their Witnesses are dead, or Vouchers lost; also it was never intended that the Statute should extend to all Kinds of Actions of Debt, but only to those which arose on a Contract or Lending. 2 *Sand.* 64. 1 *Sid.* 415. 1 *Lev.* 273. 2 *Keb.* 462. 497, 533. S. C.

It hath been adjudged, that the Statute does not extend to the Writ *De rationabili parte bonorum*, founded on the Custom of Nottingham, altho' it conclude in the *Detinet*; for this is an original Writ in the Register; and tho' it conclude in the *Detinet*, is yet a different Action to the common Action of Detinue mentioned in the Statute, which being frequent in Practice, is the Detinue plainly intended by the Statute, and not this, which being founded on a Custom seldom happens; and as the Statute is in Derogation of the Common Law, it ought to be construed strictly. *Hutt.* 109. *Sherwin and Cartwright.* *Lit. Rep.* 341. S. C. adjudged. 1 *Sand.* 37. 2 *Sand.* 64. S. C. cited and admitted to be Law.

An Action of Debt for a Fine of a Copyholder is not within the Statute. 2 *Keb.* 556. 1 *Lev.* 273.

If a Man recovers a Judgment or Sentence in *France* for Money due to him, the Debt must be considered here only as a Debt by simple Contract, and the Statute of Limitations will run upon it. 2 *Vern.* 540. *per Curiam.*



- 2 Lev. 166. It seems, that to an *Assumpsit* brought by the Assignees of a Bankrupt  
 3 Keb. 645. for a Debt due to the Bankrupt, this Statute is a good Bar; for tho'  
 Comb. 70. the Assignment is by Force of an Act of Parliament, yet the Assignees  
 stand only in the place of the Bankrupt, and can have no other Right  
 nor Remedy than he had.
- 3 Lev. 367. It hath been adjudged, that this Statute is a good Plea in Bar to an  
 Oliver and *Assumpsit* brought by an Attorney for his Fees; for tho' the Attorney be  
 Thomas. of Record, yet his Fees are not.
- Carth 3. Re- It hath been adjudged, that this Statute is a good Bar to an Action  
 new ver. Ax- brought against the Drawer of a Bill of Exchange; and that such Bill is  
 ton. not of as high a Nature as a Specialty, (a) neither is it within the Ex-  
 (a) Carth. ception in the Statute relating to Merchants Accounts.  
 226. adjudg-  
 ed.

## 2. Whether a Trust or Equitable Demand be within the Statute.

- March 129. It seems clearly agreed, that tho' the Statutes of Limitations bind the  
 2 Salk. 124. Courts of Equity, that yet a Trust is not within these Statutes.
- 1 Chan. Ca. And therefore where the Plaintiff, who was the Son and Executor of  
 20. Sir Ed- Ch. Just. Heath, who was made Ch. Just. at Oxon during the Difference  
 ward Heath between the King and Parliament, but never sat at Westminster-Hall,  
 ver. Henley exhibited a Bill against the Defendants, Prothonotaries of the K. B. at  
 & al'. that Time, to have an Account of the Money, &c. received by them  
 during that Time by an implied Trust *Virtute officii*; to which the Defen-  
 dants pleaded the Statute of Limitations; but upon Argument the Plea  
 was over-ruled.
- 2 Chan. Ca. So where the Plaintiff exhibited a Bill to have an Account of Money  
 26. Sheldon received by the Defendant from his Father, (whose Executor he was)  
 ver. Weld- who gave it to him to compound for his Estate, sequestered for Delin-  
 man. quency at Goldsmiths-Hall; and it was ordered accordingly, the Court  
 declaring it a Trust, and therefore not within the Statute of Limita-  
 tions.
- 2 Vent. 345. So where my Lady Hollis lent 100 l. and in the Note which was given  
 for it, Mention was made, that it should be disposed of as my Lady  
 should direct; and a Bill being exhibited for it, the Court held it a  
*Depositum* or Trust, and decreed Payment of it; tho' otherwise it had  
 been barred by the Statute of Limitations.
- 2 Vern. 399. A Charity is not barred by Length of Time, nor within the Statute of  
 Limitations.
- 1 Vern. 256. So it hath been held, that a Legacy is not within the Statute of Li-  
 mitations.
- 1 Chan. Ca. It seems to be the Doctrine of Courts of Equity, that Mortgages are  
 102. but now not within the Statute of Limitations; yet where a Man comes in at an  
 by the 7 Geo. old hand, it hath been sometimes decreed, that the Possessor should ac-  
 2. the Re- count no further than for the Profits made in his own Time, to dis-  
 demption of courage the stirring in such Dormant Titles; also the Courts have al-  
 Mortgages is lowed Length of Time to be pleaded in Bar, where the mortgaged Estate  
 expressly li- hath descended as a Fee without Entry or Claim from the Mortgagor,  
 mited to 20 and where the Possessor would be intangled in a long Account; and in  
 Years, which these Cases the Statute of Limitations has been mentioned as a proper  
 vide Title Direction to go by.  
 Mortgages.



### 3. At what Time the Right of Action Shall be said to have accrued, before which the Statute can be no Bar.

This Statute cannot be a Bar, unless the six Years are expired after there hath been compleat Cause of Action; as if a Man promise to pay 10*l.* to *J. S.* when he comes from *Rome*, or when he marries, and ten Years after *J. S.* marries, or comes from *Rome*, the Right of Action accrues from the happening of the Contingency, from which Time the Statute shall be a Bar, and not from the Time of the Promise. *Godb. 437.*

So in an Action on the Case, wherein the Plaintiff declared, that in Consideration that he would forbear to sue the Defendant for some Sheep killed by his the Defendant's Dog, the Defendant promised to make him Satisfaction upon Request, and that such a Time he requested, &c. and it was held, that the Right of Action accrued from the Request, and not from the Time of killing the Sheep; and that therefore the Defendant could not plead the Statute of Limitations, the Request being within six Years, tho' the killing the Sheep, and Promise of Satisfaction, was long before. *Godb. 437. Sluttford ver. Broughs ad-judged.*

So in *Assumpsit*, in Consideration that the Plaintiff would deliver to the Defendant such a Deed, the Defendant promis'd, that he would re-deliver it to him on Request, and also in Consideration that he had, upon Request, delivered to him another Deed; the Defendant promised to pay him 40*l.* and alledges, that he had delivered to him the first Deed, and altho' at such a Day afterwards he made Request, yet he had not re-delivered the first Deed, nor paid the 40*l.* the Defendant pleads the Statute of Limitations, and that he did not promise within six Years before the Action brought; whereupon the Plaintiff demurs; for the Cause of Action, as to the first Deed, did not arise upon the Promise, but upon the Refusal after Request; and the Request was within six Years; and so held the Court. *1 Lev. 47. Webb and Martin 1 Sid. 66. 1 Keb. 177. S. C.*

So in *Assumpsit*, in Consideration that the Plaintiff, at the Defendant's Request, would receive *A.* and *B.* into his House *ut Hospites*, and diet them, the Defendant promised, &c. *Non assumpsit infra sex annos* was pleaded; the Plaintiff demurred, and held no Plea; for the Defendant cannot in such Case plead *Non assumpsit infra sex annos*, (a) but *Actio non accrevit infra sex annos*; for it is not material when the Promise was made, if the Cause of Action be within six Years, and the Dieting might be long afterwards. *2 Salk. 422. Gould and Johnson.*

An Executor, several Years before the Action brought, left some Household-Stuff in the House, by the Consent of the Heir, who used them after; and within six Years of the Action brought, the Executor demands the Goods, and the Heir refused to let him have them; whereupon Trover was brought, and the Statute of Limitations pleaded; and *per Cur.* the Ufer before the Demand was no Conversion, nor Evidence of it, for it was the Consent of the Executor till then, and the Demand being within six Years, the Refusal which ensued it, and is the only Evidence of a Conversion in the Case, was within the six Years; and (b) if a Trover before six Years, and a Conversion after, the Statute cannot be pleaded. *(a) For this side 1 Vent. 191. 3 Keb. 613. Farel. 99. Wortley Mountague ver. Lord Sandwich. (b) But for this side Cro. Car. 245-6, 533.*

*1 Jon. 252. 3 Mod. 111.*

In an Action upon the Case against an Executor, the Plaintiff declares, that upon a Marriage Treaty it was agreed between the Plaintiff and Testator, that he should pay to the Plaintiff 100*l.* and whilst that should be unpaid he should pay the Plaintiff 10*l.* *per Ann.* which Agreement was made *Anno* 1618, and the Action was brought for all the Arrears by the Space of Twenty-eight Years. The Defendant pleaded the *Allen 62. Hurvey and Thorne ad-judged, no Body appearing for the Defendant.*

the Statute of Limitations; and on Demurrer it was held, that all could not be barred by the Statute; and therefore the Plaintiff had Judgment.

2 Salk. 420.  
Coventry ver.  
Apfley, &  
vide 3 Mod.  
110.  
Comb. 26.

Trespass for imprisoning him, and detaining him in Prison from 32 Car. 2. till the 3d of April 4 Jac. 2. The Defendant pleaded as to all till 32 Car. 2. such a Day, *Non Culp. infra quatuor annos*, and as to the Rest, a Pleint, and *Capias* issued; the Plaintiff demurred; & *per Curiam*, tho' the Imprisonment be complained of as one continued Imprisonment, yet the Defendant may divide the Time, and plead the Statute as to Part; and the Plaintiff may reply the Continuance; therefore as to this, Judgment was given against the Plaintiff upon his Demurrer, but for him as to the Rest, because the *Capias* was awarded by the Court *ex officio*, and it did not appear that the Defendant meddled in it.

6 Mod. 26.

In Case of Seamen, the Duty does not arise from the Contract, but from the Service done; and therefore tho' the Contract were above six Years, and any Part of the Service within that Time, it is out of the Statute.

#### 4. In what Court the Demand must be made, or what Courts are bound by Statute.

Marsh 129.  
1 Salk. 424.

It is clearly agreed, that the Statute of Limitations is a good Plea in a Court of Equity; but it seems the safest Way for him who pleads it, in his Answer, also to say, that he has paid the Money, because otherwise the Court supposes a Trust between the Plaintiff and Defendant, and that the Money is a *Depositum* in the Hands of the Defendant for the Benefit of the Plaintiff; and the Statute of Limitations, as has been observed, does not reach Trusts.

6 Mod. 25,  
26.  
2 Salk. 424.  
3 Keb. 366,  
392.

But it seems to be agreed, that the Statute of Limitations is no Plea in the Court of Admiralty, or Spiritual Court, where they proceed according to their Law, and in a Matter in which they have Conuzance.

6 Mod. 26.

Therefore it hath been agreed, that for a Suit upon a Contract *super altum mare*, no Prohibition should go upon their Refusal of a Plea of the Statute of Limitations.

2 Salk. 424.

So it has been held not to be pleadable to a Proceeding in the Spiritual Court, *pro violenta manu injectione super Clericum*, because the Proceeding is *pro reformatione morum*, and not for Damages.

2 Salk. 424.  
6 Mod. 25.

It has been doubted, whether to a Suit in the Admiralty for Mariners Wages, this Statute is a good Plea; because it is said, that this is a Matter properly determinable at Common Law; and the allowing the Admiralty Jurisdiction therein, only a Matter of Indulgence.

But this is now settled by the 4 & 5 Ann. cap. 16. by which it is enacted, ' That all Suits and Actions in the Court of Admiralty for ' Seamen's Wages, shall be commenced and sued within six Years next ' after the Cause of such Suits or Actions shall accrue, and not after.

(E) **Of the Exceptions in the Statute 21 Jac. 1. cap. 16. and What Will save a Bar thereof:**  
And herein,

**1. What Actions are within the Exceptions of the Statute.**

AS to this it hath been adjudged, that the last Proviso in the Statute Cro. Car. 245. 533. not only extends to those Actions therein enumerated, but also to an *Assumpsit*, tho' not mentioned, and to all other Actions on the Case 2 Sand. 120. 2 Mod. 71. being of equal Mischief, and plainly within the Intention of the Legislature. 1 Sid. 453.

**2. Of the Exception in Relation to Infants, &c.**

As to this it hath been holden, that the Statute being general, Infants 1 Lec. 31. had been included, had they not been particularly excepted.

It hath been holden, that if an Infant, during his Infancy, by his Guardian bring an Action, the Defendant cannot plead the Statute of Limitations; altho' the Cause of Action accrued six Years before, and the Words of the Statute are, *That after his Coming of Age, &c.* 2 Sand. 121.

It has been held in Chancery, that if one receives the Profits of an Infant's Estate, and six Years after his coming of Age, he brings a Bill for an Account, the Statute of Limitations is as much a Bar to such a Suit, as if he had brought an Action of Account at Common Law; for this Receipt of the Profits of an Infant's Estate is not such a Trust, as being a Creature of the Court of Equity, the Statute shall be no Bar to; for he might have had his Action of Account against him at Law, and therefore no Necessity to come into this Court for the Account; for the Reason why Bills for an Account are brought here, is from the Nature of the Demand, and that they may have a Discovery of Books, Papers, and the Party's Oath, for the more easy taking of the Account, which cannot be so well done at Law; but if the Infant lies by for six Years after he comes of Age, as he is barred of his Action of Account at Law, so shall he be of his Remedy in this Court. Abr. Eq. 504. Lo. key v. Lo. key.

**3. Of the Exception in relation to Merchants Accounts.**

As to the Exception relating to Merchants, it hath been a Matter of much Controversy, whether it extends to all Actions and Accounts relating to Merchants and Merchandize, or to Actions of Account open and current only, the Words of the Statute being, *That all Actions of Trespass, &c. all Actions of Account and upon the Case, other than such Actions as concern the Trade of Merchants;* so that by the Words, *other than such Actions*, not being said Actions of Account, it has been insisted that all Actions concerning Merchants are excepted. 1 Jon. 401. 2 Sand. 124. 125. 1 Lev. 287. 2 Keb. 622. 1 Lev. 298. 1 Vent. 90. 1 Mod. 270. 2 Mod. 312. 2 Vern. 456.

But it is now settled, that Accounts open and current only are within the Statute; and that therefore, if an Account be stated and settled between Merchant and Merchant, and a Sum certain agreed to be due to one of them, if in such Case he, to whom the Money is due, does not bring his Action within the Time limited, he is barred by the Statute. Vide the Authorities supra.

*Carib.* 226. So it hath been adjudged, that by the Exception in the Statute concerning Merchants Accounts, no other Actions are excepted but Actions of Account.

*Carib.* 226. Also it hath been adjudged, that Bills of Exchange for Value received, are not such Matters of Account as are intended by the Exception in the Statute of Limitations.

#### 4. Of the Exception in relation to Persons beyond Sea.

*Cro. Car.* 245, 333. It seems to have been agreed, that the Exception as to Persons being beyond Sea, extends only where the Creditors or Plaintiffs are so absent, and not to Debtors or Defendants, because the first only are mentioned in the Statute; and this Construction has the rather prevailed, because it was reputed the Creditor's Folly, that he did not file an Original and outlaw the Debtor, which would have prevented the Bar of the Statute.

<sup>1</sup> *Fon.* 252.

<sup>1</sup> *Lev.* 143.

<sup>3</sup> *Mod.* 311.

<sup>2</sup> *Lutw.* 950.

<sup>1</sup> *Salk.* 420.

But as the Creditor's being beyond Sea is saved by the 21 *Jac.* 1. so now by the 4 & 5 *Ann. cap.* 16. it is enacted, ' That if any Person or Persons, against whom there is or shall be any Cause of Suit or Action for Seamen's Wages, or against whom there shall be any Cause of Action of Trespafs, Detinue, Action *sur* Trover or Replevin, for taking away Goods or Cattle, or of Action of Account, or upon the Case, or of Debt grounded upon any Lending or Contract without Specialty, of Debt for Arrearages of Rent, or Assault, Menace, Battery, Wounding and Imprisonment, or any of them, be, or shall be, at the Time of any such Cause of Suit or Action given or accrued, fallen or come, beyond the Seas, that then such Person or Persons, who is or shall be intitled to any such Suit or Action, shall be at Liberty to bring the said Actions against such Person and Persons after their Return from beyond the Seas, within such Times as are limited for the bringing of the said Actions by the 21 *Jac.* 1.

#### 5. Where no Executor or Administrator to sue or be sued.

<sup>1</sup> *Salk.* 421. If *A.* receives Money belonging to a Person who afterwards died Intestate, and to whom *B.* takes out Administration, and brings an Action against *A.* to which he pleads the Statute of Limitations, and the Plaintiff replies, and shews that Administration was committed to him such a Year, which was *infra sex annos*; though six Years are expired since the Receipt of the Money, yet not being so since the Administration committed, the Action is not barred by the Statute.

In which last Book it is said, that *Holt* was of Opinion, that the Administrator should have six Years from the Time of granting Administration, according to *Sanford's Case* cited in *Saffin's Case*, *Cro. Jac.* 60, 61. but in the Principal Case there was Judgment against the Plaintiff on another Point.

<sup>2</sup> *Salk.* 424-5. It is said in general, that where one brings an Action before the Expiration of six Years, and dies before Judgment, the six Years being then expired, this shall not prevent his Executor.

*Trin.* 5 *Geo.* 2. But if an Executor sues upon a Promissory Note to the Testator, and dies before Judgment, and six Years from the original Cause of Action are actually expired, and the Executor of the Executor brings a new Action in four Years after the first Executor's Death, the Statute of Limitations shall be a Bar to such Action; for tho' the Debt does not become irrecoverable, by an Abatement of the Action after the six Years elapsed by the Plaintiff's Death, yet the Executor should make a recent Prosecution, to which the Clause in the Statute, that provides a Year after the Reversal of a Judgment, &c. may be a good Direction; or shew that he came as early as he could, because there was a Contest about the Will,

or Right of Administration; for the Statute was made for the (a) Benefit of Defendants, to free them from Actions when their Witnesses were dead, or their Vouchers lost.

(a) That the Statute of Limitations was one of

the best of Statutes, and the Pleading thereof no Disparagement to any Body: *Per Holt C. J. Faresf. 12*

If there is no Executor against whom the Plaintiff may bring his Action, he shall not be prejudiced by the Statute of Limitations, nor shall any Laches in such Case be imputed to him.

2 Vern. 695.

## 6. Where no Jurisdiction to sue in, or where hindered by some Authority.

It seems agreed, that there being no Courts, or the Courts of Justice being shut, is no Plea to avoid the Bar of the Statute of Limitations; as where after the Civil War an *Affumpsit* was brought, and the Defendant pleaded the Statute of Limitations; to which the Plaintiff replied, that a Civil War had broke out, and that the Government was usurped by certain Traitors and Rebels, which hindered the Course of Justice, and by which the Courts were (b) shut up, and that within six Years after the War ended he commenced his Action; and this Replication was held ill; (c) for the Statute being general, must work upon all Cases which are not exempted by the Exception.

1 Keb. 157

1 Lev. 31,

111.

Carth. 137.

2 Salk. 420

(b) In *Plow.*

9. b. that

Things hap-

pening by

an invinci-

ble Necessi-

ty, tho' they

be against

the Common Law, or an Act of Parliament, shall not be prejudicial. — Therefore to say the Courts were shut, is a good Excuse, on Voucher of Record. *Bro. Tit. Fuller of Record.* — So in the Times of Domestick War, when the Courts of Justice are shut, a Descent shall not take away an Entry, tho' the Disseisin was in Times of Peace; for then the Disseisee would be without all Remedy, there being no Courts open to bring his Action in. *Co. Lit. 249.* (c) In some Books it is said, that the Defendant rejoined, and set forth the Act of Oblivion, and that for Confirmation of Judicial Proceedings; and for this Reason also the Replication was held ill. 1 Keb. 157, 1 Lev. 111.

And in Confirmation of this Doctrine we find, that an Act of Parliament was made 1 H. & M. whereby it is enacted, that from the 10th of December (which was the Day that King James departed, till the 12th of March 1688. when King William assumed the Government) shall not be accounted any Part of the Time within which any Person by Virtue of the Statute of Limitations might bring his Action; but that he shall have so much Allowance of Time as is from the 10th of December to the 12th of March for bringing his Action.

3 Lev. 283.

It is clearly agreed, that the Defendant's being a Member of Parliament, and intitled to Privilege, will not save a Bar of the Statute; because the Plaintiff might have filed an Original without being guilty of any Breach of Privilege.

1 Lev. 31,

111.

Carth. 136-7.

It is said, that if a Man sues in Chancery, and, pending the Suit there, the Statute of Limitations attaches on his Demand, and his Bill is afterwards dismissed, the Matter being properly determinable at Common Law; in such Case the Court will preserve the Plaintiff's Right, and will not suffer the Statute to be pleaded in Bar to his Demand.

1 Vern. 73, 74.

But it seems

that there

must be some

equirable

Circum-

stances at-

tending his Case; and therefore in 2 Chan. Ca. 217. it is said, that unless the Plaintiff was stayed by some Act of the Court, as Injunction, &c. the Court will not interpose.

If the Statute of Limitations be pleaded to an Action, the Plaintiff to save his Action may reply, that he had commenced (d) the Suit in an Inferior Court within Time of Limitation, and that it was removed to Westminster by Habeas Corpus; and this shall be allowed by a favourable Con-

1 Sid. 228.

3 Keb. 263.

Bevin and

Chapman.

1 Lev. 143.

S. C. but

same Point does not appear. (d) The Plaintiff must aver, that the Cause of Action in the Court below, and that removed, is the same. *Cro. Car. 294.* — But a Difference in Value is not material. 1 Vent. 252.

struction of the Statute of Limitations; altho' in Strictness the Suit is commenced in the Court above, when it is removed by *Habeas Corpus*.

2 Salk. 424.  
Matthews v.  
Phillips.

So in a like Case, where Debt was brought in the Palace-Court, and after some Proceedings there, the six Years expired, the Defendant sued a *Habeas Corpus*, and removed the Cause into B. R. where the Plaintiff declared *de novo*; and the Defendant pleaded, that the Cause of Action did not accrue within six Years before the *Teste* of the *Habeas Corpus*; and this was held to be a good Plea; but that the Plaintiff might reply the Suit below, and shew that to have been within the six Years; not that this Suit was a Continuance of the Suit below, but that the Plaintiff had rightfully and legally pursued his Right; and it should not be in the Power of the Defendant, to defeat or hinder him of a Remedy without any Default.

### 7. Where the Suing out a Writ will save a Bar of the Statute.

Carth. 136.  
1 Salk. 420.  
3 Mod. 311.

It is clearly agreed, that the Suing out an Original will save a Bar of the Statute of Limitations, and that thereupon the Defendant may be outlawed; and that if beyond Sea at the Time of the Outlawry, tho' it shall be reversed after his Return, yet the Plaintiff may bring another Original by (a) *Journies Accounts*, and thereby take Advantage of his first Writ.

(a) For this  
vide 1 Lutw.  
260.

1 Sid. 53, 60.  
Carth. 233.  
1 Salk. 421.

Also it is agreed, that the Suing out a *Latitat* is a sufficient Commencement of a Suit, to save the Limitation of Time, because the *Latitat* is the Original of B. R. and may be continued on Record as an Original Writ.

2 Keb. 46.  
Bottle and  
Wood.

Also it hath been ruled, that to a Plea of the Statute of Limitations the Plaintiff may reply, that he sued out a *Latitat*, and continued it down by a *Vicecomes non misit breve*, without concluding *prout patet per Recordum*; for the *Latitat* Roll is only for the private Use of the Court, and no Record.

Stil. 178.  
2 Keb. 369.  
S. C. cited.

So it seems the Plaintiff may reply, that he sued out a *Latitat* of such a Term, without setting forth the Day of the *Teste*; and that in such Case it shall have Relation to the first Day of the Term.

Carth. 144.  
2 Salk. 420.  
1 Lutw. 101,  
254.

But tho' the Suing out an Original, or *Latitat*, will be a sufficient Commencement of a Suit, yet the Plaintiff, in Order to make it effectual, must shew that he hath (b) continued the Writ to the Time of the Action brought.

3 Mod. 33.  
(b) That the  
1 Keb. 140.

Attorney's Writing the Continuances on the Writ in his Chambers is sufficient. 1 Sid. 53.

Carth. 144.  
Rudd v. Ber-  
kenhead.  
2 Salk. 420.  
S. C.

As in *Assumpsit* for Fees due to an Attorney, the Defendant pleaded *non Assumpsit infra sex annos*; the Plaintiff replied, that on such a Day two Years before, he had sued out an Attachment of Privilege against the Defendant; upon which Writ *taliter processum fuit*; that the Defendant (on such a Day) in *Hillary Term*, anno 2 W. &c. appeared, and the Plaintiff declared against him *modo & forma*, &c. and upon Demurrer to this Replication it was held ill; because the Plaintiff did not set forth any Continuance of this Writ of Attachment, (*per Vic' non misit Breve*), which was sued out two Years before; for 'tis impossible that the Defendant should appear in *Hillary Term* anno 2 Will. to a Writ returnable two Years before, and no other Writ is set forth by the Plaintiff; but if the Plaintiff, after the *taliter processum fuit*, had shewn the last Attachment, and the Return thereof, upon which in Truth the Defendant did appear, it had been well enough, without shewing any of the Continuances.

An *Indebitatus Assumpsit* laid several Ways; the Defendant pleaded, *Actio non, quia dicit quod billa prædicta exhibitæ fuit 20 die Junii, & non antea, & quod ipse ad aliquod tempus infra sex annos ante exhibitionem billæ prædictæ non assumpsit, &c.* The Plaintiff replied a Bill of *Middlesex* tested *die lunæ prox' post tres septimanas, &c.* returnable the same Day; whereupon was returned *Non est inventus*, and continued down by *Tre non misit breve & præcept' sicut alias.* To this it was demurred, and Judgment given for the Defendant; for there cannot be such a Bill of *Middlesex* as this, which is returnable the very Day of the *Teste*; and the Statute of Limitations, on which the Security of all Men depends, is to be favoured.

### 8. Where a Debt barred by the Statute Shall be said to be revived.

It is clearly agreed, that if after the six Years the Debtor acknowledges the Debt, and promises Payment thereof, that this revives it, and brings it out of the Statute; as if a Debtor by Promissory Note, or Simple Contract, promises within six Years of the Action brought that he will pay the Debt; tho' this was barred by the Statute, yet it is revived by the Promise; for as the Note it self was at first but an Evidence of the Debt, so that being barred, the Acknowledgment and Promise is a new Evidence of the Debt, and being proved, will maintain an *Assumpsit* for Recovery of it.

Also it hath been adjudged, that a conditional Promise will revive a Debt barred by the Statute of Limitations; as where to an *Assumpsit* by an Executor for Goods sold and delivered by the Testator, the Defendant pleaded the Statute; and upon Evidence it appeared, that the Defendant within six Years, being applied to by the Executor for the Debt, said, *If you prove that I had the Goods, I will pay you*; which being fully proved at the Trial, it was held that this conditional Promise revived the Debt; and that though made to the Executor, after the Death of the Testator, was sufficient to maintain the Issue; (a) because the Promise did not give any new Cause of Action, but only revived the old Cause, and was of no other Use, but to prevent the Bar by the Statute of Limitations.

mise to the Testator, and the Defendant pleaded *Non assumpsit infra sex annos*; and upon the Trial of the Issue it appeared, that there was a new Promise made within six Years, but it was a Promise made to the Plaintiff himself, and not to the Testator; and it was held *per Cur'*, that he should have declared accordingly. 1 Salk. 28. *Dean v. Crane.* 6 Mod. 309. S. C. said to be so held on a Conference with all the Judges.

So it hath been held, that a bare (b) Acknowledgment of the Debt, within six Years of the Action, is sufficient to (c) revive it, and prevent the Statute, tho' no new Promise was made.

*Serjeants-Inn.* (b) So stating an Account of the Goods sold. *March 105-6.* (c) In 5 Mod. 426. it is said to be Evidence of a Promise. — But in 2 Show. 126. 2 Vent. 151-2. it is said, that an Acknowledgment is not sufficient without a Promise.

But if an *Indebitatus Assumpsit* for Goods sold, be brought against four Persons, who plead the Statute of Limitations, and it be found that one of them promised within six Years, there can be no Judgment against him; for the Contract being intire, it must be found that they all promised.

*tris* who inclined to the contrary; because the Plea of *Non assumpsit infra sex annos* implies a Promise at first; and if one should renew his Promise within six Years, it is reasonable it should bind him; and the Plaintiff must sue them all, or else he will vary from the original Contract.



1 Salk. 154.  
2 Vern. 141.

It seems to be the Doctrine of the Courts of Equity, that if a Man by Will or Deed subject his Lands to the Payment of his Debts, Debts barred by the Statute of Limitations shall be paid, for they are Debts in Equity, and the Duty remains; and the Statute hath not extinguished that, tho' it hath taken away the Remedy.

Abr. Eq. 305.  
Andrews v.  
Brown.

Also it hath been ruled in Equity, that if a Man has a Debt due to him by Note, or a Book-Debt, and has made no Demand of it for six Years, so that he is barred by the Statute of Limitations; yet if the Debtor, or his Executor, after the six Years, puts out an Advertisement in the *Gazette*, or any other News Paper, that all Persons, who have any Debts owing to them, may apply to such a Place, and that they shall be paid; this (tho' general, and therefore might be intended of legal subsisting Debts only,) yet amounts to such an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again.

### (F) Of the Manner of Pleading and taking Advantage of the Statute of Limitations.

1 Lev. 111.  
1 Sid. 253, &  
vide Cro. Jac.  
115.

(a) And  
therefore if  
the Defen-

IT seems to be admitted, that the Statute of Limitations must be pleaded (a) positively by him that would take (b) Advantage thereof; (c) and that the same cannot be given in Evidence, especially in an *Affumpsit*, because the Statute speaks of a Time past, and relates to the Time of making the Promise. (b) If a Man devise all the Rest and Residue of his Personal Estate, after Debts and Legacies paid, to J. S. and several of the Creditors are barred by the Statute of Limitations, who notwithstanding bring Actions against the Executor, and he refuses to plead the Statute of Limitations; yet Equity will not, in Favour of J. S. to whom the Surplus is devised, compel the Executor to plead the Statute. *Abr. Eq. 305. Castleton v. Lord Fanshawe.* (c) That tho' it appears upon the Face of the Declaration, that the Cause of Action did not arise within six Years, yet the Defendant shall not take Advantage of that without Pleading; because there might be an Original sued out, which the Plaintiff cannot otherwise shew, than by Way of Replication, upon the Defendant's putting him upon it. 2 Salk. 422-3.

1 Salk. 278.  
per Holt.

But in Debt for Rent, upon *Nil debet* pleaded, the Statute of Limitations may be given in Evidence; for the Statute has made it no Debt at the Time of the Plea pleaded, the Words being in the Present Tense.

1 Sid. 81. A-  
rundel and  
Trevil.  
1 Keb. 279.  
S. C.

In Replevin the Defendant pleaded Not guilty *de capt' prædict' infra sex annos jam ultimo elapsos*; and tho' it was urged that this was the same with pleading *Non cepit*, and if he did not take, he could not be guilty of the Detainer; and if this Way of Pleading were not allowed, the Statute would be entirely evaded, as to this Action; yet the Plea was held ill, because he ought to have answered to the Detainer, as well as to the Taking; for there may be a Detainer without a Taking; also a Thing may be lawfully distrained, although unlawfully kept; as by being put into a Castle, &c. by which Means it could not be replevied.

Raym. 86.  
1 Lev. 110.  
1 Keb. 566.  
S. C. Lee v.  
Raynes.

In Trespass, for a Trespass done thirteen Years before, the Defendant pleads, that *infra sex annos, &c. non est inde culpabilis*. Plaintiff replies, that he brought his Action such a Term, and that within six Years before that Time the Defendant did the Trespass; and upon this the De-

fendant



Defendant takes Issue, and is found guilty : And it was held 1<sup>st</sup>, That the Defendant's Plea was good in Bar, without pleading the Statute. 2<sup>dly</sup>, That the Plaintiff's Replication was no Departure ; although it was objected, that he could have replied nothing, but that he was under some of the Disabilities, for which there is a Saving in the Statute ; for the Plaintiff is not tied to the Time or Place laid in the Declaration, but may vary from it upon Evidence ; and so when the Defendant, by his Plea, pleads to a certain Time or Place, and thereby makes the Time or Place material, the Plaintiff may follow him without any (a) Departure.

(a) Note.  
This Case  
seems to dis-

fer from *Tyler and Wall, Cro. Car. 229.* for there the Plaintiff in his Replication varies, as well from the Time laid by the Defendant in his Plea, as the Time laid in the Declaration.

## Maihem.

(A) What it is.

(B) How punished.

(A) What it is.

**M**AIHEM is defined to be any Hurt done to a Man's Body, whereby he is rendered less able in Fighting, either to defend himself, or annoy his Adversary ; such as the Cutting off, Disabling, or Weakening a Hand or Finger, Striking out an Eye or Fore-Tooth, or Castration, &c. and these are properly said to be Maihems, and to come under the Notion of Felonies ; but the Cutting off an Ear, or Nose, are said not to be properly Maihems, because they do not weaken a Man, but only disfigure him.

*Co. Lit. 126,*  
*128.*  
*3 Inst. 62,*  
*118.*  
*1 Hawk P.C.*  
*111.*

(B) How punished.

**B**Y the old Common Law Castration was punished with Death, and other Maihems with the Loss of Member for Member ; but of later Days Maihem was punishable only by Fine and Imprisonment.

*Braff. 144.*  
*3 Inst. 62.*

And by the Statute (b) 22 & 23 Car. 2. cap. 1. it is enacted ' That if any Person shall on Purpose, and of Malice fore-thought, and by lying in wait, unlawfully cut out, or disable the Tongue, put out an Eye, slit the

(a) The Oc-  
casion of  
this Act was  
an Assault

that was made on Sir John Coventry, a Member of the House of Commons, by Slitting his Nose, and thence called Coventry's Act.

Nose

‘ Nose, cut off a Nose or Lip, or cut off or disable any Limb or Member of any Subject of his Majesty, with Intention in so doing to maim or disfigure, in any the Manners before-mentioned, such his Majesty’s Subject, that then, and in every such Case, the Person or Persons so offending, their Counsellors, Aiders and Abettors, knowing of and privy to the Offence, as aforesaid, shall be and are by the said Statute declared to be Felons, and shall suffer Death as in Cases of Felony without Benefit of Clergy.

‘ Provided, that no Attainder of such Felony shall extend to corrupt the Blood, or forfeit the Dower of the Wife, or the Lands, Goods or Chittels of the Offender.

*State Tr.*

*Vol. 6. f. 211.*

so ruled in

Coke’s Trial,

who together

with Wood-

burne were

condemned

and executed

at Suffolk

Assizes,

8 Geo. 1. for

Slitting the Nose of Mr. Crispe.

If a Man attack another of Malice fore-thought, in order to murder him with a Bill, or any other such-like Instrument, which cannot but endanger the Maiming him, and in such Attack happen not to kill, but only to maim him, he may be indicted on this Statute, together with all those who were his Abettors, &c. and it shall be left to the Jury on the Evidence, whether there was a Design to murder by Maiming, and consequently a malicious Intent to maim, as well as to kill; in which Case the Offence is within the Statute, tho’ the primary Intention was Murder.

## Maintenance, and the Offence of Buying or Selling a pretended Title.

*Co. Lit. 368.b.*

*2 Inst. 208,*

*212.*

*1 Hawk. P.C.*

*249.*

**M**AINTENANCE in general signifies an unlawful Taking in Hand, or Upholding of Quarrels, or Sides, to the Disturbance or Hindrance of common Right, and is said to be twofold.

*Co. Lit. 368.*

*2 Inst. 213.*

*2 Rol. Abr.*

*115.*

1. *Ruralis*, or in the Country; as where one assists another in his Pretensions to certain Lands, by taking or holding the Possession of them for him by Force or Subtilty; or where one stirs up Quarrels and Suits in the Country, in relation to Matters wherein he is no Way concerned; and this Kind of Maintenance is punishable at the King’s Suit by Fine and Imprisonment, whether the Matter in Dispute any Way depended in Plea or not; but it is said not to be actionable.

*2 Inst. 212.*

*2 Rol. Abr.*

*115.*

2. *Curialis*, or in a Court of Justice, where one officiously intermeddles in a Suit depending in any such Court, which no Way belongs to him, by assisting either Party with Money, or otherwise, in the Prosecution or Defence of any such Suit.

Of this second Kind of Maintenance there are said to be three Species.

1. Where one maintains one Side to have Part of the Thing in Suit, which is called Champerty; and for which *vide Tit. Champerty.*

2. Where

2. Where one laboureth a Jury, which is called Embracery; and for which *vide* Tit. *Embracery*.

3. Where one maintains another without any Contract to have Part of the Thing in Suit, which generally goes under the common Name of Maintenance; and of which in the following Order.

(A) What shall be said to amount to an Act of Maintenance.

(B) In what Respects some such Acts may be justified: And herein,

1. How far they are justifiable in respect of an Interest in the Thing in Variance.
2. How far in respect of Kindred or Affinity.
3. How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.
4. How far in respect of Charity.
5. How far in respect of the Profession of the Law.

(C) How Maintenance is restrained and punished by the Common Law.

(D) How restrained and punished by Statute.

(E) Of the Offence of Buying or Selling a pretended Title.

(A) What shall be said to amount to an Act of Maintenance.

IT is said, that not only he, who assists another with Money in his Cause, as by retaining Counsel for him, or otherwise, bearing him out in the Whole, or Part of the Expence, but also he who, by his Friendship or Interest, saves him that Expence, which otherwise he may be put to, is guilty of Maintenance; as where one perswades, or but endeavours to perswade, a Man to be of Counsel for another *gratis*.

Also it seems to be an Act of Maintenance to open Evidence to the Jury, or to give Evidence officiously without being called upon to do it, or to speak in a Cause as one of Counsel with the Party, or to retain an Attorney for him; and some have said, that it is Maintenance even barely to go along with him to inquire for a Person learned in the Law.

It seems to be Maintenance for a Man of great Power and Interest to say publicly, that he will spend 20*l.* on one Side, or that he will give 20*l.* to labour the Jury; and it hath been said to be Maintenance for such a Person to come to the Bar with one of the Parties, and stand by him while his Cause is tried, without saying any Thing: But a Promise to maintain another is not Maintenance, unless it be in respect of the publick Manner in which it is made, or the Power of the Person by whom it is made.

*Bro. Maint.*  
7, 14.  
2 *Rol. Abr.*  
118.  
1 *Hawk. P.C.*  
249.

*Hettl.* 78, 79.  
*Cro. Eliz.* 735.  
1 *Rol. Abr.*  
593.  
2 *Roll. Abr.*  
118.

1 *Hawk. P.C.*  
250. and several  
Authorities  
there cited.

- <sup>1</sup> *Hawk P.C.* 250. It is said to be Maintenance for a Juror to solicit a Judge to give Judgment according to the Verdict; but it seems to be no Maintenance for a Juror to exhort his Companions to join with him in such a Verdict as he thinks right.
- <sup>1</sup> *Hawk P.C.* 250. It seems to be no Maintenance for a Man to give another friendly Advice what Action is proper for him to bring for such a Debt; or what Method is safest to free him from such an Arrest; or what Counsellor or Attorney is likely to do his Business most effectually; for it would be extremely hard to make such neighbourly Acts of Kindness, which seem rather commendable than blame-worthy, to come under the Notion of Maintenance; which always seems to imply a contentious and over-busy Intermeddling with other Mens Matter, in which Respect it is so highly criminal; yet it is said, that a Man of great Power, not learned in the Law, may be guilty of Maintenance, by telling another, who asks his Advice, that he has a good Title.
- <sup>1</sup> *Hawk P.C.* 250. It is no Maintenance to give a Man Money, who has no Suit then depending, unless it plainly appear that it was given with a Design to assist him in a Suit intended, which Suit is afterwards actually brought.
- <sup>1</sup> *Hawk P.C.* 250. It is as much an Act of Maintenance to support a Man after Judgment given, as to do it hanging the Plea.

## (B) In what Respects some such Acts may be justified: And herein,

### 1. How far they are justifiable in respect of an Interest in the Thing in Variance.

- <sup>2</sup> *Rel. Abr.* 115, 117.  
<sup>2</sup> *Iust.* 504.  
*Bro. Maint.* 28, 53. IT seems clear, that not only those who have an actual Interest in the Thing in Variance, as those who have a Reversion expectant on an Estate-tail, or on a Lease for Life, or Years, &c. but also those who have a bare Contingency of an Interest in the Lands in Question, which possibly may never come in *esse*, and even those who, by the Act of God, have the immediate Possibility of such an Interest, as Heirs apparent, or the Husbands of such Heirs, tho' it be in the Power of others to bar them, may lawfully maintain another in an Action concerning such Lands; and if a Plaintiff, in an Action of Trespafs, alien the Lands, the Alienee may produce Evidence to prove that the Inheritance, at the Time of the Action, was in the Plaintiff, because the Title is now become his own.
- Bro. Maint.* 51. Also he who is bound to warrant Lands may lawfully maintain the Tenant in the Defence of his Title, because he is bound to render other Lands to the Value of those that shall be evicted.
- Noy* 99, 100.  
*Moor* 620.  
*Cro. Eliz.* 552.  
<sup>1</sup> *Sid.* 217. Also he who has an equitable Interest in Lands or Goods, or even in a Chose in Action, as a *Cestui que Trust*, or a Vendee of Lands, &c. or an Assignee of a Bond for a good Consideration, may lawfully maintain a Suit concerning the Thing in which he hath such an Equity; and from the same Ground it seems plainly to follow, that the Grantee of a Reversion for good Consideration might, without any Attornment, maintain the Tenant of the Land, before the Statute 4 & 5 *Ann.e*, which makes such Attornment needless.
- <sup>1</sup> *Hawk P.C.* 252. Wherever any Persons claim a common Interest in the same Thing, as in a Way, Church-yard or Common, &c. by the same Title, they may maintain

maintain one another in a Suit concerning such Thing; and a Man's Bail may take Care to have his Appearance recorded; but, as some say, they cannot safely intermeddle farther.

## 2. How far in respect of Kindred or Affinity.

Whoever is of Kin, or Godfather, to either of the Parties, or related by any Kind of Affinity still continuing, may lawfully stand by at the Bar and counsel him, and pray another to be of Counsel for him; but cannot lawfully lay out his Money in the Cause, unless he be either Father or Son, or Heir apparent to the Party, or Husband of such an Heiress.

2 Inst. 564.  
1 Hawk. P. C.  
252.

## 3. How far in respect of other Relations; as that of Lord and Tenant, Master and Servant.

Not only the actual Lord, but also the *Cestui que Use* of a Seigniori, may come with the Tenant to a Trial in an Assise against him, and stand by him, and assist him, and also pray the Sheriff to return an indifferent Jury; and it seems a plausible Opinion, that he may also justify laying out his Money in Defence of his Tenant's Title: Also the Lord of a Town may maintain the Inhabitants in an Action, wherein the Right to their common Burying Place is questioned, by shewing authentic Evidence of it to the Jury.

Co. Lit. 68,  
101, 384.  
2 Rol. Abr.  
116, 117.

A Tenant may lawfully come with his Lord and stand with him at a Trial.

1 Hawk. P. C.  
253.

A Master may go along with his Servant, or with his Domestick Chaplain, to retain Counsel; also he may pray one to be of Counsel for him, and may go with him, and stand with him, and aid him at the Trial, but ought not to speak in Court in Favour of his Cause; also if the Servant be arrested, the Master may assist him with Money to keep him from Prison, that he may have the Benefit of his Service; but the Master cannot safely lay out Money for the Servant in a real Action, unless he have some of his Wages in his Hands; but those, with the Servant's Consent, he may safely disburse.

Bro. Maint.  
44, 52.  
Butley 79.  
Moor 814.

A Person retained generally as a Servant, and not for a particular Occasion only, may lawfully ride about to speed his Master's Business, and may go to Counsel for him, and shew his Evidence to the Counsel, or to the Jury, and stand by him at a Trial, but cannot lawfully lay out his own Money in the Suit.

1 Hawk. P. C.  
253.

## 4. How far in respect of Charity.

Any one may lawfully give Money to a poor Man to enable him to carry on his Suit; also any one may lawfully go with a Foreigner, who cannot speak *English*, to a Counsellor and inform him of his Case.

Bro. Maint.  
14.

## 5. How far in respect to the Profession of the Law.

A Counsellor, having received his Fee, may lawfully set forth his Client's Cause to the best Advantage; but can no more justify giving him Money to maintain his Suit, or threaten a Juror, than any other Person.

2 Inst. 564.  
2 Rol. Abr.  
116.

Also

*Kelw.* 50.  
*2 Inst.* 564.  
*Winch* 52.  
*1 Fon.* 208.  
*Cro. Car.* 159.  
*3 Mod.* 98.

Also an Attorney specially retained may lawfully prosecute or defend an Action in the Court wherein he is an allowed Attorney, and lay out his own Money in the Suit, and maintain an Action against his Client for the Money so laid out, by Virtue of the Retainer, without any special Promise; also an Attorney so retained may in like Manner maintain his Client in a Court wherein he is not an allowed Attorney; but as some say cannot have an Action for the Money laid out in the Suit, without a special Promise; but an Attorney, who maintains another, is no way justified by a general Retainer, to prosecute for him in all Causes; neither can an Attorney lawfully carry on a Cause for another at his own Expence, with a Promise never to expect a Re-payment; and it is questionable, whether Solicitors, who are no Attornies, can in any Case lawfully lay out their own Money in another's Case.

*2 Inst.* 215.

But Counsellors and Attornies using deceitful Practice in Maintenance of their Clients Causes, are punishable by the Common Law, as well as by the Statute of *Hestm.* 1. *cap.* 28. which enacts, ' That if any Serjeant, ' Pleader or other, do any Manner of Disceit or Collusion in the King's ' Court, or consent unto it in Disceit of the Court, or to beguile the ' Court of the Party, and thereof be attainted, he shall be imprisoned ' for a Year and a Day, and from thenceforth shall not be heard to ' plead in that Court for any Man; and if he be no Pleader, he shall ' be imprisoned in like Manner by the Space of a Year and a Day at ' the least; and if the Trespas require greater Punishment, it shall be ' at the King's Plea.

*Dyer* 249.  
*pl.* 84.  
*2 Inst.* 215.

It is an Offence within this Statute for an Attorney to sue out an *Habere facias seisinam*, falsely reciting a Recovery where there was none, and by Colour thereof to put the supposed Tenant in the Action out of his Freehold.

*2 Inst.* 215.

Also it is an Offence within the Statute to bring a *Præcipe* against a poor Man, having nothing in the Land, on Purpose to oust the true Tenant; or to procure an Attorney to appear for a Man, and confess a Judgment without any Warrant; or to plead a false Plea, known to be utterly groundless, and invented meerly to delay Justice, and to abuse the Court.

### (C) How Maintenance is restrained and punished by the Common Law.

*2 Rol. Abr.*  
 114.  
*2 Inst.* 208.  
*Hetley* 79.

BY the Common Law, all unlawful Maintainers are not only liable to render Damages in an Action at the Suit of the Party grieved, but may also be indicted and fined, and imprisoned, &c. and it seems that a Court of Record may commit a Man for an Act of Maintenance in the Face of the Court.

### (D) How restrained and punished by Statute.

BY the 1 *E.* 3. *cap.* 14. and 20 *E.* 3. *cap.* 4. it is enacted, ' That none ' of the King's Ministers, nor no great Man of the Realm, by him- ' self nor by other, by sending of Letters nor otherwise, nor none other ' great

great nor small, shall take upon them to maintain Quarrels, nor Parts, in the Country, to the Disturbance of common Right.

And by the 1 R. 2. *cap.* —. it is enacted, ‘ That no Person whatsoever shall take or sustain any Quarrel by Maintenance in the Country or elsewhere, on grievous Pain, that is to say, the King’s Counsellors and great Officers, on a Pain that shall be ordained by the King himself, by the Advice of the Lords of this Realm, and other Officers of the King, on Pain to lose their Offices and to be imprisoned, and ransomed, &c. and all other Persons, on Pain of Imprisonment and Ransom, &c.

In the Construction of these Statutes the following Points have been holden.

That *Nul tiel Record* is a good Plea to an Action on these Statutes, by <sup>1 Hawk. P.C.</sup> which it appears that they extend not to the taking out an Original, <sup>156 7.</sup> which is never returned, but they extend as well to Maintenance in a Court-Baron, as to Maintenance in a Court of Record; neither is it material whether the Plaintiff in the Action, wherein there was such Maintenance, were nonsuited or recovered; but it is said, that none of the Statutes of Maintenance extends to the Spiritual Court.

He, who fears that another will maintain his Adversary, may, by Way <sup>1 Hawk. P.C.</sup> of Prevention, have an Original grounded on these Statutes, prohibiting <sup>156.</sup> him to do it.

By the 32 H. 8. *cap.* 9. ‘ No Person shall unlawfully maintain or cause or procure any unlawful Maintenance in any Suit, in any of the King’s Courts, where any Person shall have Authority by the King’s Commission, Patent, or Writ to hold Plea of Lands, or to examine, hear or determine any Title of Lands, &c. and no Person shall unlawfully maintain, for Maintenance of any Suit or Plea, any Person or Persons, or embrace any Freeholders or Jurors, or suborn any Witnesses by Letters, Rewards or Promises, or any other sinister Means, to maintain any Matter or Cause, or to the Disturbance of Justice, &c. on Pain of 10*l.* one Moiety to the King, the other to the Informer.

In an Information thereon, it is not sufficient to say, that the Defendant maintained the Party, without adding, that he did it unlawfully; <sup>1 Hawk. P.C.</sup> <sup>258.</sup> neither is it sufficient to say, that a Bill was exhibited, without further shewing that a Plea was depending.

## (E) Of the Offence of Buying or Selling a pretended Title.

IT seems an high Offence at Common Law, as plainly tending to Oppression, for a Man to buy, at an under Rate, a doubtful Title known to be disputed, to the Intent that the Buyer may carry on the Suit, which the Seller doth not think it worth his while to do; and it seems not to be material whether the Title be good or bad; or whether the Seller were in Possession or not, unless the Possession were lawful and uncontested. <sup>Moor 751.</sup> <sup>Pl. 1031.</sup> <sup>Heb. 115.</sup> <sup>Plow. 80.</sup>

Also by the 1 R. 2. *cap.* 9. reciting, that many Persons having true Title to Lands, &c. were wrongfully delayed, by Means that the Defendants did make Gifts and Feoffments of their Lands in Debate, and of their Goods to Great Men, against whom the said Pursuants durst not make their Pursuits; and also that many Persons used to disseise others, and anon to make Feoffments sometimes to Great Men to have Maintenance, and sometimes to Persons unknown, to the Intent to de-

lay the said Disseisees, &c. and therefore it is enacted, ' That no Gift  
' or Feoffment of Tenements or Goods be made by such Fraud or Main-  
' tenance, and that if any be so made, they shall be holden for (a) none ;  
' and that the said Disseisees shall recover against the first Disseisor their  
' Lands and Damages, without having Regard to such Alienations, so  
' that they commence their Suit within a Year after the Disseisin.  
(a) In re-  
spect of the  
Disseisees ;  
but they are  
effectual be-  
tween the  
Feoffor and Feoffee. *Co. Lit.* 369.

It is further enacted by 32 H. 8. cap. 9. ' That no Person shall bargain,  
' buy or sell, or by any Means obtain any pretended Rights or Titles,  
' or take, promise, grant or covenant to have any Right or Title to any  
' (b) Hereditament, unless the Seller, &c. his Ancestors, or they from  
' whom he claims, have been in Possession of the same, or of the Re-  
' version or Remainder thereof, or taken the Rents or Profits thereof,  
' for one whole Year next before the said Bargain and Sale, &c. on Pain  
' that such Seller shall forfeit the whole (c) Value of the Hereditaments  
' so sold, and the Buyer or Taker, knowing the same, shall forfeit the  
' Value of the Hereditaments so by him bought or taken ; the one Half  
' of the said Forfeitures to be to the King, the other to him who will sue.  
(b) Whether  
Freehold or  
Copyhold.  
4 Co. 26. a.  
Co. Lit. 369. b  
Moor 655.  
(c) And  
therefore  
the Plain-  
tiff in his  
Action must  
shew the Value at the Time of the Bargain. *Cro. Car.* 255.

But it is provided, ' That it shall be lawful for any Person, being in  
' lawful Possession, by taking of the yearly Farm-Rents, or Profits of  
' any Hereditaments, to buy or get, by any reasonable Means, the pre-  
' tended Right or Title of any other Person to the same.

' *Provided*, that no one shall be charged with these Penalties, unless he  
' be sued within one Year after the Offence.

In the Construction of this Statute the following Opinions have been  
holden.

*Lit. Rep.* 369. That the Statute being publick, there is no Need to recite it in an Action  
*Plow.* 84. brought upon it ; but if you take upon you to recite it, a material Mis-  
*Cro. Car.* 233. recital will be fatal.  
*Dyer.* 74.

In an Action against the Buyer of a pretended Title, it must expressly ap-  
pear, that the Defendant knew that the Seller had not been a Year in Pos-  
session ; but in such an Action by the Buyer, the contrary must expressly  
appear ; for otherwise it may be intended that he was *Particeps criminis*.  
1 Leon. 167.  
*Lit. Rep.* 369.

It is not sufficient to shew that the Seller had not been in Possession a  
*Dyer* 74. pl. Year before, &c. without averring, that he had a pretended Right or  
19, 20. Title, for that is the Point of the Action.  
*Plow.* 80, 87.

A Contract for a Lease for Years, unless fairly made to try a Title in  
*Cro. Car.* 233. Ejectment, is within the Statute, whether it were made off from the  
*Co. Lit.* 369. Land, or upon the Land, by a Person in or out of Possession ; and in  
1 Leon. 166. an Action on the Statute for making such a Lease, there is no need to  
1 And. 76. shew its Commencement or End, because the Plaintiff is supposed to be  
a Stranger to it.

No Conveyance by one who has the uncontested Possession and abso-  
*Plow.* 88. lute undisputed Propriety of Lands, as by a Disseisor having obtained a  
*Co. Lit.* 369. Release from the Disseisee who had the true Right not contested by any  
1 Leon. 166. other Person whatsoever, or by a Mortgagor having redeemed his Lands,  
*Savil* 95. is within the Meaning of the Statute ; because it no Way favours of  
Maintenance, and can be prejudicial to no one ; neither is a Lease for  
the usual Rent, by one who recovers Lands by Virtue of an antient Title,  
within the Meaning of the Statute, tho' he had the absolute Property  
and Possession of the Land ; for the Intent of the Statute was to restrain  
all Persons from transferring any disputed Right to Strangers.

Whoever has a Reversion or Remainder vested in him, may lawfully  
*Co. Lit.* 369. take any Conveyance which will strengthen his Estate ; but cannot take  
a Covenant from a Stranger for a Conveyance from him, when he shall  
have recovered the Land.



# Mandamus.

- (A) Of the Nature of the Writ; and herein of the Suggestion and Manner of Awarding thereof.
- (B) Of the form thereof, and for what Irregularities it may be quashed or superseded.
- (C) In what Cases to be granted: And herein,
1. Where it lies to restore or admit a Person to an Office; and what shall be said such a publick Office for which a *Mandamus* will lie.
  2. Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting *Mandamus's* to restore Members of Colleges, &c.
  3. What Removal or 'Turning out of an Officer will intitle him to a *Mandamus*.
- (D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice, which the Publick Good requires, and the Law enjoins.
- (E) Of the Authority by which it issues; and therein of the discretionary Power in the Court of granting or refusing it.
- (F) To whom to be directed.
- (G) By whom to be returned.
- (H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.
- (I) What shall be said a good Return.
- (K) Of traversing the Return, and taking Issue thereon.
- (L) Of the Party's Remedy for a false Return.
- (M) Of awarding a peremptory *Mandamus*.

- (A) Of the Nature of the Writ; and herein of the Suggestion and Manner of Awarding thereof.

**A** *Mandamus* is a Writ commanding the Execution of an Act, where otherwise Justice would be obstructed, or the King's Charter neglected, issuing regularly only in Cases relating to the Publick and the Government; and is therefore termed (a) a Prerogative Writ, being grantable only where the Publick Justice of the Nation is concerned.

(a) 4 Mod.  
251.

And

(a) There is a Writ called a *Mandamus*, which lay where the King's Tenant, who held of him by Knight's Service, died, his Heir within Age, and no Writ of *diem clausit extremum*, &c. was sued out within a Year and a Day after his Death; then issued a *Mandamus* to the Elcheator, commanding him to inquire of what Lands holden by Knight's Service the Tenant died seised, &c. but for this *vid. F. N. B. 561. Dyer 209 pl. 19. 248. pl. 81. Lamb. 36.* (b) 1 *Lev. 23. 1 Show. 263. Ct. Law and Eq. 57.* (c) 11 *Co. 94. 1 Rol. Rep. 173. S. C.* (d) 1 *Lev. 23. Ca. Law and Eq. 53, 57. Palm. 51. Dyer 333.*

*Paf. h. 6 Geo. 2. in B. R. The King v. Mayor and Burgesses of Evesham.*

*Mich. 4 Geo. 2. in B. R.*

It is now an established Remedy, and every Day made use of, to oblige inferior Courts and Magistrates to do that Justice, which, without such Writ, they are in Duty, and by Virtue of their Offices, obliged to do; and is a Writ of Right, which the superior Court is obliged to issue in the ordinary Form, without imposing any Terms on him who demands it; and therefore where a *Mandamus* was granted, to oblige a Corporation to proceed to the Election of a Capital Burgefs, and being afterwards moved, that a Day should be fixed for the Election, that all Parties might have Notice; for that otherwise the Person obtaining the *Mandamus* might steal an Election by Surprise; the Court refused to grant the Motion, and held, that their Power was only to command an Election, but not to prescribe the Manner of it, which was left to the Law, and which must make it good or bad accordingly.

But tho' it be a Writ of Right, yet the Court seldom grants it, without giving the Party, to whom it is prayed, a Day to shew Cause against it; also such Matter must be laid before the Court, by which it may appear, that the Party is intitled to it; and therefore on a Motion for a *Mandamus*, to restore the Register of the Blacksmiths Company, the Court refused it, because they did not produce their Charter, or a Copy of it, with an *Affidavit*; for this being a private Corporation, they held they could not take Notice thereof, as they will of a Town, &c. without such previous Information.

## (B) Of the Form thereof, and for what Irregularities it may be quashed or superseded.

*2 Salk. 434.* A *Mandamus* is a signable Writ, and must be signed by the proper Officer of the Court before it is sealed; there must be fifteen Days between the *Teste* and the Return of the first Writ of *Mandamus*, if the Corporation, to which it is sent, be above forty Miles from London; but if but forty Miles, or under, then eight Days only.

*6 Mod. 133.* If there be any Irregularity in the Writ, it may be amended at any Time before it is returnable; but it cannot be superseded after the Return is out; neither can the Party move to quash it before a Return made and filed.

*2 Salk. 456-7. Comb. 307. 5 Mod. 11. 2 Salk. 433.* S P. and that several Persons cannot join in an Action on the Case for a false Return.

the Writ will be quashed; for several Persons cannot join in such Writ, the Motion of one not being the Motion of another; besides their Interests are several, and they might have been removed for several different Causes, one for one Fault, and one for another; which would make it impracticable for the Court to grant a joint Restitution to them.

If the Writ be directed to a Corporation by a wrong Name, this is such an Irregularity for which it may be quashed; as if to the Mayor, Aldermen and Commonalty of *Rippon*, where it should have been, Mayor, Burgesses and Commonalty; but in this Case, the Parties having made a good Return, the Court refused to grant a new Writ; for by the Return, if false, they subjected themselves to an Action on the Case, and therefore a new Writ would be only vexatious.

2 Salk. 435.  
*The King v. Mayor, &c. of Rippon*; vide *Carth.* 500-1.

So where in a *Mandamus* to the Corporation of *Ipswich*, the Direction was to the Vill *de Gippo*, instead of *de Gipwico*; and it was held that the Direction was wrong, *Gippus* and *Gipwicus* being different Names; but that yet they should have returned the special Matter accordingly, and relied upon it; but that after the Return, they admitted themselves the Corporation to whom the Writ was directed; besides, a Corporation may have several Names.

2 Salk. 434.  
Serjeant *Whitaker's Case*.

If a Writ appears on the Face of it to be *Felo de se*, the Court *ex officio* may quash it; as where the Bishop of *Ely* procured a *Mandamus* to the Vice-Master of *Trinity-College Cambridge*, to compel him to execute a Sentence of Deprivation, pronounced by the Bishop, against Doctor *Bently* Master of the said College, and which Sentence the Vice-Master, by the Statutes of the College, was obliged to execute; and it appearing on the Face of the Writ, that the Bishop himself was General Visitor, and that therefore it belonged to him to enforce the Execution of his own Sentence, the Court of *B. R.* quashed the Writ, being a Matter in which they had no Right to intermeddle, there being a proper Visitor.

Hill. 9 Geo. 2.  
in *B. R. The King v. Doctor Walker*.

### (C) In What Cases to be granted: And herein,

1. Where it lies to restore or admit a Person to an Office, and what shall be said such a publick Office for which a *Mandamus* will lie.

Herein we must observe, that the Cases in the Books on this Head are so unsettled and contradictory, that it is hardly possible to fix on any general Rule, whereby to determine in what Instances the Court of *K. B.* having a Superintendency over all Inferior Courts and Magistrates, will grant a *Mandamus* or not; for tho' in general it be laid down as a Rule, (a) that where a Man is refused to be admitted, or wrongfully turned out of any Office or Franchise that concerns the Publick, or the Administration of Justice, he may be admitted, or restored by *Mandamus*; yet it being still Matter of Controversy, what shall be said a Publick Office, or such as relates to the Administration of Justice; and as the Court of late has rather extended than contracted this Remedy, it will be necessary, for the better apprehending hereof, to insert the Cases themselves, in which the Court has granted or denied a *Mandamus*.

(a) 11 Co. 95.  
*Bages's Case*.  
2 Sid. 112.  
same Rule laid down by *Glyn C. J.*

It is clearly agreed, that the Court of King's Bench, having a Superintendency over all Inferior Courts and Magistrates, may by the Pleinitude of its Power correct, not only Errors in Judicial Proceedings, but also extrajudicial Errors and Misdemeanors, tending to the Breach of the Peace, Oppression of the Subject, to the Raising of Faction,

11 Co. 98.  
4 Inst. 71.

Controversy, Debate, or any Manner of Misgovernment; so that no Tort or Injury, whether Publick or Private, can be committed, but what may be reformed and punished according to the due Course of Law.

And on this Foundation it has been adjudged, and admitted in Variety of Cases, that if a Mayor, Alderman, Burgefs, (a) Common-Council Man, Freeman or other Person, Member of a Corporation, having a Franchise and Freehold therein, be refused to be admitted, or being admitted be turned out or disfranchised without just Cause, he may have his Remedy by Writ of *Mandamus*.

(a) It is said, that a Custom to elect one to be of the Common Council, and to remove him *ad libitum*, is good; but where a Man is a Freeman, or Alderman, &c. they cannot remove him from his Freedom or Place without Cause; and a Custom to the contrary is void, because the Party hath a Freehold therein; but that to be of Council is a Thing collateral to the Corporation. *Cr. Jac.* 450. *Warren's Case*.

But it must appear what the Office is; and therefore a *Mandamus* to swear one, who was elected to be one of the eight Men of *Affburn-Court*, was denied; because it was not specially inserted, what the Nature of the Office was, so as the Court might be able to determine, whether it were such a Place for which a *Mandamus* will lie, or not.

A *Mandamus* lies to restore a Town-Clerk, being an Office of a Publick Nature, and such as relates to the Administration of Justice; but

(b) if a Corporation have Power by their Charter to have a Town-Clerk, who shall continue *durante beneplacito* of the Mayor and Aldermen; by this they have an arbitrary Power of turning him out at Pleasure, and need not, to the Return of a *Mandamus*, assign any reasonable Cause for their Conduct herein.

Raym. 188. S. C. where it is said, that the Court advised to repeal the Patent because of this Inconvenience.

So a *Mandamus* lies for a (c) Recorder and (d) Clerk of the Peace; for these are Officers of a Publick Nature, and relate to the Administration of Justice.

It is admitted by all (e) the Books which speak of this Matter, that a *Mandamus* lies to restore a Steward of a Court-Leet; but (f) some hold, that a *Mandamus* does not lie to restore a Steward of a Court-Baron, because but a private Office, and such as does not concern the Administration of Justice; but (g) others hold that it does; because he is Judge of that Part of the Court which concerns Copyholds, and is therefore an Officer concerned in the Administration of Justice.

(g) 1 Vent. 153. 2 Lev. 18. S. P. expressly by Hale C. J.

It hath been adjudged, that a *Mandamus* lies to restore one to an Attorney's Place in an Inferior Court; because his is an Office concerning the Publick Justice, and is compellable to be an Attorney for any Man; and has a Freehold in his Place.

who was restored to an Attorney's Place of the Court of *Canterbury*; and in one *Collin's Case*, who was restored to an Attorney's Place, of the Liberty of *St. Martin's le Grand*.

So a *Mandamus* was granted to the Mayor of *Reading*, for an Attorney of B. R. who was prohibited to practice in an Inferior Court in *Reading*.

It hath been adjudged, that a *Mandamus* lies to restore a Sexton; tho' as to this the Court at first doubted; because he was rather a Servant to the Parish than an Officer, or one that had a Freehold in his Place; but upon a Certificate shewn from the Minister, and divers of the Parish, that the Custom was to chuse a Sexton, and that he held it for his Life, and

and that he had 2 d. a Year of every Houfe within the Parifh; they granted a *Mandamus* directed to the Church-wardens.

A *Mandamus* lies to reftore a Church-warden, being a Temporal Officer, and an Office concerning the Publick; and therefore (a) where to a *Mandamus* to fwear a Church-warden, chofen according to the Cuftom, the Arch-deacon returned, that the Perfon prefented was a poor Dairy-Man who had no Eftate, was *Persona minus habilis & idonea* for that Office, the Court granted a peremptory *Mandamus*.  
 2 Sid. 112.  
 1 Vent. 143.  
 3 Mod. 335.  
 5 Mod. 325.  
 Comb. 417.  
 (a) Carth.  
 393.  
 Comb. 417.  
 1 Salk. 166. *The King v. Recs.*

So a *Mandamus* hath been granted to reftore a Parifh-Clerk, chofen according to the Cuftom, being a Temporal Officer.  
 Stile 457.  
 2 Sid. 112.  
 1 Vent. 143.  
 3 Mod. 335 Comb. 105.

So a *Mandamus* was lately granted, to admit one Robert Trott to the Office of Parifh-Clerk of *Clerkenwell*, being elected by the Parifh; it being fhewn that the Official had ufually admitted to this Office.  
 King v. Doctor Henchman,  
 Official of  
 the Confi-  
 ftery-Court of the Bifhop of London.

So a *Mandamus* lies for a Schoolmafter, or the Usher of a School, if he be elected for Life, altho' he be not a fworn Officer; for this is a Temporal and Publick Office, in which the Party hath a Freehold.  
 2 Sid. 112.  
 1 Sid. 40.  
 Stile 457.  
 Comb. 144.

A *Mandamus* lies to admit, reftore, or difcharge a Conftable; for he is a Publick Officer, and one whole Office relates to the Adminiftration of Juftice.  
 2 Rol. Rep 82.  
 1 Rol. Abr.  
 335.  
 1 Salk. 175.

It hath been adjudged, that no *Mandamus* lies to reftore a Proctor of *Doctors-Commons*, admitting that no Appeal lay from the Dean of the Arches to the Archbifhop, as Vifitor; becaufe this is an Ecclefiastical Office, and a Matter properly and only cognizable in that Court; and that the Temporal Courts are not to intermeddle, or inquire into this Sentence, or into the Proceedings in any Matters whereof they have a proper Jurifdiction, but are to give Credit thereunto; altho' it was urged, that if a *Mandamus* did not lie in this Cafe, the Party would be without Remedy, for that no Affife would lie of this Office; and tho' an Action on the Cafe might lie, yet it may be defective; becaufe a Jury may not well compute the Damages in Proportion to the Lofs of a Man's Livelihood; befides it was urged, that a *Mandamus* ought to lie in this Cafe, as well as for an Attorney of an Inferior Court, becaufe this is an (b) Officer of a more publick Concern.  
 Carth. 169,  
 170.  
 3 Lev. 309.  
 3 Mod. 333.  
 Skin. 290.  
 Lee's Cafe.  
 1 Show. 217,  
 261. S. C. by  
 the Name of  
*The King v.*  
*Oxenden.*

Officer, properly fpeaking, it is only an Employment in that Court, which acts by different Rules from the King's Bench. 3 Mod. 335. *Per Cur'.*

But it hath been fince held, that a *Mandamus* lies for a Register in an Ecclefiastical Court, (c) upon an *Affidavit* that he hath Ecclefiastical Jurifdiction.  
 Carth. 170.  
 6 Mod. 18.  
 S. P. per Holt;  
 but faid to be againft his Consent. (c) Comb. 133.

So upon a *Mandamus* to the Commiffary of *Tork*, to admit Mr. Dryden a Deputy-Register under Doctor Sharp; it was objected, that the Writ did not lie for an Ecclefiastical Officer, becaufe he is under the Enquiry and Cenfure of his proper Judge; nor for a private Officer, becaufe he may have his Action on the Cafe for a Difurbance, or an Affize, in Cafe the Place be a Freehold; and herein was cited the above Cafe of *Lee*, and the exprefs Opinion of my Lord Holt therein, that a *Mandamus* did not lie for a Deputy-Register; in anfwer to which were cited the Cafes of *The King ver. Doctor Bettefworth*, to admit Mr. Faulkes Apparitor General  
 Mich. 4 Geo. 2.  
*The King v.*  
*Doctor Ward.*

to the Archbishop of *Canterbury*; *Hill. 4 Geo. 1. The King ver. The Chapter of Norwich*, to admit Doctor *Sherlock* to a Prebendary; *Hill. 9 Geo. 1.* to the University of *Cambridge*, to restore Doctor *Bentley* to his Degrees of Master of Arts and Doctor of Divinity; from the Reason of which Cases the Court held, that this Writ lay for a Register, an Officer much less Spiritual than a Prebendary, or the Degree of Doctor in Divinity; also this *Mandamus* is at the Suit of Doctor *Sharp*, and sets forth his Title to the Office of Register, *exercendum per se vel sufficient' deputatum suum*; and that the Commissary had refused Mr. *Dryden*, whom he appointed his Deputy; and that therefore the *Mandamus* was well awarded, because he had no other Way to get his Deputy admitted.

1 *Vent.* 110.

1 *Lev.* 306.

2 *Keb.* 738.

*The King ver. Clapham*

So where a *Mandamus* was prayed to the Lord President and Council of the *Marches*, to admit *A.* to the Exercise of the Office of Deputy-Secretary; and it was objected, 1<sup>st</sup>, That a Deputy could not pray a *Mandamus*, because his Authority was revocable. 2<sup>dly</sup>, That he being an Officer belonging to the Court, they are to judge of his Sufficiency, and so have Power to refuse. As to the first Objection, it was adjudged, that the *Mandamus* being at the Suit of the Principal, and setting forth that he had the Office of Secretary *exercendum per se vel sufficientem deput' suum*, the *Mandamus* was well awarded, because he had no other Remedy to have his Deputy admitted; and as to the second Objection, it was adjudged, that if they refused to admit him for Insufficiency, they ought to have returned that he was insufficient.

*Comb.* 133.

A *Mandamus* is said to have been denied to restore a Clerk of a Dean and Chapter; because that he hath nothing to do with the Publick, his Office being only to enter Leafes granted, &c. and that therefore he hath no more to do with the Publick than a Bailiff of a Manor.

*Comb.* 41.

*Earell.* 118.

*S. P.* where,

in such a Case, the Court made a Rule, to shew Cause why the *Mandamus* should not be granted.

1 *Lev.* 123.

1 *Sid.* 169.

1 *Keb.* 625.

*Middleton's*

Case.

3 *Mod.* 334.

*S. C.* cited;

and said to have been granted *de bene esse*, to bring the Matter before the Court.

It hath been adjudged, that a *Mandamus* lies to restore the Treasurer of the New River Company; for tho' it be a private Corporation, yet it was created by the King's Letters Patent, which being on Record the Judges are obliged to take Notice of them, and see that they are duly executed.

*Comb.* 145.

A *Mandamus* was granted to the Mayor of *Bristol*, to restore Mr. *Roe* to the Office of Sword-Bearer.

1 *Vent.* 143.

(a) Refused

to restore

the Clerk of

the Butcher's

Company.

6 *Mod.* 18.

6 *Mod.* 82.

*Comb.* 347.

— But *Quare*

of these Cases;

for they seem not to be Law.

It is said, that a *Mandamus* was denied to one, who pretended to be (a) Master of the Lord Mayor's Water-house, because not an Office, but a Service.

— So to restore the Approver of Guns to the Gunsmiths Company.

*Hill. 7 Geo. 2.*  
in *B. R. The King ver. City of London.*

A *Mandamus* was lately granted, to restore one *Smith* to the Office of Clerk of the City-Works; it appearing by his *Affidavit*, that the Office was an antient Office, established Time out of Mind, to survey the Works and Edifices of the City, and to see that all the City-Buildings were well done; and to sign the Workman's Bills; and that he was admitted into this Office, with the Fees belonging to it, *quandiu se bene gesserit*; and that there was an Oath of Office taken by him, and the Oaths to the Government; for the Court held, that tho' there was something here that looked like Service, by the Nature of the Employment, yet there being an Oath of Office, and Oaths to the Government to be taken, these import a Publick Office, for which a *Mandamus* is proper.

If there be a Dispute between the High-Steward of *Westminster* and the Dean and Chapter, about appointing a Bailiff, and the Steward names one, and the Dean and Chapter appoint and swear in another, the Appointee of the Steward may have a *Mandamus*, but without Prejudice; for tho' the Court will not regularly grant a *Mandamus* to try private Titles, yet here the Appointee of the Steward having no Seisin, so as to enable him to maintain an Assise, and an Action on the Case only repairing him in Damages, without putting him in Possession of the Office, a *Mandamus* is a proper Remedy.

4 *Mod.* 281.  
*Comb.* 244.  
*Knife and Edwin.*

2. Where the Party's having another Remedy is a sufficient Foundation to deny it; and therein of granting *Mandamus's* to restore Members of Colleges, &c.

It seems to be now agreed, that no *Mandamus* lies to restore or admit a Fellow or Member of any (a) College; because that these being private Eleemosynary Societies, and governed by particular Laws of the Founders, they who would take the Benefit of them, must take it on such Terms as the Founder has thought proper to impose; and must therefore, in Case of any Grievance, apply themselves by way of Appeal to their (b) proper Visitors.

(a) That the Law is the same in the Case of an Hospital or College of Physick, said to have been adjudged in *Merrick's Case*, who was one of the College of Physicians, and in *Ayliffe's Case*, *Carth.* 92. 3 *Mod.* 265. (b) That in Lay-Foundations, whether of Hospitals or Colleges, the Visitation Power is either in the Founder or his Heirs, or the Visitors appointed by the Founder, and they have the sole Power to exerce Justice within that Foundation; but where the Corporation is Spiritual, there the Bishop of the Diocese is Visitor. *Carth.* 93. 10 *Co.* 31. 1 *Show.* 74.

*Skin.* 454.  
*Show Par. Cases.*  
 4 *Mod.* 112,  
 124. in the  
*Case of Phillips and Bury*  
 fully debated and settled.

And this seems to have been the better Opinion of the Judges, not only in those (c) Cases where Application was made for a *Mandamus* before the Party had appealed to the Visitor, but also where after such Application the Sentence had been confirmed by the Visitor; as in (d) *Appleford's Case*, where to a *Mandamus* to restore him to a Fellowship of *New College*, the Return was, that by the Founder's Laws they might expel any one who had committed an enormous Crime; and that *Appleford* had committed an enormous Crime, and therefore they expelled him; that he appealed to the Visitor, who was the Bishop of *Winchester*, who confirmed the Expulsion; and concluded to the Jurisdiction of the Court; and this was held a good Return, tho' it did not mention what Manner of Crime *Appleford* had committed, so that it might appear whether he was lawfully expelled or not; for it was not necessary to mention the Crime, because the Court had no Authority to intermeddle with it.

(c) As Dr. *Witherington's Case.*  
 1 *Sid.* 71.  
*Raym.* 31, 68.  
 1 *Lev.* 25.  
 1 *Keb.* 2, 50.  
*Dr. Robert's Case.*  
 2 *Keb.* 102.  
*Dr. Patrick's Case.*  
*Raym.* 101.  
 1 *Lev.* 65.  
 1 *Sid.* 346.  
 2 *Keb.* 164.  
 (d) 1 *Mod.* 82.  
 2 *Lev.* 14  
*Carth.* 168.  
*Probst's Case.*

A *Mandamus* to restore one *Probst* to the Place of Chaplain of *All Souls College* in *Oxon*, being turned out by the Warden of that College, was granted upon Suggestion, that the Archbishop of *Canterbury* was Visitor of the College, and the See being now vacant by the Deprivation of the Bishop, by Virtue of the Act of Parliament which enjoins the Oath of Allegiance; and for that *Probst* had no other Remedy, because the Dean and Chapter of *Canterbury*, who are Guardians of the Spirituality *sedes vacante*, have (e) refused to meddle with this Visitation Power by way of Appeal. But at another Day, it being shewn in Behalf of the College, that the Dean and Chapter of *Canterbury*, and not the Archbishop, are Visitors of this College, because they were created, and stand

(e) Whether a *Mandamus* will lie to a Visitor to compel him to execute

his Jurisdiction, was said by my Lord *Hardwick* in *Dr. Bentley's Case*, *Hill.* 9 *Georg.* 2. not to have been determined, tho' a Rule for that Purpose, to shew Cause, was made 12 *Ann.* and he seemed to think, that if this Power of a Visitor be a Jurisdiction, yet it is *Forum Domesticum*, and not any publick Jurisdiction; or rather a Decision of the Founder, upon his own private Charity, than any Jurisdiction at all.



instead of the Prior and Convent of *Canterbury*, who were Visitors heretofore; and farther, that they were ready to hear the Appeal; the Court discharged the first Rule, and ordered *Probus* to apply himself by way of Appeal.

3 *Keb.* 360.  
*Wheeler's*  
*Case.*

A *Mandamus* was prayed to the Mayor and Jurats of *Sandwich*, Governors of the Hospital of the Brothers and Sisters of *St. Bartholomew*, to restore one who was a Sister of the said Hospital; and it was urged, that a *Mandamus* ought to be granted, because the Party had a Corody and Freehold in the Hospital; but *per Cur.* the King is the Founder, and so hath the Visitation, and therefore Application must be made to him.

### 3. What Removal or Turning out an Officer will intitle him to a Mandamus.

1 *Lev.* 162.  
1 *Keb.* 868.  
*Raym.* 152.  
*The King ver.*  
*Approved Men*  
*of Guildford.*

(a) A *Mandamus* to restore an Alderman expelled from his Priority and Precedency of his Place of Alderman.  
1 *Lev.* 119.

It seems by the better Opinion, that a Member of a Corporation, being only suspended, and not (a) totally removed, may have a *Mandamus*; because were it otherwise, they might always suspend, and thereby not only effectually keep him out, but also deprive him of all Remedy of Redress.

1 *Sid.* 29.  
1 *Lev.* 19.  
1 *Keb.* 75, 84.  
*Dr. Goddard*  
*ver. College of*  
*Physicians.*

A *Mandamus* was granted to the College of Physicians in *London*, to restore *Dr. Goddard* to all the Privileges and Preheminencies that belonged to him; the President of the College returns, that they were incorporate, &c. and of the Statute *H. 8.* and that they made a By-Law, that there should be a select Number of twelve to attend in Committees, and that *Dr. Goddard* was one of the thirty, and that they put him out for certain Reasons, but that he remains Fellow still; and all the Court, except *Mallet*, held that this was a good Return; for it was in the Fellowship he had a Franchise; but to be one of the thirty is no such Thing as a Man may sue to be restored to, for it is only a select Number for the Convenience of ordering their Affairs.

### (D) Where it lies to inferior Courts, and Magistrates, to oblige them to do that Justice, which the Publick Good requires, and the Laws enjoin.

*Stil.* 7, 8.  
1 *Lev.* 186.  
1 *Sid.* 293.  
*Comb.* 158,  
450.  
(b) And  
therefore,  
where to a  
*Mandamus*  
to the Judge  
of the Pre-

THE Court of King's Bench having a Superintendancy over all inferior Courts and Magistrates, will oblige them to execute that Justice which the Party is intitled to, and which they are enjoined by Law to do; and of this there are Multitudes of Instances; (a) as where the Ordinary refuses to grant the Probate of a Will to an Executor, or to grant Administration to the next of kin, he may be compelled thereto by *Mandamus*; for these being Things enjoined by Statute, the Temporal Courts will take Care that due Obedience is paid to them. prerogative Court to grant the Probate of a Will to a Person named Executor therein, the Ordinary returned, that he was an absconding Person, and insolvent; and that he had refused to give Caution to pay Legacies bequeathed to some of the Testator's Infant Relations; and a peremptory *Mandamus* was granted; for the Ordinary has no Authority to interpose and demand Caution of the Executor, when the Testator himself required none. *Carth.* 467. 1 *Salk.* 299. *The King ver. Sir Richard Raines.* But where Executors may be compelled to give Security in Equity, vide *Tit. Executors and Administrators*, Letter (A).



But a *Mandamus* will not lie to oblige the Ordinary to grant Administration *durante minori etate* of an Infant to the next of Kin, this being a Matter out of the Statutes, and therefore discretionary in the Ordinary to whom to grant it; and if in such Case he grants it to an improper Person, or insists upon unreasonable Security, the Redress must be by Appeal; or if in the last Instance there be any Remedy at Common Law, it must be by Prohibition.

Hill. 4 Geo. 2.  
Smith's Case  
in B. R.

So if the Testator make *J. S.* his Residuary Legatee, who by the Ecclesiastical Law is intitled to Administration upon the Executors Renunciation; yet if the Spiritual Court refuse to admit him thereto, they cannot be compelled by *Mandamus*; for this is a Matter purely of Ecclesiastical Cognizance, and out of the Statutes; and therefore the Party's Redress must be by Appeal.

Mich. 7 Geo. 2.  
in B. R. The  
King ver.  
Bettesworth.

If by the Custom of a Corporation, &c. a Person serving an Apprenticeship there, is at the End of his Term intitled to his Freedom, and the Mayor, &c. refuse to admit him thereto, they may be compelled by *Mandamus*; for this is an Act of Publick Justice, which the superior Court will see executed.

1 Lev. 91.  
1 Sid. 107.  
5 Mod. 402.  
6 Mod. 227,  
260.  
Carth. 448.

So it hath been held, that a *Mandamus* lies to the Justices of the Peace, to oblige them to admit a Person to take the Oath of Allegiance, and to subscribe according to the Act of Toleration, in order to qualify him to teach a Dissenting Congregation; and herein it is said, that the Party ought to suggest whatever is necessary to intitle him to be admitted; and if that be not done, or if it be done, and the Fact be false, that will be a good Matter to Return.

6 Mod. 310.  
Peat's Case,  
& vid. 2 Salk.  
572.  
6 Mod. 229.

So a *Mandamus* lies to the (a) Justices of the Peace, Church-wardens and Overseers of the Poor, to oblige them to make Rates for the Relief of the Poor.

Comb. 422,  
478.  
(a) To a  
Justice of the  
Peace to sign a Poor-Rate. 5 Mod. 279.

So *Mandamus's* have been granted to oblige Justices of the Peace to discharge Prisoners, pursuant to Acts of Parliament made for the Relief of Insolvent Debtors.

2 Show. 74.  
Comb. 203.  
vide 6 Mod.  
97-8.

So where by the Statutes 13 & 22 Car. 2. for erecting *Newgate Market*, Power is given to the Mayor and Aldermen of *London* to impanel a Jury, who shall assess and adjudge what Satisfaction and Recompence shall be given to the Owners of the Grounds; and that the Verdict of such Jury, on that Behalf to be taken, and the Judgment of the said Mayor and Court of Aldermen thereupon, and the Payment of the Money so awarded or adjudged, &c. shall be binding and conclusive to and against the Owners, &c. and there being 15000 Foot of the Grounds of *J. S.* taken away for this Purpose, for which a Jury being impanelled assessed and awarded two Shillings a Foot; but the Mayor and Court of Aldermen refusing to give Sentence or Judgment thereupon, a *Mandamus* was awarded to compel them to it.

1 Vent. 187.  
Raym. 214.  
Amburst's  
Case.

And this general Jurisdiction and Superintendancy of the King's Bench over all inferior Courts to restrain them within their Bounds, and to compel them to execute their Jurisdiction, whether such Jurisdiction arises from a modern Charter, subsists by Custom, or is created by (b) Act of Parliament, yet being in *Subsidium Justitiæ*, has of late been exercised in Variety of Instances; as (c) a *Mandamus* granted to the Quarter-Sessions to give Judgment for abating a Nuisance.

(b) A *Mandamus* to the  
President  
and Fellows  
of St. John's  
College Cam-

bridge, to oblige them to turn out certain Fellows of the College, whose Places became void for not taking the Oaths of Supremacy and Allegiance, pursuant to the Statute 1 W. & M. Skin. 359, 368, 393, 546. 4 Mod. 233. S. C. (c) Hill. 3 Geo. 1.

So a *Mandamus* was granted to the Court of *Sandwich*, to give Judgment in an Action of Assault and Battery.

So

Mich. 5 Geo. 1.

*Mich. 7 Geo. 1.* So a *Mandamus* was granted to the Sheriffs Court in *London*, to give final Judgment upon a Writ of Inquiry.  
*Baily ver. Bourn.*

*Trin. 2 Geo. 2.* So a *Mandamus* was granted to the Bailiff of *Andover*, to give Judgment in a Cause there depending; but the Court in this Case required an Affidavit of their Refusal, or else it should be presumed that the Court would do right.

*Mich. 8 Geo. 1.* So a *Mandamus* was granted to the Corporation of *Liverpool*, to hold an Assembly for doing the publick Business, which was making Leases.

But tho' these kind of Writs are daily awarded to Judges of Courts to give Judgment, or to proceed in the Execution of their Authority, yet are they never granted to aid a Jurisdiction, but only to enforce the Execution of it; nor are they ever granted where there is another proper Remedy, and therefore will not lie to an Officer of an inferior Court, as to a Serjeant at Mace, an Apparitor, &c. to compel them to execute their Duty; for these are Servants to their respective Courts, and punishable by the Judges of them; and for the superior Court to interpose in obliging such inferior Officers, would be to usurp the Authority of the Court, which has a proper Jurisdiction over its own Officers, and which alone is answerable to the superior Court for the Execution of such Authority; and therefore where a *Mandamus* issued to the Vice-Master of *Trinity College Cambridge*, commanding him to execute a Sentence of Deprivation, pronounced by the Bishop of *Ely*, as Visitor of the College, against Dr. *Bentley*, the Master of that College; and it appearing on the Face of the Writ, and by the Return, that the Bishop himself or the King were Visitors, the Court held, that no *Mandamus* would lie; for taking the Bishop to be general Visitor, as the Writ supposes, he is the proper Person to carry his own Sentence into Execution, having Power *tam in Capite quam in membris*; and if the Vice-Master refuses Obedience to his Mandate, he may pronounce Sentence of Deprivation against him, and he will be immediately ousted by the Judgment; or taking the Crown to be Visitor, the Vice-Master may be punished by Commissioners appointed by the Crown; one of which Ways the Court held to be the proper one to compel the Vice-Master to do his Duty.

*1 Sid. 31.* A *Mandamus* lies to deliver up the Ensigns of an Office, or the Papers or Records of a publick Nature to a Successor; as (a) a *Mandamus* to deliver the Mace, and other Ensigns of Mayoralty, to the succeeding Mayor; so (b) a *Mandamus* to a Town-Clerk, to deliver several Books which belonged to the Corporation.  
*(a) 5 Mod. 314.*  
*(b) Comb. 102.*

*Vide Tit. Corporations.* A *Mandamus* lies to oblige Corporations to chuse proper Officers, which if they neglected to do, this by the Common Law was a Forfeiture of their Charter; and tho' by the Common Law, upon the Death of a Mayor within his Year, which was the Act of God, and an ordinary Contingency, the Court of King's Bench was authorized to grant a *Mandamus* immediately to fill up the Vacancy; yet upon an Omission to elect at the Charter-Day, or upon the Removal of an Officer unduly chosen, there was no Power to compel an Election before the Day came round again to supply those Defects.

By the 11 *Georg. 1. cap. 4.* it is enacted in the following Words:  
 'Whereas in many Cities, Boroughs and Towns Corporate, within that Part of Great Britain called *England, Wales, and Berwick upon Tweed*, the Election of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, is by Charter, or ancient Usage, confined to a particular Day or Time, without any Provision how to act or proceed in case no Election be then made; and it frequently happens that by such Charter, or Usage, particular Acts are required to be done at certain Times, in order to and for the compleating of such Elections, and by the Contrivance or Default of the Person or Persons, who ought to hold the Court, or preside in the Assembly where such Elections are to be made,

‘ made, or such Acts to be done; or by Accident it hath sometimes  
 ‘ happened, and may frequently do so, if not timely prevented, that no  
 ‘ Courts or Assemblies have been held, or Elections made, or such Acts  
 ‘ done within the Time fixed for that Purpose; in which Cases, if  
 ‘ Elections of such Officers could not afterwards be made, the Corpora-  
 ‘ tion should be dissolved, great Mischiefs might ensue, for Remedy and  
 ‘ Prevention whereof be it enacted, That if any City, Borough or Town  
 ‘ Corporate, within that Part of *Great Britain* called *England*, *Wales*,  
 ‘ and *Berwick upon Tweed*, no Election shall be made of the Mayor,  
 ‘ Bailiff or Bailiffs, or other chief Officer or Officers of such City, Bo-  
 ‘ rough or Town Corporate, upon the Day, or within the Time ap-  
 ‘ pointed by Charter or Usage for such Election; or such Election being  
 ‘ made, shall afterwards become void, whether such Omission or Avoid-  
 ‘ ance shall happen thro’ the Default of the Officer or Officers, who  
 ‘ ought to hold the Court, or preside where such Election is to be made,  
 ‘ or by any Accident, or other Means whatsoever; the Corporation shall  
 ‘ not thereby be deemed or taken to be dissolved or disabled from elect-  
 ‘ ing such Officer or Officers for the future; but in any Case where no  
 ‘ Election shall be made as aforesaid, it shall and may be lawful for the  
 ‘ Members or Persons of such City, Borough or Corporation, who  
 ‘ have Right to vote, or be present at, or to do any other Act necessary  
 ‘ to be done, in order to or for the compleating such Election; and  
 ‘ they, and such of them, as shall be hindered by any reasonable Impe-  
 ‘ diment or Excuse, are hereby required respectively to meet or assemble  
 ‘ together in the Town Hall, or other usual Place of Meeting, for  
 ‘ making such Election within such City, Borough or Town Corporate,  
 ‘ upon the Day next after the Expiration of the Time within which  
 ‘ such Election ought to have been made, unless such Day shall happen  
 ‘ to be *Sunday*, and then upon the *Monday* following between the Hours  
 ‘ of ten in the Morning and two in the Afternoon of the same Day; and  
 ‘ that the Members, or Persons, having Right to vote at, or to do any  
 ‘ other Act necessary to be done in order to such Election, or such of  
 ‘ them as shall be so assembled or met together, shall forthwith proceed to  
 ‘ the Election of a Mayor or Bailiffs, or other chief Officer or Officers,  
 ‘ for such City, Borough or Corporation, and to do every Act necessary  
 ‘ to be done, in order to or for the compleating such Election, in such  
 ‘ Manner as was usual in, or in order to the Election of such Officer or  
 ‘ Officers, upon the Day, or within the Time appointed by Charter or  
 ‘ Usage for such Election; and in Case upon such Day of meeting  
 ‘ hereby appointed for such Election, the Mayor; Bailiff or Bailiffs, or  
 ‘ other proper Officer or Officers, who ought to have held the Court, or  
 ‘ presided at the Assembly for such Election, or doing any other Act  
 ‘ necessary to be done in order to such Election, if the same had been  
 ‘ made or done on the Day fixed, or within the Time limited by Charter  
 ‘ or Usage for that Purpose, shall be absent; then such other Person,  
 ‘ having a Right to Vote, being the nearest then present in Place or  
 ‘ Office to the Person or Persons so absenting himself, or themselves,  
 ‘ shall hold the Court, or preside in the Meeting or Assembly hereby  
 ‘ appointed, and shall have the same Power and Authority in all Re-  
 ‘ spects therein, as belongs to the Mayor, Bailiff or Bailiffs, or other  
 ‘ chief Officer or Officers, of the same City, Borough or Town Corpo-  
 ‘ rate, at any Court or Assembly, for the Election of Officers for such  
 ‘ Place, or for doing any other Act necessary to be done in order to  
 ‘ such Election.

And *Sec. 2.* it is further enacted, ‘ That if it shall happen that in  
 ‘ any City, Borough or Town Corporate, within that Part of *Great*  
 ‘ *Britain* called *England*, *Wales*, and *Berwick upon Tweed*, no Election  
 ‘ shall be made of the Mayor, Bailiff or Bailiffs, or other chief Officer  
 ‘ or Officers of such City, Borough or Town Corporate, upon the Day,  
 Vol. III. 6 N ‘ or

‘ or within the Time appointed by Charter or Usage for that Purpose ;  
 ‘ and that no Election of such Officer or Officers shall be made pursuant  
 ‘ to the Directions herein before prescribed ; or such Election being made,  
 ‘ shall afterwards become void as aforesaid ; in every such Case it shall  
 ‘ and may be lawful for his Majesty’s Court of King’s Bench, upon Mo-  
 ‘ tion to be made in the said Court, to award a Writ or Writs of *Man-*  
 ‘ *damus*, requiring the Members or Persons of such City, Borough or  
 ‘ Town Corporate, having a Right, to vote at, or to do any other Act  
 ‘ necessary to be done, in order to such Election, or to signify to the  
 ‘ said Court good Cause to the contrary ; and thereupon, to cause such  
 ‘ Proceedings to be had and made, as in other Cases of Writs of *Manda-*  
 ‘ *mus*’s granted by the said Court for Election of Officers of Corpora-  
 ‘ tions, and of the Day and Time appointed, in and by any such Writ  
 ‘ or Writs of *Mandamus*, for holding such Assembly, Publick Notice in  
 ‘ Writing shall, by such Person as the Court shall appoint, be affixed in  
 ‘ the Market-place, or some other publick Place within such City, Bo-  
 ‘ rough or Town Corporate, by the Space of six Days before the Day  
 ‘ so appointed ; and such Officer, and other Person respectively, shall  
 ‘ preside in such Assembly, as ought to have presided at the Election of  
 ‘ such Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, or at  
 ‘ the doing any other Act necessary to be done in order to such Elec-  
 ‘ tion, in Case the same had been made or done upon the Day herein  
 ‘ before prescribed for that Purpose.

‘ *Seet. 3.* And whereas in certain Boroughs and Towns Corporate  
 ‘ within that Part of *Great Britain* called *England, Wales, and Berwick*  
 ‘ upon *Tweed*, the Mayor, Bailiff or Bailiffs, or other chief Officer or  
 ‘ Officers, is or are to be nominated, elected or sworn at a Court-Leet,  
 ‘ or View of Frankpledge, or some other Court ; and by reason of the  
 ‘ Contrivance or Default of the Lord, or his Steward, or such other  
 ‘ Officer, by or before whom such Court ought to be held, in not hold-  
 ‘ ing the same, or by some Accident it hath happened, and may here-  
 ‘ after happen, that no due Nomination, Election or Swearing, of such  
 ‘ Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, hath been,  
 ‘ or shall be had or made ; be it further enacted by the Authority afore-  
 ‘ said, That in every such Case it shall and may be lawful to and for  
 ‘ his Majesty’s Court of King’s Bench, upon Motion to be made in the  
 ‘ said Court, to award a Writ of *Mandamus*, requiring the Lord, or his  
 ‘ Steward, or other Officer, by or before whom such Court ought to be  
 ‘ held, to hold, or cause to be holden, such Court-Leet, or other  
 ‘ Court, and to do every other Act necessary to be done by him, in  
 ‘ order to such Nomination, Election or Swearing, at such Day and  
 ‘ Time, as shall be for that Purpose judged proper by the said Court of  
 ‘ King’s Bench, and shall be appointed in such Writ ; or to signify to  
 ‘ the said Court good Cause to the contrary ; and thereupon, to cause  
 ‘ such Proceedings to be had and made, as in other Cases of Writs of  
 ‘ *Mandamus*, granted by the said Court for holding of any Court, and  
 ‘ of the Day and Time appointed, in and by any such Writ of *Mandamus*,  
 ‘ for holding such Court, publick Notice in Writing shall, by such Per-  
 ‘ son as the said Court of King’s Bench shall appoint, be affixed in the  
 ‘ Market-place, or some other publick Place within such Borough or  
 ‘ Town Corporate, by the Space of six Days before the Day so appoint-  
 ‘ ed ; and where a Nomination of Persons, in order to the Election of  
 ‘ any such Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, is  
 ‘ to be made at such Court-Leet, or other Court ; in every such Case,  
 ‘ after such Nomination made, all and every other Act and Acts neces-  
 ‘ sary to be done, in order to such Election, shall be had, made and  
 ‘ done at such Assembly, and in such Manner and Form as the same  
 ‘ ought to have been had, made and done, in Case such Election had  
 ‘ been made upon the Day next after the Expiration of the Time pre-

scribed for such Election by the Charter or Usage of such Borough or Corporation, according to the Directions herein before mentioned.

*Sec. 4.* And be it further enacted by the Authority aforesaid, That the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, who shall be elected pursuant to the Directions of this Act, shall take the Oath, or Oaths, by Law required, at the Time of his Admission into such Office, before such Officer as shall preside at such Election, in Pursuance of this Act, who is hereby authorized and required to administer such Oath or Oaths, and shall have the same Privileges, Precedence, Powers and Authorities, in all Respects, as any Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, of the same City, Borough or Corporation, elected on the Days or Time fixed by Charter or Usage for that Purpose, ought to have or enjoy.

*Sec. 5.* Provided always, that no such Election, nor any Act done in order thereunto, shall be valid, unless as great a Number of Persons, having a Right to be present at and vote therein, shall be present at the Assembly holden for such Purpose, and concur therein, as would respectively have been necessary to be present and concur in such Election or Act, in case the same had been made or done upon the Day, or within the Time appointed for that Purpose, by the Charter or Usage of such City, Borough or Corporation, saving only that the Presence of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, who ought to preside, shall not be necessary.

*Sec. 6.* And be it further enacted by the Authority aforesaid, That if any Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, of any City, Borough or Town Corporate, shall voluntarily absent himself, or themselves from, or knowingly, or designedly prevent or hinder the Election of any other Mayor, Bailiff, or other chief Officer in the same City, Borough or Town Corporate, upon the Day, or within the Time appointed by Charter or ancient Usage for such Election, the Person or Persons so offending, being thereof lawfully convicted, shall for every such Offence suffer Imprisonment for the Space of six Months, without Bail or Mainprize, and shall be for ever disabled to take, hold, or exercise any Office belonging to the same City, Borough or Corporation.

*Sec. 7.* And be it further enacted, That no Corporation shall be deemed or adjudged to be dissolved or disabled from electing a Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, by reason of any Omission or Default which hath already happened, in not nominating, electing or swearing a Mayor, Bailiff or Bailiffs, or other chief Officer or Officers of such Corporation, upon the Day, or within the Time limited for such Nomination, Election or Swearing, by the Charter or Usage of such Corporation, or by Reason of the Absence of the Mayor, Bailiff or Bailiffs, or other chief Officer or Officers, who ought to have presided at the Assembly for such Nomination, Election or Swearing, or by Reason of such Election having become void, as aforesaid; but every such Corporation shall be adjudged, deemed and taken to be, and to have been subsisting and capable of electing such Officer or Officers to all Intents and Purposes; any such Omission, Absence, Default or Avoidance, or any Defect, Disability or Forfeiture arising therefrom, in any wise notwithstanding.

*Sec. 8.* Provided always, That nothing herein contained shall extend, or to be construed to extend to invalidate or make void any Charter heretofore granted to and accepted by any City, Borough or Town Corporate, or any Corporation within the same, or any of them, or any Elections or Acts had, made or done in Pursuance of any such Charter, nor to make good the Election of any Officer or Member, or of any Person claiming to be an Officer or Member of any City, Borough or Corporation, against whom any Judgment of *ouster* shall

‘ shall have been entred or given upon any Information in the Nature of  
 ‘ a *Quo Warranto*, or whose Election shall have been avoided upon any  
 ‘ Writ of *Mandamus*, on or before the last Day of *Michaelmas* Term in  
 ‘ the Year of our Lord God 1724.

*Secd. 9.* It is further enacted, ‘ That where any Writ of *Mandamus*  
 ‘ shall issue out of the Court of King’s Bench in any of the Cases  
 ‘ aforesaid, the Person or Persons, to whom such Writ shall be directed,  
 ‘ shall make his or their Return to the first Writ of *Mandamus*.

### (E) Of the Authority by which it issues; and therein of the discretionary Power in the Court of granting or refusing it.

*Vide Tit.  
 Courts and  
 their Juris-  
 diction.*

THIS general Jurisdiction and Superintendancy is now only exercised by the Court of King’s Bench, as the supreme Court for restraining and keeping all inferior Courts and Magistrates within their proper Bounds, and obliging them to execute that Justice with which they are invested.

1 *Vern.* 175.

And tho’ a *Mandamus* may issue out of Chancery, yet on a Motion to the Lord Keeper, to grant a Mandatory Writ to the Chief Justice of the King’s Bench, to command him to sign a Bill of Exceptions, and a Precedent produced, where in a like Case such a Writ had issued out of Chancery to the Judge of the Sheriff’s Court in *London*; the Lord Keeper denied the Motion, for that the Precedent produced was to an inferior Court, and he would not presume but the Chief Justice of *England* would do what should be just in the Case.

*Hill. 8 Geo. 2.  
 The King ver.  
 Mayor and  
 Burgeses of  
 Tintagel in  
 Cornwall.*

But tho’ the Court of King’s Bench be intrusted with this Jurisdiction of issuing out *Mandamus*’s, yet are they not obliged to do so in all Cases wherein it may seem proper, but herein may exercise a discretionary Power, as well in refusing as granting such Writ; as where the End of it is merely to try a private Right; where the granting it would be attended with manifest Hardships and Difficulties, &c. So even since the Statute 11 *Geo. 1.* for obliging Corporations to elect Officers, it hath been held, that this Court has a discretionary Power of refusing a Writ for that Purpose, but may first receive Information about the Election, and, if dissatisfied about the Right, may send the Parties to try it in an Information.

1 *Sid.* 169.  
 1 *Lev.* 23.  
 2 *Lev.* 14.  
 2 *Shorr.* 74.  
*Carth.* 169.  
*Ca. Law Eq.*  
 49.

Also in a doubtful Case, the Court of King’s Bench may award a *Mandamus* to be considered of further on the Return, which may give more Light, and discover more fully the Justness of granting or refusing it, and on such Return may either establish or quash the Writ.

### (F) To Whom to be directed.

(a) 2 *Salk.*  
 432, 701.

THE Writ is to be directed to him, who by Law is obliged to execute it, or to do the Thing thereby required; and therefore (a) where a *Mandamus* was granted to the Mayor, &c. of *Norwich*, it was moved, that the Sense of the Mayor differed from the Majority of the Corporation, and that he would execute the Writ; whereas the Corpora-

tion

tion were for returning an Excuse, &c. and they prayed, that the Mayor might be ordered to deliver the Writ to the Rest of the Corporation. *Sed non allocatur*; for he is the Head and Principal, and (a) take your Course against him.

(a) That if the Mayor had made any Return, contrary to

the Votes of the Majority concerned, it was at his Peril; and that the Way to punish him was by Information in *B. R. Carth.* 500.

If a *Mandamus* be directed to the two Bailiffs of a Town, to swear in other Bailiffs, and they object, that having sworn in others, and being now no longer Bailiffs, and that the Writ not being directed to them in their natural Capacities, they are not obliged to pay any Obedience thereto; the Court will notwithstanding oblige them to return the Writ; for if the Persons sworn in by them had no Right to be chosen, they still continue Bailiffs, and ought to obey the King's Writ.

6 Mod. 135.  
*The Queen*  
ver. *The*  
*Town of Clitheroe.*

But where a *Mandamus* was directed to the Church-wardens of *H.* to restore *A.* to the Office of Sexton, and served upon the late Church-wardens, after their Office was expired; and a Rule being made to shew Cause why an Attachment should not go, for not obeying the *Mandamus*; and the whole Matter being disclosed by Affidavit, the Court allowed as a good Reason for their not returning the Writ, that they, at the Time of the Writ delivered to them, were not Churchwardens.

*Trin.* 5 Geo. 2  
in *B. R. The*  
*King* ver.  
*Church-wardens of Wrexham.*

A *Mandamus* to the Mayor, Aldermen and Capital Burgeffes of *D.* viz. whereas *A.* and *B.* &c. removed the Party complaining from his Office of Burgeffs, commanding them to command *A.* and *B.* to restore him, was quashed, for that it is absurd, that the Writ should be directed to one Person to command another.

2 Salk. 456  
*The Queen*  
ver. *The*  
*Mayor, &c.*  
of *Derby.*

### (G) By Whom to be returned.

THE Writ is to be returned by him to whom it is directed; and if any other return it in his Name, without his Privy and Consent, an Action on the Case lies against him; also it is such an Offence, for which the Court will grant an Attachment.

*Skin.* 368.  
*Carth.* 500.  
*Comb.* 422.  
2 *Shov.* 505.

If a *Mandamus* be directed to the Mayor, &c. and the Mayor, who is the most principal and proper Person, returns and brings in the Writ; the Court upon Affidavits will not examine, whether there was the Sense of the Majority, but will receive it, and leave the Parties to punish the Mayor for the Misdemeanor, if he be guilty; but a peremptory *Mandamus* will be granted, if the Return be falsified.

*Carth.* 500.  
*The King*  
ver. *Mayor,*  
&c. of *Abingdon.*  
2 Salk. 431.  
*S. C.* and  
Leave given

by the Court to file an Information against the Mayor.

### (H) Of the Manner of enforcing Obedience to the Writ, and compelling a Return.

ON every *Mandamus* there regularly issues an *Alias* and *Pluries*, to oblige the Party to return the Writ; but the Court of King's Bench may make a peremptory Rule to return the first Writ; and in case of Disobedience grant an Attachment; also by the Statutes 9 Ann. and 11 Geo. 1. Persons, who are by Law required to make Returns to *Mandamus's*, in

2 Salk 429,  
434.  
6 Mod. 25.  
*Skin.* 669



such Cases as are within these Statutes, must make their Return to the first Writ of *Mandamus*.

*Mich. 9 Geo. 2.  
The King  
ver. Baskerville,  
Sheriff  
of Shropshire.*

If an Attachment issues for not returning a *Mandamus*, and the Sheriff, who is to serve the Process, takes Bail thereupon, this is such a Misdemeanor, for which an Attachment will be granted against him; for these are not like Attachments in Chancery, for want of an Answer, which are only as Attachments of Process, but are Writs on Contempt, in Nature of Executions, and so not bailable by the Sheriff.

*6 Mod. 152.*

If a *Mandamus* is awarded for electing an Officer, and there is an Equality of Votes, so that the Electors cannot agree, it is said, that they shall be all brought up as in Contempt, and laid by the Heels till they do agree.

### (1) What shall be said a good Return.

*1 Salk. 432.  
1 Vent. 111.*

AS every *Mandamus* issues upon a Supposal of some Breach and Disobedience of the Law, or Neglect of the Party's Duty to whom it is directed, the Return thereto must be certain to every Respect; and therefore it is said, not to be sufficient to offer such Matter as the Party may falsify in an Action, but also such Matter must be alledged, that the Court may be able to judge of it, and determine whether the Party's Conduct be agreeable to Law or not.

*1 Vent. 110.  
The King  
ver. Clapham.*

Therefore, if to a *Mandamus* to the Lord President and Council of the *Marches*, to admit a Person to the Exercise of the Office of Deputy-Secretary, the Return is, that *Non fuit tempore receptionis brevis deputatus constitutus*; this is naught; for if he were made his Deputy before, the Return was true; unless he made him his Deputy at the very Instant of the Receipt of the Writ.

*2 Salk. 436.  
The Queen  
ver. Mayor,  
&c. of Norwich.*

To a *Mandamus* to admit a Person Alderman, the Party may return, that he was not qualified, or that he was not elected; also several Causes may be returned, but they must be consistent; and therefore if the Return admits a good Election, and afterwards avoids it by Matter repugnant, this is naught.

*6 Mod. 309.*

A *Mandamus* to swear one into the Place of Town-Clerk; the Return was, that upon the Election *B.* had eighteen Voices, and the Party who sued the *Mandamus* but seventeen; and that they swore in *B.* and it was held a bad Return, being argumentative, when it should be express and direct, that he was not chose.

*Raym. 153.*

A *Mandamus* was granted to restore the Recorder of *Barnstable*, directed to the Mayor of the Corporation; and he returned, *quod non constat nobis* that he was ever elected; and the Return adjudged insufficient, and Restitution awarded.

*1 Sid. 209.  
1 Keb. 655,  
716, 733.*

So where to a *Mandamus*, to restore a Town-Clerk, it was returned, that he *nunquam debito modo admissus*; and it was held a bad Return, being a Negative pregnant, and involving Matter of Law, when the plain Fact only should be returned, so as to enable the Court to adjudge upon it; and the Party to bring his Action, in case it were false.

*Carth. 170.  
Lambert's  
Case.  
2 Salk. 433.  
5 Mod. 11.  
S. P.*

But if the *Mandamus* suggest, that he was *debite electus*, a Return *quod non fuit debite electus* is good, because it answers the Suggestion in the Writ.



## (K) Of traversing the Return, and taking Issue thereon.

THE Party to the Return of a *Mandamus* could not traverse nor interplead, which is one Reason why the utmost Certainty was required in such Return. 1 Vent. 111.  
2 Salk. 431

But now by the 9 *Ann. cap. 20.* reciting, that divers Persons had illegally intruded themselves into, and taken upon them to execute the Office of Mayors, Bailiffs, Port-reeves, and other Offices within Cities, Towns Corporate, Boroughs and Places; and the great Difficulty of determining, where the Office was annual, the Right to the same, within the Compass of the Year, or where it was not annual, the Difficulty of determining the Right, before the Persons had done divers Acts prejudicial to the Peace and Order of such City, &c. and reciting the great Difficulty Persons illegally turned out, or refused to be admitted, lay under, and the Dilatoriness and Expence attending the Proceedings on Writs of *Mandamus*, it is therefore enacted, ' That as often as, in any of the ' Cases aforesaid, any Writ of *Mandamus* shall issue out of the King's ' Bench, the Courts of Sessions of Counties Palatine, or out of any the ' Courts of the Grand Sessions in *Wales*, and a Return shall be made ' thereunto, it shall and may be lawful to and for the Person or Persons, ' suing or prosecuting such Writ of *Mandamus*, to plead to or traverse ' all or any the material Facts contained within the said Return; to ' which the Person or Persons making such Return, shall reply, take ' Issue or demur; and such further Proceedings, and in such Manner ' shall be had therein, for the Determination thereof, as might have been ' had if the Person or Persons, suing such Writ, had brought his or ' their Action on the Case for a false Return; and if any Issue shall be ' joined on such Proceedings, the Person or Persons suing such Writ, ' shall and may try the same in such Place, as an Issue joined in such Action on the Case should or might have been tried; and in case a Verdict shall be found for the Person or Persons suing such Writ, or Judgment given for him or them on Demurrer, or by *Nil dicit*, or for Want of a Replication or other Pleading, he or they shall recover his and their Damages and Costs, in such Manner as he or they might have done in such Action on the Case as aforesaid; such Costs and Damages to be levied by *Capias ad Satisfaciendum*, *Fieri Facias* or *Elegit*, and a peremptory Writ of *Mandamus* shall be granted without Delay, for him or them for whom Judgment shall be given, as might have been, if such Return had been adjudged insufficient; and in case Judgment shall be given for the Person or Persons making such Return to such Writ, he or they shall recover his or their Costs of Suit, to be levied in Manner aforesaid.

## (L) Of the Party's Remedy for a false Return.

IT is clearly agreed, that for a false Return to a *Mandamus* an Action on the Case lies; as if upon a *Mandamus* to restore T. S. to his Place of Burgefs of P. the Mayor, &c. return a good Cause, the Matter of which is false, an Action lies for the false Return. 11 Co. 99.  
Bagg's Case.

Also

*Cartb.* 171-2.  
*Sir Peter Rich*  
*ver. Pilkington,*  
*Lord Mayor of London.*  
*6 Mod.* 152.  
*S. P.*

1 *Salk.* 374.

Also it hath been adjudged, that where the Return is made by several Persons, the Action may be either joint against all or several, being founded on a Tort or Injury; as if made by the Mayor and Aldermen, the Action may be brought against the Mayor only; and if upon Evidence it appears, that he voted against the Return, but was over-ruled by the Majority, the Plaintiff will be nonsuited.

Also if the Matter concerns Publick Government, and no particular Person is so far interested, as to maintain an Action, the Court will grant an Information against the particular Persons that made the Return.

### (M) Of awarding a peremptory Mandamus.

11 *Co.* 99.

(a) That on falsifying the Return, in

an Action on the Case, no Motion can be made for a peremptory *Mandamus* till four Days are past after the Return of the *Posse*; because the Defendant has so long to move in Arrest of Judgment. 2 *Salk.* 430-1. (b) Not to be granted in the first Instance. *Skin.* 669. 5 *Mod.* 314. (c) But it is said, that if the Court does not see Cause of Restitution, tho' there be no good Return to the Writ, yet they will not grant a peremptory *Mandamus*. *Farell.* 83 4.

2 *Salk.* 428.  
*Skin.* 670.  
*S. C.*

But the Action, which falsifies the Return, is to be brought in that Court out of which the *Mandamus* issued; and therefore where in an Action on the Case in *C. B.* for a false Return to a *Mandamus*, Judgment was given for the Plaintiff on Demurrer; yet the Court of *B. R.* refused to grant a peremptory *Mandamus*; because every *Mandamus* recites the Fact *prout nobis constat per recordum*, which cannot be said in this Case, as the Court cannot take Notice of the Records of the Common Pleas.

## Master and Servant.

(d) Hence by the Statute

25 *E.* 3. it is Petit Treason for a Servant to kill his Master; in the Construction

THE Relationship between a Master and a Servant from the Superiority and Power which it creates on the one Hand, and Duty, Subjection, and as it were (d) Allegiance on the other, is in many Instances applicable to other Relationships, which are in a superior and subordinate Degree; such as Lord and Bailiff, Principal and Attorney, (e) Owners and Masters of Ships, Merchants and Factors, and all others having Authority to enforce Obedience to their Orders, from those whose Duty it is to obey them, and whose Acts, being conformable to their Duty and Office, are esteemed the Acts of their Principals;

whereof it hath been held to extend to a Mistress, or Master's Wife. *Plow.* 86. 3 *Inst.* 20. 4 *Co.* 46. (e) Where a Master of a Ship is expressly said to be a Servant to the Owners, and the Owners shall answer for him as such. 3 *Mod.* 323. 2 *Vern.* 643.

cipals ; but these being treated of under their proper Heads, we shall here consider this Relationship, as it more particularly affects Masters and those who are more properly called Servants and Apprentices.

(A) Of the Manner of Hiring and Binding a Person Servant or Apprentice.

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters.

(D) Of the Necessity of serving an Apprenticeship, as a Qualification to follow a Trade within the 5 Eliz. And herein,

1. What shall be said a Trade, which a Person is prohibited to follow, within the Statute.
2. What Manner of following or exercising a Trade shall be said within the Statute.
3. What Kind of Service will be a sufficient Qualification within the Statute.
4. By whom the Offence of following a Trade without a Qualification is cognizable.
5. Of the Form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

(E) Of assigning and turning over Apprentices to other Masters.

(F) Of making Apprentices free.

(G) How Apprentices are to be taken Care of when their Masters happen to die.

(H) Of Servants Wages, how recoverable.

(I) What Acts of the Servant are deemed the Master's, of which the Master may take Advantage.

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

(L) For what Acts of his shall the Servant himself answer to others.

(M) For what Acts of his shall the Servant answer, and be responsible to his Master: And herein,

1. Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.
2. Where Servants and Apprentices shall be punished criminally, for Acts done in relation to their Masters.

- (N) Of the Master's Authority over his Servant, and how far he may correct and punish him.
- (O) Of the Master's Remedies against others for enticing away, and other Injuries done, in relation to his Servant.
- (P) What a Master or Servant may justify doing in each other's Defence.

### (A) Of the Manner of Hiring and Binding a Person Servant or Apprentice.

21 H. 6. 23.  
3 Keb. 304.  
6 Mod. 182.  
1 Salk. 68.

(a) That by the Contract he is con-

sidered as Servant, tho' he has not yet actually done any Service for his Master. *Dalt. Just. cap. 58.* — And on such Contract the Master may have an Action against him, if he either refuses to serve at all, or departs before the Time is expired for which he agreed to serve. *Dalt. Just. cap. 58.* — And where the Master has his Remedy against another detaining him, *vide infra* Letter (O).

Co. Lit. 42.

A Servant may hire himself for what Time he pleases; but it is said, that if a Man retain a Servant generally, without expressing any Time, the Law will construe it to be for one Year, because that Retainer is according to Law.

2 Keb. 16.  
Cotes ver.  
Sadler.

Also it hath been adjudged, that if a Person retain a Servant for a Year, *& sic de anno in annum quamdiu ambabus partibus placuerit*, that after a second Year begun the Retainer holds good for another Year; and that it shall not be a Retainer for a Year certain, and afterwards at Will.

2 Rol. Rep.  
305.  
Palm. 361.  
1 Mod. 271.

(b) Where Persons, binding themselves Apprentices to Mariners, their Indentures are to be inrolled

in the next Corporate Towns. 3 Lev. 389 (c) Where it is necessary in order to prove him an Apprentice. *Skim. 579.*

And as an Apprentice can only be bound by Deed, so it is necessary, according to the Custom of (b) some Places, that such Deed or Indenture be inrolled; as in *London*, if the Indentures be not inrolled before the Chamberlain within a Year, upon a Petition to the Mayor and Aldermen, *&c.* a *Scire fac'* shall issue to the Master, to shew Cause why not inrolled; and if it was through the Master's Default, the Apprentice (c) may sue out his Indentures, and be discharged; otherwise if through the Fault of the Apprentice; as if he would not come to present himself before the Chamberlain, *&c.* for it cannot be inrolled, unless the Apprentice be in Court and acknowledges it.

5 Mod. 69.

But it hath been held, that this Custom does not extend to one bound Prentice to a Waterman, under twenty-one Years of Age; for the Company of Watermen are but a voluntary Society, and being free of that does not make one free of *London*.

(B) Who may serve, or are capable of binding themselves Servants or Apprentices.

IT is said, that if a married Man and his Wife do bind themselves to serve, they shall be compelled thereto, according to their Covenant or Agreement; and that if a Woman who is a Servant shall marry, yet she must serve out her Time; and her Husband cannot take her out of her Master's Service. *Dalt cap 58.*

It seems clearly agreed, that by the (a) Common Law Infants, or Persons under the Age of twenty-one Years, cannot bind themselves Apprentices, in such a Manner as to intitle their Masters to an Action of Covenant, or other Action, for departing their Service, or other Breaches of their Indentures; which makes it necessary, according to the usual Practice to get some of their Friends to be bound for the faithful Discharge of their Offices, according to the Terms agreed on. *11 Co. 89. 2 Inst. 579. 380. 2 Leon 65. Fawc. 14. (a) Nor in Equity. Abr. Eq. 6. — But if*

an Infant of five Years of Age, or other Person who is not *Potens in corpore*, be retained, and serve in the best Manner they can, their Masters must pay them their Wages. *Bro. Tit. Labour, 46. Dalt. Just. cap. 58.*

But by the 5 *Eliz. cap. 4. sect. 42, 43.* it is enacted in the Words following, 'And because there hath been, and is some Question and Scruple moved, whether any Person being within Age of twenty-one Years, and bounden to serve as an Apprentice, in any other Place than in the said City of London, shall be bounden, accepted and taken as an Apprentice; for the Resolution of the said Scruple and Doubt, be it enacted by the Authority of this present Parliament, That all and every such Person or Persons, that at any Time or Times from henceforth shall be bounden by Indenture to serve as an Apprentice in any Art, Science, Occupation or Labour, according to the Tenour of this Estatute, and in Manner and Form aforesaid, albeit the same Apprentice, or any of them, shall be within the Age of twenty-one Years, at the Time of making their several Indentures, shall be bounden to serve for the Years in their several Indentures contained, as amply and largely to every Intent, as if the same Apprentices were of full Age at the Time of making such Indentures; any Law, &c.'

But notwithstanding this Statute, it hath been held, in an Action of Covenant against an Apprentice, for departing from his Master's Service without Licence, within the Time of his Apprenticeship; where the Defendant pleaded, that at the Time of making the Indenture he was within Age; and on Demurrer to this Plea, it was argued, that this Indenture should bind the Infant, because it was for his Advantage to be bound Apprentice, to be instructed in a Trade; it was also urged, that he was compellable by the 5 *Eliz. supra*, to be bound out an Apprentice; but all the Court resolved, that although an Infant may voluntarily bind himself an Apprentice, and if he continue an Apprentice for seven Years, he may have the Benefit to use his Trade; yet neither at the Common Law, nor by any Words of the above-mentioned Statute, a Covenant or Obligation of an Infant, for his Apprenticeship, shall bind him; but if he misbehave himself, the Master may correct him in his Service, or complain to a Justice of Peace, to have him punished according to the Statute; but no Remedy lieth against an Infant upon such Covenant. *Cro. Car. 179. Gilbert ver. Fletcher. Cro. Jac. 494. S. P.*

By the Custom of London, an Infant unmarried, and above the Age of fourteen, may bind himself Apprentice to a Freeman of London, by Indenture with proper Covenants; which Covenants, by the Custom of London, shall be as (b) binding as if he were of full Age. *Meer 134. 2 Bulst. 192. 2 Rol. Rep. 305. Palm. 361.*

1 *Mod. 271.* 2 *Keb. 687.* (b) And for a Breach an Action may be brought in any other Court, as well as in the Courts of the City. *Meer 136.*

(C) Of

(C) Of the Jurisdiction of Justices of Peace in binding out Apprentices, in obliging Masters to provide for them, in compelling them to refund the Money had with them, and in discharging Apprentices from their Masters.

THE Jurisdiction of Justices of the Peace herein depends on divers Acts of Parliament, particularly on the 5 *Eliz. cap. 4.* the most material Clause of which, as to this Purpose, is *Sec. 35.* which is as followeth: ' That if any Person shall be required by any Householder, ' having and using Half a Plough-Land, at the least, in Tillage, to be an ' Apprentice, and to serve in Husbandry, or in any other kind of Art, ' Mystery or Science, before expressed, and shall refuse so to do, that ' then, upon Complaint of such Housekeeper, made to one Justice of ' the Peace of the County where the said Refusal is, or shall be made, ' or of such Householder inhabiting in any City, Town Corporate, or ' Market-Town, to the Mayor, Bailiffs, or head Officer of the said City, ' Town Corporate, or Market-Town, if any such Refusal shall be there, ' they shall have full Power and Authority, by Virtue hereof, to send for ' the same Person so refusing; and if the Justice, or the said Mayor or head ' Officer, shall think the said Person meet and convenient to serve as an ' Apprentice in that Art, Labour, Science or Mystery, wherein he shall be ' so then required to serve, that then the said Justice, or the said Mayor ' or head Officer, shall have Power and Authority, by Virtue hereof, ' if the said Person refuse to be bound as an Apprentice, to commit him ' unto Ward, there to remain until he be contented, and will be ' bounden to serve as an Apprentice should serve, according to the true ' Intent and Meaning of this present act; and if any such Master shall ' misuse or evil intreat his Apprentice, or that the said Apprentice shall ' have any just Cause to complain, or the Apprentice do not his Duty ' to his Master, then the said Master, or Apprentice, being grieved, and ' having Cause to complain, shall repair unto one Justice of Peace within ' the said County, or to the Mayor, or other head Officer of the said ' City, Town Corporate, Market-Town, or other Place, where the said ' Master dwelleth, who shall, by his Wisdom and Discretion, take such ' Order and Direction between the said Master and his Apprentice, as ' the Equity of the Cause shall require; and if for want of good Con- ' formity in the Master, the said Justice of Peace, or the said Mayor or ' head Officer, cannot compound and agree the Matter between him ' and his Apprentice, then the said Justice, or the said Mayor, or other ' head Officer, shall take Bond of the said Master to appear at the next ' Sessions then to be holden in the said County, or within the said City, ' Town Corporate, or Market-Town, if the said Master dwell within ' any such; and upon his Appearance, and hearing of the Matter, be- ' fore the said Justices, or the said Mayor, or other head Officer, if it ' be thought meet unto them to discharge the said Apprentice of his ' Apprenticeship, that then the said Justices, or four of them at the ' least, whereof one of them to be of the *Quorum*, or the said Mayor, ' or other head Officer, with the Consent of three other of his Brethren, ' or Men of best Reputation within the said City, Town Corporate or ' Market-Town, shall have Power, by Authority hereof, in Writing ' under their Hands and Seals, to pronounce and declare that they have ' discharged the said Apprentice of his Apprenticeship, and the Cause ' thereof; and the said Writing, so being made and enrolled by the  
Clerk

‘ Clerk of the Peace, or Town-Clerk, amongst the Records that he  
 ‘ keepeth, shall be a sufficient Discharge for the said Apprentice against  
 ‘ his Master, his Executors and Administrators; the Indenture of the  
 ‘ said Apprenticeship, or any Law or Custom to the contrary notwith-  
 ‘ standing; and if the Default shall be found to be in the Apprentice,  
 ‘ then the said Justices, or the said Mayor, or other head Officer, with  
 ‘ the Assistance aforesaid, shall cause such due Correction and Punish-  
 ‘ ment to be ministred unto him, as by their Wisdom and Discretion  
 ‘ shall be thought meet.

‘ *Provided*, That no Person shall by Force or Colour of this Statute be  
 ‘ bounden to enter into any Apprenticeship, other than such as be under  
 ‘ the Age of Twenty-one Years.

By the 43 *Eliz. cap. 2. sect. 5.* it is enacted, ‘ That it shall be lawful  
 ‘ for the Church-wardens and Overseers of the Poor, or the greater Part  
 ‘ of them, by the Assent of any two Justices of the Peace, to bind poor  
 ‘ Children Apprentices, where they shall see convenient, till such Man-  
 ‘ Child shall come to the Age of Twenty-four Years, and such Woman-  
 ‘ Child to the Age of Twenty-one Years, or the Time of her Marriage;  
 ‘ the same to be as effectual to all Purposes, as if such Child were of full  
 ‘ Age, and by Indenture of Covenant bound him or herself.

By the 1 *Jac. 1. cap. 25. sect. 23.* this last mentioned Act is continued,  
 with this further Addition, ‘ That all Persons, to whom the Overseers  
 ‘ of the Poor shall, according to this Act, bind any Children Apprentices,  
 ‘ may take and receive and keep them as Apprentices; any former Sta-  
 ‘ tute to the contrary notwithstanding.

By the 8 & 9 *W. 3. cap. 30.* reciting, that whereas by an Act made in  
 the 43 *Eliz.* it is, among other Things, enacted, that it shall be lawful  
 for the Church-wardens and Overseers of the Poor of any Parish, or  
 the greater Part of them, by the Assent of two Justices of the Peace,  
 whereof one to be of the *Quorum*, to bind poor Children Apprentices  
 where they shall see convenient; but there being Doubts, whether the  
 Persons, to whom such Children are to be bound, are compellable to re-  
 ceive such Children as Apprentices, that Law hath failed of its due Exe-  
 cution; therefore it is enacted and declared, ‘ That where any poor  
 ‘ Children shall be appointed to be bound Apprentices pursuant to the  
 ‘ said Act, the Person or Persons, to whom they are so appointed to be  
 ‘ bound, shall receive and provide for them, according to the Indenture  
 ‘ signed and confirmed by the two Justices of the Peace, and also exe-  
 ‘ cute the other Part of the said Indentures; and if he or she shall refuse  
 ‘ so to do, Oath being thereof made by one of the Church-wardens or  
 ‘ Overseers of the Poor, before any two of the Justices of the Peace for  
 ‘ that County, Liberty or Riding, he or she shall for every such Offence  
 ‘ forfeit the Sum of 10 *l.* to be levied by Distress; the same to be ap-  
 ‘ plied to the Use of the Poor of that Parish or Place where such Of-  
 ‘ fence was committed; saving always to the Person to whom any poor  
 ‘ Child shall be appointed to be bound an Apprentice, as aforesaid, if he  
 ‘ or she shall think themselves aggrieved thereby, his or her Appeal to the  
 ‘ next General or Quarter-Sessions of the Peace for that County or  
 ‘ Riding, whose Order therein shall be final, and conclude all Parties.

In the Construction of these Statutes the following Opinions have  
 been holden :

That by the 5 *Eliz.* the Justices of Peace might bind a poor Person to *Raym. 65,*  
 Husbandry against the Consent of his Master; but that neither by that *177.*  
 Statute, nor the Statute 43 *Eliz.* which impowers the Church-wardens, *1 Sid. 99.*  
 &c. to raise a Stock of Money, by way of Assessment on the Parish, for *1 Lev. 84.*  
 that Purpose, they could impose an Apprentice on a Tradesman against *1 Vent. 325.*  
 his Consent, but must assess and raise Money to bind him out. *S. P. cent.*  
*Carth. 94.*  
*Comb. 165.*

3 *Mod. 269.* 1 *Show. 76.* *The King* ver. *Fairfax*, S. P. resolved by three Judges against *Holt.*



2 Salk. 491.  
Minchamp's  
Case.

That tho' by the Statute 8 & 9 W. 3. the Master is bound under the Penalty of 10*l.* to keep an Apprentice bound to him pursuant to the Statute 43 Eliz. yet if two Justices bind a poor Girl to a Merchant, and he appeals to the Sessions, where the Order is reversed, it being thought unfit to compel a Merchant to take an Apprentice; the Court of King's Bench, on removing the Order before them, may confirm the Order of Sessions, (as they did in this Case) for the Statute having given an Appeal to the Sessions, they are made thereby proper Judges, whether the Person be a proper Person to impose an Apprentice on or not.

Comb. 289.

per Holt C. J.

The Church-wardens and Overseers need not aver, that the Parents were not able to maintain the Child, for they have a discretionary Power, by the Statute, of determining that.

6 Mod. 165.

1 Salk. 381.

The Queen  
ver. Gold.

And as the Justices of Peace have a Power of imposing an Apprentice on a Master, in Consequence thereof an Indictment lies for Disobedience to their Orders, either in not receiving or receiving, and after turning off, or not providing for such Apprentice; for tho' an Act of Parliament prescribes an easier way of Proceeding by Complaint, yet that does not exclude the Remedy by Indictment.

Skin. 108.

5 Mod. 139.

2 Salk. 471.

(a) The Or-

der of Dis-

charge need

not be mu-

tual; there-

fore if they

order that

the Servant

shall be discharged

from his Master,

they need not discharge

the Master from his Covenants; for

when the Servant is discharged, the other is no longer Master. 5 Mod. 139. 2 Salk. 471. (b) A

Person, after three Years Service, plainly appearing to be a natural Idiot, discharged, and Order

affirmed. Skin. 114. — That by the Custom of London, a Freeman may turn away his Apprentice for

Gaming. 2 Vern. 291. — But if an Apprentice marries without the Privy of his Master, yet that

will not justify his Turning him away, but he must take his Remedy on his Covenant. 2 Vern. 492.

Carth. 366.

5 Mod. 138.

2 Salk. 471.

The King ver.

Gately.

Therefore where an Order of Sessions was made to discharge a Surgeon's Apprentice from his Master, for not instructing him in the Art of Surgery; but the Master being a Mountebank kept the Apprentice for a Tumbler on the Stage; the Order was quashed for want of Jurisdiction in the Justices, because a Surgeon is not one of the Trades mentioned in the 5 Eliz. and here it was held, that the Justices have Power only over such Apprentices who are bound to the Trades therein named, and not over Apprentices to other Trades.

1 Sand. 314.

Hawthornth

and Hillarys.

1 Salk. 67.

Skin. 108.

(c) Where a

Court of

Equity will

oblige a Ma-

ster to re-

fund.

1 Vern. 460.

2 Vern. 64,

492.

The King ver.

Amies, Trin.

7 Geo. 2. in

B. R.

And yet it hath been resolved, that the Justices may not only discharge a Merchant's Apprentice, (which has been agreed not to be a Trade within the Statute 5 Eliz.) but also oblige the Master to refund Part of the Money which he had with him; and this Doctrine of Refunding seems to be now established, as founded on (c) great Reason, tho' not expressly mentioned in the Act; for the Justices being authorized to discharge according to their Discretions, when the End of the Apprenticeship cannot be attained with one Person, it is but Justice the Master should return Part of the Money he has received with his Apprentice, to Place him out with a new Master.

It hath been held, that an Order on the Master to return Money is good, tho' it is not averred that he had any with the Apprentice; for the Order being to return Money, is as necessary a Proof of the Receipt of it, as if it had been expressly alledged; and in this Case the Court seemed to be of Opinion, that tho' the Justices had Jurisdiction as to Discharging and Obliging the Master to refund, as well in other Trades as those mentioned in the Statute; and that the Justices are not obliged in their Orders to set forth all the Steps they take in their Proceedings, there



there being nothing in the Act which makes it necessary, and that there was a known and established Distinction between Orders and Convictions.

It hath formerly been held, that the Sessions cannot make an original Order of Discharge; but that, according to the Statute, the Parties ought first to apply themselves to a Justice of Peace; and if he cannot compound the Matter, then he is to bind the Master to appear at the next Sessions; but it hath been ruled of (a) late, and seems now established, that an Order on an original Application is good, and that the previous Application to one Justice is only Discretionary.

1 *Sand.* 316.  
*Carth.* 198.  
 1 *Salk.* 68.  
 5 *Mod.* 138  
 (a) So ruled in the Case of *The King* ver. *Anties*, Trin 7 Geo 2

If the Master, being bound to answer at the Sessions, does not appear, it is a Forfeiture of his Recognizance; but yet at the same Time the (b) Justices may proceed to make an Order against him.

1 *Salk.* 67.  
 (b) For this the Statute says the Dis-

charge must be made on the Appearance of the Master, yet it must have a reasonable charge, to as not to permit the Master to take Advantage of his own Obstinacy. 2 *Salk.* 490.

The Order of Discharge must be under the Hands and Seals of the four Justices, according to the express Appointment of the Statute; but it is (c) said, that in a *Certiorari* to remove the Order, it is sufficient in the Return to take Notice of the Order so made, for it is not necessary to certify the Discharge it self.

1 *Sand.* 316.  
*Carth.* 199.  
*Comb.* 344  
 (c) 2 *Salk.* 470.

## (D) Of the Necessity of serving an Apprenticeship as a Qualification to follow a Trade within the 5 Eliz.

AT Common Law, every Person might follow what lawful Trade he pleased; which being inconvenient in many Instances, and a Detriment to the Publick, in permitting Persons to exercise Trades in which they had little or no Skill or Experience; to prevent which Mischief, and the better to train up and enure Persons to Labour and Industry from their Youth, and thereby make them more skilful and expert,

11 *Co.* 53.  
 2 *Bulf.* 191.  
*Skin.* 153.  
 1 *Sand.* 317.

It is enacted by the (d) 5 *Eliz. cap. 4. sect. 31.* ' That it shall not be lawful to any Person or Persons, other than such as now do lawfully use or exercise any Art, Mystery or Manual Occupation, to set up, occupy, use or exercise any Craft, Mystery or Occupation, now used or occupied within the Realm of *England* or *Wales*, except he shall have been brought up therein seven Years, at the least, as an Apprentice, in Manner and Form above said; nor to set any Person on Work in such Mystery, Art or Occupation, being not a Workman at this Day, except he shall have been Apprentice, as is afore said; or else having served as an Apprentice, as is afore said, shall or will become a Journeyman, or hired by the Year, upon Pain, that every Person willingly offending, or doing the contrary, shall forfeit and lose for every Default forty Shillings for every Month.

(d) It is said, that no Encouragement was ever given to Prosecutions upon this Statute, and that it would be for the common Good, if it was repealed; for no greater Punishment

can be to the Seller than to expose goods to Sale ill wrought; for by such Means he will never sell more, *per Dolben* Justice. 3 *Mod.* 317.

In the Construction hereof it will be necessary to consider,

1. What shall be said such a Trade as a Person is prohibited to follow.

2 Salk. 611. Herein we must observe, that it hath been ruled, that there are many Trades within the general Words and Equity of the Act, besides those which are particularly enumerated therein; yet it seems agreed, and hath frequently been (a) adjudged, that in every Indictment, &c. it must be alledged, that it was a Trade at the Time of making the Statute; for the Words thereof are, *any Craft, Mystery or Occupation, now used, &c.* from whence it seems to follow, that a new Manufacture, which to all other Purposes may be called a Trade, is yet not a Trade within this Statute. (a) Palm. 528. 1 Sid. 175. S. P. adjudged. — So for not averring, that the Trade of a Tyler was an Art or Mystery used in England at the Time of the making the Statute, tho' the Statute expressly mentions it. 4 Mod. 145 6.

8 Co. 130. Also it seems agreed, that the Act only extends to such Trades as imply Mystery and Craft, and require Skill and Experience; and that therefore Merchants, Husbandmen, Gardeners, &c. are not within the Statute; and on this Foundation it hath been held, that (b) a Hemp-dresser is not within the Statute, as not requiring much Learning or Skill, and being what every Husbandman doth use for his necessary Occasions. 2 Bulf. 190. (b) Cro. Car. 499. The King ver. Fredland.

(c) 2 Bulf. 186. It is said in (c) 2 Bulf. to have been adjudged, that an Upholster is not a Trade within the Statute, as not requiring Skill; but this hath been contradicted by a later (d) Resolution, wherein it is said to have been resolved, that a Barber and Taylor were Trades within the Statute. 1 Rol. Rep. 10. S. C. but no Resolution. 2 Salk. 611. S. C. and denied to be Law. (d) 2 Lev. 243. The King ver. Sellers. 1 Sid. 367. 2 Keb. 366. S. C.

2 Bulf. 190. Also it is said in 2 Bulf. that a Pippin-monger is not within the Statute, because there is no Mystery in buying of Apples, and all his Skill is in so laying his Apples as to keep them from rotting; but this likewise hath been doubted in a late (e) Case, where it was debated, whether the Using of the Trade of a Costermonger or Fruiterer be within the Statute; but there is no Resolution. (e) 2 Lev. 206. 1 Vent. 326, 346. The King ver. Plym. 2 Salk. 611. S. C. cited, and said not to be resolved.

11 Co. 34. a. It is clearly agreed, that the Following the common Trade of a Brewer, Baker or Cook, is within the Statute, as Unskillfulness herein may be very prejudicial to the Lives and Healths of his Majesty's Subjects; but it is at the same Time agreed, that the Exercising of any of these Trades in a Man's own House or Family, or in a private Person's House, is not within the Restraint of the Statute. Cro. Car. 499. Hob. 183, 211. Moor 886. 8 Co. 129. Palm. 542. Lit. Rep. 251. Bridgm. 141.

2 Salk. 611. On Motion to quash an Indictment for using the Trade of a Fellmonger, it was urged, that this was a Business which required no Skill, for that it was only to pull the Wool from the Skin; but per Holt Chief Justice, if in the Indictment it be averred to be a Trade at the Time of making the Statute, we will not quash it; for whether it was a Trade then or no, or whether any Skill be requisite to the Exercise of it, is a Matter of Fact proper for the Trial of a Jury. The Queen ver. Slaughter.

2 Salk. 611. So the Court refused to quash an Indictment for using the Trade of a Seamstress, not having served as Apprentice; because it was set forth in the Indictment to be a Trade in England at the Time of making the Act; so that if this Trade of a Seamstress be not within the Act, the Defendant will have the Advantage of it on the Trial. Cernifs.

But it is said, that the Court had quashed an Indictment for following the Trade of a Merchant-Taylor, because they did not know what was meant by it, and it seemed to them Nonsense and unintelligible.

2 Salk. 611.  
The King ver.  
Harper.

## 2. What Manner of following or exercising a Trade shall be said within the Statute.

It seems agreed, that the following a Trade within this Statute, must be such whereby the Party gets his Livelihood; and that therefore the using of the Trade of a Brewer, Baker, Cook, Taylor, &c. in one's own House, or in the private Family of another, without any Reward, is not within the Statute.

11 Co. 54.  
H. b. 183.

But in an Action for using the Trade of a Clothier, not having been Apprentice to that Trade; where by special Verdict it was found that *A.* was a *Turkey* Merchant, and exported great Quantities of *English* Cloth into the *Levant*; and for this Purpose *only* he hired several Cloth-workers, who had been all Apprentices to the same Trade, and kept also a Master-Workman of that Trade to inspect their Work; and that by those Men he made great Quantities of *English* Cloth, all which he transported; and that he the said *A.* kept a Dye-house, and hired Men of that Trade to dye his own Clothes, and no other: It was resolved to be within the Restraint of the Statute, tho' the Cloth was made for his own Merchandize only, and tho' made by Persons who had been Apprentices; for here they are not Traders but Hirelings, and he is the Tradesman who hath all the Profit, as *A.* in this Case has.

Carth. 162.  
2 Salk. 610.  
3 Mod. 313.  
Hobs qui tam  
ver. Young.

vended out for the sake of Commerce; and whether the Utterance be in *England* or in *Turkey* is not material. 2 Salk. 610.

(a) For the Cloth is not confined to the Use of his own Family, but *Turkey* is not

So if a Man keeps Journeymen Shoemakers to make Shoes for Transportation, this is an Exercising the Trade of a Shoemaker within this Statute.

Carth. 164.

But it hath been held, that this Statute doth not restrain a Man from using several Trades, so as he had been an Apprentice to all; wherefore it indemnifies all Petty Chapmen in little Towns and Villages, because their Masters kept the same mixed Trades there before.

Carth. 163  
per Cur.

(b) It seems to be the better Opinion,

that this Statute hath not abrogated the particular Customs concerning Trades in particular Towns and Villages; and that therefore a Widow, by Custom, may continue her Husband's Business; and it seems, by some Opinions, she may do it without any such Custom, for that the Wife serves as an Apprentice; but for this *vide* Cro. Car. 347, 316-7. 2 Eulf. 187. 8 Co. 130. Palm. 541. 11 Co. 54. Ney 5. Hutt. 131. Hob. 211. 1 Sand. 311. Carth. 163.

If a Coachmaker keeps Servants to make his Wheels, and Workmen to curry his own Leather, this is against the Statute, because it is he only who receives all the Profits of the several Trades, and the Wheelwright and the Currier are but his Servants.

Carth. 163 4.  
per Holt.

So in a Case upon this Statute, prosecuted by the Horners Company, against a Comb-maker in *London*, for using the Trade of a Horner, *viz.* in pressing Horn for making Combs, which Pressing did not belong to their Trade; and this was adjudged a Breach of the Statute, for a Horner is a particular Trade, and a very ancient Company in *London*.

Carth. 162.  
cited per Holt  
Ch. Just.

### 3. What kind of Service will be a sufficient Qualification within the Statute.

*1 Salk. 67.* As to this it hath been resolved, that there is no Occasion for an actual Binding, but that the Following a Trade for seven Years is a sufficient Qualification within the Statute.  
*2 Salk. 613.*  
*S. P. being a hard Law.*

*Carth. 163.* So where an Action was brought on this Statute, and upon Not guilty pleaded, it appeared that the Defendant's Father kept the same Trade, and that he the Defendant for several Years had been employed by his Father therein; and it was held, that he might lawfully use that Trade, for that he had been (a) *quasi* an Apprentice to it, which was sufficient to satisfy the Statute.  
*per Cur.*

(a) And for the like Reason it seems, that a Wife living with her Husband seven Years, may after his Death continue the Trade; for the Act does not require a Man or a Woman to be an actual Apprentice, but the Words are *tanquam* an Apprentice. *Vide the Authorities supra, and Cases in Law and Eq. 70.*

*Ca. Law and Eq. 71.* So if a Man lives with another, that uses a Trade which the other is not qualified for using, seven Years, he may set up the Trade as well as if he had lived with one never so well qualified.

*1 Salk. 67.* Also it hath been held, that the Service need not be in any particular Country; and therefore an Indictment for using the Trade of a Taylor, not having served an Apprenticeship seven Years, was quashed, because only said, not having served as an Apprentice *infra Regnum Angliæ aut Walliam*; for it may be he did so beyond Sea; and if it were any where it suffices.  
*The King ver. Fox.*

*Ca. Law and Eq. 70.* So it hath been held, that Serving five Years to a Trade out of *England*, and two in *England*, is sufficient to satisfy the Statute, but that there must be a Service of a full Time either in *England* or out of *England*; and therefore Serving five Years in a Country, where by the Law of the Country more is not required, will not qualify a Man to use the Trade in *England*.

### 4. By whom the Offence of following a Trade without a Qualification is cognizable.

This Matter depends chiefly on the Statute 31 *Eliz. cap. 5. sect. 7.* whereby it is enacted, ' That all Suits for using a Trade without having been brought up in it, shall be sued and prosecuted in the General Quarter-Sessions of the Peace, or Assises of the same County where the Offence shall be committed, or otherwise inquired of, heard and determined in the Assises, or General Quarter-Sessions of the Peace of the same County where such Offence shall be committed, or in the Leet within which it shall happen, and not in any wise out of the same County where such Offence shall happen or be committed.

*Cro. Jac. 178.* In the Construction hereof it hath been holden, that it restrains not a Suit in the King's Bench or Exchequer, for such Offence happening in the same County where these Courts are sitting; for the Negative Words of the Statute are not, that such Suits shall not be brought in any other Court, but that they shall not be brought in any other County; and the Prerogative of these High Courts shall not be restrained without express Words.  
*Hob. 184.*  
*1 Salk. 373.*

*Hob. 184, 327.* But where the Offence is in a different County, such Suits in these, or any other Courts, out of the proper County, seem to be within the express Words of the Statute.  
*Cro. Jac. 85.*

Yet it hath been doubted, whether an Action of Debt, or Information in the Courts of *Westminster-Hall*, were not to be construed to be out of the Meaning of the Statute; but it seems to be now settled, in the Construction of the Statute 21 *Jac.* 1. *cap.* —. which provides, that no Action of Debt or Information, or other Suit whatever, can be brought in any Court of *Westminster-Hall* on any penal Statute, made before the said Statute of 21 *Jac.* 1. for any Offence therein excepted, for which the Offender may be prosecuted in the Country; unless such Offence shall be committed in the same County in which such Court shall sit.

But these Statutes hinder not the Removal of any Indictment into the *King's Bench* by *Certiorari*, after which it may be tried there, or in the County by *Nisi prius*.

It hath been held, that Quarter-Sessions of Boroughs may receive Indictments on the 5 *Eliz.* as well as those of the County at large, in that there is no Danger of Oppression, because a *Certiorari* lies.

## 5. Of the form of the Proceedings in order to a Conviction, for following a Trade without being qualified.

The Plaintiff, in an Action on this Statute 5 *Eliz.* must alledge in his Declaration, that the Defendant did not use the Trade at the Time of making the Statute; for tho' it cannot be presumed that he did, after such a Length of Time, yet as it is, the Statute makes him liable, and subjects him to a Penalty; the Prosecutor must shew that he has transgressed the Law, and that he is intitled to his Action.

An Indictment for following the Trade of a Cutler, not being an Apprentice, *cont' form* 5 *Eliz.* was quashed on Demurrer; because the Trade of a Cutler was averred to be a Trade then used *infra hoc Regnum Angliæ*, whereas this Kingdom was not then subsisting.

It has been held, that an Indictment against two, or more, for following a Joint-Trade, without having served a seven Years Apprenticeship, required by the Statute, is naught, in that it would be absurd to charge them jointly, because the Offence of each Defendant arises from the Defect peculiar to himself.

## (E) Of assigning and turning over Apprentices to other Masters.

THE Placing out an Apprentice to a particular Person arises from an Esteem, and a good Opinion of the Party to whom he is so committed; that he will not only instruct him in his Trade or Calling, but will also be careful of his Health and Safety; and therefore the Law has made it such a personal Trust or Confidence, which the Master cannot assign, or transfer over to another; he must also have him under his own Care and Inspection, and cannot send him abroad, tho' under the Pretence of Improvement; unless by express Agreement, and unless the Nature of his Business requires it, and implies such a Power as that of a Merchant-Adventurer, Sailor, &c. are said to do; therefore it hath been adjudged, that a Surgeon sending his Apprentice a Voyage to the *East-Indies*, tho' in Company with other Surgeons, and the better to instruct him in the Art of Surgery, was a Breach of his Covenant, where-

1 *Sid.* 303.  
1 *Keb.* 584.  
2 *Lev.* 204.  
1 *Vent.* 8, 364.  
2 *Lev.* 204.  
1 *Salk.* 372.  
5 *Mod.* 425.

1 *Jon.* 193.

6 *Mod.* 220.  
1 *Salk.* 327.

1 *Sid.* 302.  
*Dring ver.*  
*Respass.*

*The King ver.*  
*Briton, Pasch.*  
5 *Geo.* 2.

1 *Rel. Abr.* S.  
5 *Mod.* 180.  
1 *Salk.* 382.

*Hob.* 134.  
*Coventry ver.*  
*Woodball.*

by

by he bound himself to retain, teach, keep and employ the said Apprentice in his own House and Service, &c.

*March 3.*  
*1 Keb. 250.*

But by the Custom of *London*, a Freeman of *London* may turn over his Apprentice to another Master, being a Freeman; and such second Master shall have the same Benefit of the Apprentice's Covenants, as shall the Apprentice of the Covenants on the Side of the Master, as if he had been originally bound to him.

*Comb. 324.*  
*The King ver.*  
*Chaplin.*

But it hath been held, that tho' Justices of Peace have a Jurisdiction of discharging Apprentices, and may bind them to other Masters; that they cannot turn them over; and therefore an Order that an Apprentice, whose Master was dead, should serve the Remainder of his Time with his Master's Widow's second Husband, was quashed; because the Justices have nothing to do about turning over an Apprentice; and that tho' he applied to them, that could not give them a Jurisdiction.

### (F) Of making Apprentices free.

*1 Sid. 107.*  
*2 Show. 154.*

Wherever by the Custom of any Town, Borough, &c. the Serving an Apprenticeship intitles the Party to his Freedom, the Persons to admit him refusing, without sufficient Cause, may be compelled thereto by *Mandamus*.

*1 Lev. 91.*  
*1 Sid. 107.*  
*1 Keb. 458,*  
*470, 659.*  
*Townsend's*  
*Case*

Therefore, where to a *Mandamus* to the Mayor, &c. of *Oxford*, to admit a Person to be free of that City, who had served seven Years Apprenticeship; to which it was returned, that he put himself Apprentice seven Years according to the Custom, and that he covenanted to serve seven Years, and not to marry within the Time, and that within the first two Years he married, and so broke his Covenant; and that his Master accepted of him to serve for the Residue of the Time, which he did, but not as an Apprentice, but rather as a Journeyman; and tho' it was urged, that by his Breach of Covenant he lost his Right of Freedom, yet the Court held the contrary; and that tho' an Action of Covenant might lie, yet that it was no Loss of his Freedom; and therefore awarded a peremptory *Mandamus* to admit him.

*5 Mod. 402.*  
*The King ver.*  
*Mayor of Lin-*  
*coln.*

So where a *Mandamus* to the Mayor, &c. of *Lincoln*, to admit *A.* to his Freedom, he having served an Apprenticeship there; and the Mayor returned, that *A.* (being a Quaker) refused to take the usual Oath, according to the Custom of the said City, but offered to take the solemn Affirmation and Declaration; and the Court held this sufficient to intitle him to his Freedom, within the Statute 7 & 8 W. 3. cap. 34.

*6 Mod. 227,*  
*260.*

Also it is frequent for Masters to bind themselves to make their Apprentices free at the End of their Time, which they must perform according to their Covenants.

### (G) How Apprentices are to be taken Care of, When their Masters happen to die.

*1 Sid. 216.*  
*1 Keb. 761,*  
*820.*  
*1 Lev. 177.*

IT seems agreed, that if a Man be bound to instruct an Apprentice in a Trade for seven Years, and the Master dies, that the Condition is dispensed with, being a Thing personal; but if he be bound further, that in the mean Time he will find him in Meat, Drink, Cloathing and other

other Necessaries, here the Death of the Master doth not dispense with the Condition, but his Executors shall be bound to perform it, as far as they have Assets.

But if a Person is bound Prentice by Justices of Peace, and the Master happens to die before the Term expired, the Justices have no Power to oblige his Executor, by their Order, to receive such Apprentice, and maintain him; for by this Method the Executor is deprived of the Liberty of pleading *Plene administravit*, which he may do, in case Covenant be brought against him, and must maintain the Apprentice, whether he hath Assets or not.

But it is said, that in this Case of the Master's dying, by the Custom of London, the Executor must put the Apprentice to another Master of the same Trade.

*Cart. 231.  
1 Salk. 66  
1 Show. 403  
The King ver  
Peck.*

*1 Salk. 66  
Per Holt C.*

## (H) Of Servants Wages, how recoverable.

IT is clearly agreed, that if a Person retains a Servant, and agrees to pay him so much by the Day, Month or Year, that he may have an Action against the Master on the Contract, or against his Executors; and that every such Retainer will be presumed to be in Consideration of Wages, unless the contrary appears.

So if a Man be retained in London, to serve beyond Sea, he may have his Action for his Wages in England; and lay his Action in any County, in like Manner as an Obligation, bearing Date at *Rouen* in France, may be sued in England, alledging the Place to be in such a County where he brings his Action.

As to the Jurisdiction of Justices of Peace herein, by the 5 Eliz. *Bridgm 119.* cap. 4. sect. 15. for the Declaration and Limitation what Wages Servants, Labourers and Artificers, either by the Year or Day, or otherwise, shall have and receive, it is enacted, that the Justices of Peace of every Shire, Riding and Liberty, within the Limits of their several Commissions, or the more Part of them, being then resident within the same, and the Sheriff of that County, if he conveniently may, and every Mayor, Bailiff, or other head Officer within any City or Town Corporate, wherein is any Justice of Peace, within the Limits of the said City or Town Corporate, and of the said Corporation, shall yearly at every General Sessions first to be holden and kept after *Easter*, or at some Time convenient within six Weeks next following every of the said Feasts of *Easter*, assemble themselves together; and they so assembled, calling unto them such discreet and grave Persons of the said County, or the said City or Town Corporate, as they shall think meet, and conferring together, respecting Plenty or Scarcity of the Time, and other Circumstances necessary to be considered, shall have Authority by Virtue thereof, within the Limits and Precincts of their several Commissions, to limit, rate and appoint the Wages, as well of such and so many of the said Artificers, Handcraftsmen, Husbandmen, or any other Labourer, Servant or Workman, whose Wages in Time past hath been by any Law or Statute rated and appointed, as also the Wages of all other Labourers, Artificers, Workmen, or Apprentices of Husbandry, which have not been rated, as they the same Justices, Mayor, or other head Officers, within their several Commissions or Liberties, shall think meet by their Discretions to be rated, limited or appointed by the Year, Week, Month or otherwise, with Meat and Drink, or without Meat and Drink; and what Wages every Workman or Labourer shall take by the Great for mowing, reaping

‘ or threshing of Corn and Grain, or for mowing or making of Hay,  
 ‘ or for Ditching, Paving, Railing or Hedging by the Rod, Perch,  
 ‘ Lugg, Yard, Pole, Rope or Foot, and for any other Kind of reason-  
 ‘ able Labour or Service, &c.

In the Construction of this Statute, the following Opinions have been holden.

2 Salk. 441.  
 6 Mod. 204.

That tho’ the Statute only gives the Justices Power to set the Rate for Wages, and not to order Payment; yet grafting hereupon they may now, from the frequent Practice, and the Indulgence the Law gives to Remedies for Wages, order Payment, as well as assess the Rates.

Hill. 8 Geo. 2.  
 Shergold and  
 Holloway in  
 B. R.

That tho’ a single Justice may compel Payment, yet the Power of settling Wages is only in the Sessions; and that a single Justice cannot arrest the Party refusing to pay in the first Instance.

Ca. Law and  
 Eq. 68.  
 6 Mod. 91.

That Justices of Peace have no Jurisdiction to judge of Wages, except in case of Husbandmen; but yet the Court in Favour of Servants will always, unless the contrary appears upon the Face of the Order, presume Servants to be Servants in Husbandry, and will admit of no collateral Proof to the contrary.

2 Jon. 47.

Therefore an Order, that a Person should pay so much to his Coachman, was quashed; for here it appears, upon the Face of the Order, that he is not a Servant in Husbandry.

2 Mod. 204,  
 205.

And on the Authority of this Case it hath been held, that the Justices cannot make Orders for the Payment of Footmen, Bricklayers, Carpenters, &c. Servants Wages; because their Jurisdiction is confined to the Wages of such Servants, whom they may compel to serve according to the Statute.

2 Salk. 442.  
 6 Mod. 204.  
 The Queen  
 vcr. London.

So where, upon the Face of the Order, it appeared to be for the Payment of the Wages of two Persons retained by A. Overseer of the Works in the Gardens of Hampton-Court, the Order was quashed; but in this Case it was held, that had the Order been general, viz. to pay so much to two of his Labourers, or two of his Servants, the Court would have supposed them Servants in Husbandry; but that here there was no Room for such an Intendment, since the contrary appeared.

5 Mod. 140.

So where one Rycraft, a Justice of Peace in Middlesex, made an Order for the Payment of a Seaman’s Wages; and upon an Action brought against him, the Plaintiff recovered 30*l.* Damages.

## (I) What Acts of the Servant are deemed the Master’s, of which the Master may take Advantage.

1st. Sect. 433.  
 Co. Lit. 257.b.

THERE are several Acts, which being done by a Servant, will be equally effectual and Advantageous as if done by the Master himself. Hence it is held, that continual Claim made by a Servant is good; as if he enter into a Part and claim, &c. or if the Master says, that he dares not go to any Part of the Land, nor approach nearer than D. and commands his Servant to go to D. and claim, and the Servant does so, this is sufficient, tho’ the Servant had no Fear; for he doth as much as he was commanded to do, and all that his Master durst, or ought by the Law, to do.



But if the Master be in Health, and command his Servant to go to the Land and claim, &c. in this Case a Claim made by the Servant, as near as he dares, is void; for he does not do all that he is commanded, nor so much as the Master durst have done. *Lat. 435. Co. Lit. 278 b*

But if the Master be sick, or a Recluse, (one who, by Reason of his Order, cannot go out of his House,) and he command his Servant to go and claim for him, and the Servant goes as near as he dares, by Reason of Fear, &c. this is sufficient, tho' the Command were to go to the Land; and yet, regularly, when a Servant doth less than he is commanded, his Act is void; but when a Servant exceeds his Master's Command, it is void only so far as he hath exceeded. *Co. Lit. 278. a*

If a Feoffment with Livery be made of Lands, the Servant of the Owner being in Possession, the Livery is void, tho' made with the Consent of the Servant; for the Servant continuing in Possession, it must be only for the Use and Benefit of him that placed him there, and consequently the Possession of the Servant must be looked upon as the Possession of the Master; and the Servant having no Interest, but in Right of his Master, his Consent was void, and he could neither make a Surrender, nor a Tenancy at Will, to the Feoffor. *2 Rol. Abr. 9.*

The Master hath an Interest in the Labour and Acquisitions of his Servant, and his Acts herein are said to be for the Benefit of the Master; according to the Rule, *Quicquid acquiritur servo acquiritur Domino*; but the Master of a hired Servant cannot maintain Trover for any Property acquired by the Servant; nor can he have any other Remedy against a Person who employs him, but an Action on the Case *per quod servitium amittit*. *Co. Lit. 117. a.*

But it is otherwise of an Apprentice; and therefore where a Waterman's Widow took an Apprentice, who went to Sea, and earned two Tickets, which came to the Defendant's Hands, the Widow brought Trover, and had Judgment; for what the Apprentice gains, he gains to his Master; and whether legally Apprentice, or not, is no Ways material, for it is enough if he be so *de facto*. *1 Salk. 68. Barber and Dennis.*

It is said, that the Master shall have Advantage of his Servant's Contracts, in the same Manner as he shall be bound by them, as to those Matters which come within his Compass as a Servant; as where a Servant was sent by a Master to a Debtor, and appointed by him *ad Componendum et greandum* the Money due from the Debtor; and there being a Promise made to the Servant, to pay what was due upon the Balance and Agreement, it was held, that the Master might maintain an Action in his own Name, on the Promise to his Servant. *Godb. 360. 1. Seignior and Walmer.*

If the Servant is robbed of the Master's Goods, the Master or Servant may have an Appeal. *Stamf. 60. Erc. Tit. Appeal, 92.*

*Latch 127.* S. P. and he that begins first shall recover, and prevent the other of his Action. *Per Doderidge.*

If a Servant is couzened of his Master's Money, the Master may have an Action on the Case against the Couzenor. *1 Rol. Abr. 98. Cro. Jac. 225.*

If a Servant be robbed of his Master's Money, tho' in the Absence of his Master, the Master may maintain an Action for it against the Hungred. *But for this vide Tit. Hunc and Cry.*

(K) What Acts of the Servant shall be deemed the Master's, for which the Master shall answer and be bound.

THE Reason why the Acts of a Servant are, in many Instances, deemed the Acts of the Master, arises from the Relation between a Master and Servant; for as in Strictness every Body ought to transact his own Affairs; and it is by the Favour and Indulgence of the Law, that he can delegate the Power of acting for him to another, it is highly reasonable that he should answer for such Substitute, at least *civiliter*; and that his Acts being pursuant to the Authority given him, should be deemed Acts of the Master.

11 E. 4. 6.

Therefore if a Servant sells a Piece of Cloth, and warrants it to be good, an Action of Disceit lies against the Master.

5 Co. *Pilking-*  
*ton's Case.*

2 Rol. Abr.

693.

*Cro. Eliz.* 181.

So if a Man brings a Horse to a Smith to be shod, and the Servant pricks it; or if the Servant of a Surgeon makes the Wound worse; in both these Cases an Action lies against the Master.

9 H. 6. 53.

1 Rol. Abr. 95.

(a) If a Ser-

vant sells an

unsound Horse,

or other Merchandize,

in a Fair, no Action

lies against the Master,

unless he com-

manded him to sell to a particular Person.

9 H. 6. 53.

1 Rol. Abr. 95.

S. C. *Fitz. Action sur le Cafe*, 5.

S. C. *Popb.* 143.

and 2 Rol. Rep. 6.

S. C. cited.

— But if by the Command and Covin of the Master,

he sells to a particular Person, an Action lies against the Master, for it is then his own Sale.

9 H. 6.

53. 1 Rol. Abr. 95.

*Eridg n.* 128.

S. C. cited.

*Cro. Jac.* 471.

2 Rol. Rep. 28.

So if a Goldsmith makes Plate, wherein he mingles Dross, so that it is not according to the Standard, and by his Servant sells it; an Action lies against the Master, because it fails in the Price in Silver.

2 Rol. Rep. 5,

26, 27.

*Bridg.* 125.

*Popb.* 143.

*Cro. Jac.* 469.

*Southern ver.*

*Haw.*

(b) Accord-

ing to the

Report of

this Case in

*Cro. Jac.* it is

said, that the

Court inclin-

ed against

the Plaintiff,

principally

because *A.*

did not or-

der *B.* to

conceal their

being Coun-

terfeit.

But if *A.* being possessed of certain artificial and counterfeit Jewels of the Value of 168*l.* and knowing them to be such, delivers them to *B.* his Servant, commanding him to transport the said Jewels to *Barbary*, and them to sell to the King of *Barbary*, or such other Person as would buy them; but (*b*) gives *B.* no Charge to conceal their being counterfeit; and thereupon *B.* goes into *Barbary*, and, knowing those Jewels to be counterfeit, shews them to *C.* for good and true Jewels, and affirming to *C.* that they were worth 810*l.* desires *C.* to sell them to the said King for 810*l.* which Money *C.* pays *B.* and *B.* thereupon immediately returns to *England*, and pays the 810*l.* to *A.* his Master; and after, the Jewels being discovered to be counterfeit, *C.* is imprisoned by the said King, 'till he repays the 810*l.* out of his own Effects; of all which Matters *C.* gives Notice to *A.* and demands Satisfaction, &c. yet no Act on lies against *A.* for Jewels are in themselves of an uncertain Value, and *B.* was not by *A.* particularly directed to *C.* and all that was done *quoad C.* was the voluntary Act of the Servant, for which the Master is not bound to answer.

*Tyer* 161. a.

*Pl.* 48.

3 *Mud.* 323.

S. C. cited.

King *E. 6.* sold a Quantity of Lead to *A.* and appointed the Lord *North*, who was then Chancellor of his Court of Augmentations, to take Bond for Payment of the Money; the Lord *North* appointed one *B.* who was his Clerk, to take the Bond, which was done, who delivered it to the Lord; and he delivered it back again to his Clerk, in order to send it to the Clerk of the Court of Augmentations; *B.* suppressed this Bond; and it was held by all the Judges, that the Lord *North* was chargeable

chargeable to the King; because the Possession of the Bond by his Servant, and by his Order, was his own Possession.

So where an Officer of the Customs made a Deputy, who concealed the Duties, and the Master, being ignorant of the Concealment, certified the Customs of that Part of the Revenue into the Exchequer, upon Oath; he was adjudged to be answerable for this Concealment of his Servant.

So where the Lessor was bound, that the Lessee should quietly enjoy; and it was found, that his Servant by his Command, and he being present, entered; this was held to be a Breach of the Condition, for the Maller was the principal Trespasser.

Two are constituted Post-Masters General by Letters Patent, pursuant to the Statute 12 Car. 2. cap. 35. and in the Patent there is a Power to make Deputies, and appoint Servants at their Will and Pleasure, and to take Security of them in the Name and Use of the King; and that they, the Post-Masters General, should obey such Orders as from Time to Time should come from the King; and as to the Revenue, should obey the Orders of the Treasury; and it is farther granted to them, that they should not be chargeable for their Officers, but only for their own voluntary Faults and Misbehaviours; and this granted with a Fee of 1500*l.* per Annum: And *A.* having Exchequer-Bills, incloses them in a Letter, directed to *B.* at Worcester, and delivers it at the Post-Office at London, into the Hands of *J. S.* who was appointed by the Post-Master General to receive Letters, and had a Salary; the Letter having miscarried, and the Exchequer-Bills lost, it was held by three Judges, against *Holt C. J.* that the Post-Masters General are not liable; and this from the Multiplicity of Servants they are obliged to imploy, and against whom it is impossible for them to secure themselves, the Inconsiderableness of the Premium, &c.

It hath been held, that Owners of Ships were answerable to Freighters for the Acts of Masters and Mariners, in the same Manner as other Masters are for their Servants; and should answer for their Embezzlements, Secreting of Goods, &c. But this proving a great Discouragement to Trade, by the 7 Geo. 2. cap. 15. it is provided, that for such Embezzlements, &c. without the Owners Knowledge, the Owners shall only forfeit the Value of the Ship or Vessel, with all her Appurtenances, and the full Account of the Freight due, or to grow due, for and during the Voyage wherein such Embezzlement, &c.

The Acts of a Servant are deemed the Acts of the Master, in Dealing and contracting for his Master, in those Things in which he has a general Authority; as (a) if a Servant usually buys for the Master on Tick, and the Servant buys some Things without the Master's Orders, yet if the Master were trusted by the Trader, the Master is chargeable, tho' the Things never came to the Master's (b) Use.

(b) That coming to the Master's Use, clearly implies an Authority from the Master, and shall charge him. 1 Brownl. 64.

But if a Man sends his Servant with ready Money to buy Meat, or other Goods, and the Servant buys upon Credit, the Master is not chargeable.

So if the Master had forbid the Tradesman to trust his Servant, this shall excuse the Master, on Evidence.

And herein it is said, that a Servant by transacting Affairs for his Master, does thereby derive a general Authority and Credit from him; which general Authority is not liable to be (c) determined for a Time, Monk and Clayton, where the Act of a Servant, tho' out of Place, bound his Master, by Reason of the former Credit given him by his Master's Service, the other not knowing that he was discharged.

Dyer 258. 6.  
11. 58.  
3 Mod. 325.  
S. C. cited.

4 Leon. 125.  
Seaman and  
Brearing.  
3 Mod. 325.  
S. C. cited.

Carth. 487.  
1 Salk. 17.  
5 Mod. 455.  
Lane ver.  
Robert Cotton  
and Sir Tho-  
mas Frank-  
land.

1 Vent. 190.  
253.  
Raym. 220.  
3 Keb. 72.  
112. 155.  
1 Mod. 85.  
2 Lev. 69.  
Morse ver.  
Stue.  
2 Salk. 440.  
Carth. 58.  
3 Lev. 259 Eofm ver. Sandford.

Doll & Stud.  
Dial. 2. cap 42.  
2 Vern. 643.  
Comb. 450-1.  
(a) 1 Show 95.  
10 ruled up-  
on Evidence,  
by Holt C. J.

1 Show. 95.  
Per Holt C. J.

1 Brownl. 64.

Ca. L. and  
Eq. 110.  
(c) A Case ci-  
ted between

by any particular Orders or Instructions, to which none but the Master and Servant are privy; for that if this should prevail, there would be an End of all Dealing, but with the Master.

2 Salk. 442. If a Master sends his Servant to receive Money, and the Servant instead of Money takes a Bill, and the Master, as soon as told thereof, disallows, he is not bound by this Payment; but Acquiescence, or any small Matter will be (a) Proof of the Master's Consent; and that will make the Act of the Servant the Act of the Master.  
 6 Mod. 36. Ward and Evans, & vide  
 1 L. and Eq. 109, 110. (a) If a Merchant's Apprentice draws a Bill in this Manner, *I promise to pay such a Sum for my Master*; to charge the Master with this Note, it is said, there ought to be either an Authority precedent, or a Consent subsequent; or that the Master had intrusted him with his Affairs, otherwise the Master shall not be chargeable. Comb. 450.

1 Salk. 282. If A. brings Case against the Master of a Stage-Coach, on the Custom of the Realm, for a Trunk lost by his Negligence; and on Evidence it appears, that the Trunk was delivered to the Servant who drove the Coach, who promised to take Care of it, and that the Trunk was lost out of his Possession; the Action does not lie against the Master; for a Stage-Coachman is not within the Custom as a (b) Carrier is, unless he take a distinct Price for the Carriage of Goods, as well as Persons; and tho' Money be given to the Driver, yet that is a Gratuity, and cannot bring the Master within the Custom; for no Master is chargeable with the Acts of his Servant, but when he Acts in Execution of the Authority given by his Master; and then the Act of the Servant is the Act of the Master.  
 ruled by Holt at Nisi Prius, and the Plaintiff nonsuited accordingly. (b) That if a Carrier's Porter receives Goods, the Carrier shall be liable. Comb. 118. Per Dolben Justice.

2 Salk. 441. The Master must also answer for Torts and Injuries done by his Servant, in Execution of his Authority; as where a Pawn-Broker's Servant took a Pawn, the Pawner came and tendered the Money to the Servant, who said, he had lost the Goods; upon which the Pawner brought Trover against the Master, and it was held well.  
 per Holt C. J. at Nisi Prius at Guild-hall.

2 Salk. 441. So where the Servants of A. with his Cart run against another Cart, wherein was a Pipe of Sack, and over-turned the Cart, and spoiled the Sack; it was held, that an Action lay against A.  
 cited.

2 Salk. 441. So where a Carter's Servant run his Cart over a Boy; it was held, the Boy should have his Action against the Master, for the Damage he sustained by this Negligence.  
 cited.

1 Vent. 295. So where the Servant of A. brought a Coach and two ungovernable Horses of his Master's to *Lincoln's Inn Fields*, a Place much frequented by People, and there drove them to make them tractable, and fit them for a Coach; and the Horses being unruly, and for Want of Care, &c. run upon the Plaintiff, and hurt and wounded him; in an Action brought both against the Master and Servant, it was held, that it well lay; and that it shall be intended the Master sent the Servant to train the Horses there.  
 2 Lev. 172.  
 3 Keb. 65.  
 Michael and Alefree.

### (L) For what Acts of his shall the Servant himself answer to others.

Skin. 228. IF a Master command his Servant to do what is lawful, and he misbehave himself, or do more, the Master shall not answer for his Servant, but the Servant for himself, for that it was his own Act; otherwise it would be in the Power of every Servant to subject his Master to what Actions or Penalties he pleased.

And on this Foundation it hath been ruled, that if a Man command his Servant to do a lawful Act, as to pull down a little Wooden House, (wherein the Plaintiff was, and would not come out, and which was carried upon Wheels into the Land, to trick the Defendant out of Possession,) and bid him take Care that he hurt not the Plaintiff; if in doing this, the Servant hurt the Plaintiff, in Trespas of Assault and Wounding brought against the Master, he may plead Not guilty, and give this in Evidence; for that he was not guilty of the Wounding, and the Pulling down the House was a lawful Act.

But it is laid down as a Rule, that in every Case where the Master has not Power to do a Thing, whoever does it by his Commandment is a Trespasser as well as the Master.

If a Master locks a Man into his House, and delivers the Key to his Servant, if the Servant be ignorant that any Body be there, the Servant is not chargeable; but if he knows that the Master had imprisoned one tortiously, and he still keep him in Prison, he is liable to an Action.

If the Servant of a Taverner sells Wine that is corrupted, (a) knowing it to be so, no Action of Deceit lies against the Servant, for he did it but as a Servant.

Debt knows of, and was Witness to a Release of the Debt, made before the Action brought for it, yet no Action lies against the Attorney, for he acted only as a Servant, and in the Way of his Calling. 1 Mod 209. Per Cur'.

If the Servant of A. lease Lands to another for Years, reserving a Rent to A. and to persuade the Lessee to accept thereof, he promises, that he shall enjoy the Land, during the Term, without Incumbrances; if the Land be incumbered, &c. the Lessee may have an Action, on the Case against the Servant, because he made an express (b) Warranty.

Servant to sell an ill Horse, and the Servant sells him for a good one, whereby the Servant is arrested and indamaged; yet the Servant shall not have his Remedy against his Master.

If a Man draws a Bill, to which he puts his Seal in this Form: Memorandum, That I have received of J. S. to the Use of my Master, the Sum of 40 l. to be paid at Michaelmas following; the Servant is liable hereby, for tho' in the Premises it is said to be to the Use of his Master, yet the Payment being indefinite, must be understood to be by him who sealed the Bill; but it is said, that if it had been to be repaid by his Master, that (c) the Servant had not been liable.

speaks for, or fetches Goods for his Master, without any particular Promise of paying for them; and where, upon the Circumstances of such a Case, though he is liable at Law, a Court of Equity will relieve, vide Preced. Chan. 46. Abr. Eq. 308.

So where Mr. Mildmay, Agent to the York Buildings Company, residing in Scotland, drew a Bill of Exchange in Favour of J. S. on their Cashier in London; which Bill run thus: To — Bishop, Cashier to the Honourable Governor and Assistants of the York Buildings Company, at their House in Winchester-street. Sir, Pray pay to J. S. or his Order, 200 l. and place it to the Account of the Company, for Value received, as per Advice, by your humble Servant, Charles Mildmay. The Letter of Advice referred to, was directed to the Governor and Company, informing them of the Draught made upon Mr. Bishop, in Favour of J. S. (but it did not appear that this was the usual Method of drawing Bills on the Company;) Mr. Bishop accepted the Bill generally, viz. accepted by J. Bishop; and if this Acceptance should charge him in his own Right, was the Question; which was saved for the Judgment of the Court, after a Verdict at Nisi Prius for the Plaintiff; and it was resolved it should.

(M) For What Acts of his shall the Servant answer and be responsible to his Master: And herein,

1. Where by an implied Trust or Confidence a Servant shall answer in a Civil Action.

8 Co. 84, &  
vide Tit.  
Bailment.

**I**F a Man commits Money to his Servant to carry to such a Place, and he is robbed, the Servant shall not answer for it; for a Servant only undertakes for his Diligence and Fidelity, and not for the Strength and Security of his Defence, and therefore shall not be obliged to preserve his Master's Property at all Adventures; and herein the Law, as now settled, makes a Difference between a Servant and another independent Person; for every other Person has naturally no more than the single Care of his own Affairs, and is not bound in Point of Duty to defend or intermeddle with the Property of another; but where he will officiously create to himself such an Undertaking, he is obliged to answer the Loss, if any happen; but a Servant is, by the Duty of his Place, under the Command of his Master, and is bound, in Point of Necessity, to take Care of another's Affairs; now the first Contract, whereby he becomes a Servant, implied no more than an Undertaking for his Care and Obedience; and whenever he afterwards intermeddles in the Affairs of his Master, it is but in Consequence of that original Contract, and therefore cannot be extended any farther; and since when he first contracted, it was no more than an Undertaking for his own Care and Fidelity, whenever he intermeddles with his Master's Affairs, it is under that general Undertaking, and by Consequence he cannot be charged but for Deficiency, in Point of Care, or of Faithfulness; and therefore is not answerable for any inevitable Accident.

1 Sid. 298.  
1 Lev. 188.  
2 Keb. 88.  
Hussy and  
Pa.ey.

But if *A.* is imploy'd by *B.* to sail from *England* to the *Indies*, and *A.* covenants, that he or his Servants will not thence import any Callicoos, &c. and *A.* retains *C.* as his Servant in this Voyage, and acquaints him with the Covenants, and notwithstanding *C.* falsly and fraudulently brings thence certain Callicoos, &c. *A.* shall have an Action against *C.* for tho' no Action lies by a Master for the bare Breach of his Command, yet if a Servant does any Thing falsly and fraudulently, to the Damage of his Master, an Action will lie.

1 Rol. Abr.  
105.  
Cro. Jac. 265.  
Lane 65. S.C.  
Leveson ver.  
Kirk.

So if a Merchant's Servant takes his Master's Goods that are arrived at a Port in *England*, and, before Payment of the Customs, lands them, *per quod* the Goods are forfeited and seised by the King; the Master may have an Action of Trespass or Case against his Servant.

7 H. 4. 14.  
Bro Tit. Acti-  
on fur Case, 34.

So if a Servant, that drives his Master's Cart, by his Negligence suffers the Cattle to perish, an Action upon the Case lies against him.

21 H. 4. 14.  
Moor 248.

If a Man deliver a Horse to his Servant to go to Market, or a Bag of Money to carry to *London*, which he neglects to do, the Master may have an Action of Account or Detinue against him.

Ca L. and  
Eq. 109.  
Nelson ver.  
Brehan.

A Master sends his Servant, that used to transact Affairs of that Nature for him, on *Saturday* Morning with a Note drawn upon Sir *Stephen Evans*, with Orders to get from Sir *Stephen* either Bank-Bills or Money, and turn them into Exchequer-Notes; but the Servant having other Business of his Master's upon his Hands, to save himself the Time and Trouble of going to Sir *Stephen*, goes to *B.* and prevails with him to give him a Bank-Bill for Sir *Stephen's* Note, and then in Pursuance of his Ma-

ster's

ster's Orders invested it in Exchequer-Notes, which he brought to his Master, not letting him know but that he had gone to Sir Stephen; Sir Stephen Evans failing on the Monday following; it was adjudged, that this Loss should fall on the Master, and not on B. and the Court was of Opinion, that the Master could not recover it of the Servant, the Loss being occasioned by a meer Accident, and not either Folly or Negligence.

## 2. Where Servants or Apprentices shall be punished criminally for Acts done in relation to their Masters.

At Common Law, a Servant or Apprentice, without any Regard to Age, may be guilty of Felony in feloniously taking away the Goods of their Master, tho' they were Goods under their Charge, as a Shepherd, Butler, &c. and may this Day for any such Offence be indicted, as for a Felony at Common Law; but at Common Law, if a Man had delivered Goods to his Servant to keep, or carry for him, and he carried them away *animo furandi*; this was considered only a Breach of Trust, but not Felony.

But now by the Statute of 21 H. 8. cap. 7. it is enacted, that all and singular Servants, to whom any Caskets, Jewels, Money, Goods or Chattels by his or their Masters or Mistresses shall from henceforth be delivered to keep, that if any such Servant or Servants withdraw themselves from their Masters or Mistresses, and go away with the Caskets, Jewels, Money, Goods or Chattels, or any Part thereof, to the Intent to steal the same, and defraud his or their Masters or Mistresses thereof, contrary to the Trust and Confidence to him or them put by his or their Masters or Mistresses, or else being in the Service of his or their Masters or Mistresses, without any Assent or Commandment of his Master or Mistress, imbezil the same Caskets, Jewels, Money, Goods or Chattels or any Part thereof, or otherwise convert the same to his own Use, with like Purpose to steal it; that if the said Casket, Jewel, Money, Goods or Chattels, that any such Servant shall go away with, or which he shall imbezil, with Purpose to steal as aforesaid, be of the Value of 40 s. or above, that then the same false, fraudulent, or untrue Act and Demeanor shall from henceforth be deemed and adjudged Felony, &c. Provided it extend not to Apprentices, nor to any Person under the Age of eighteen Years; but every such Apprentice, or Person within that Age doing that Act, shall be, and stand in the like Case, as they were before the making of this Act.

By the Act of 27 H. 8. cap. 17. Clergy was taken away in this Case, if the Indictment were laid specially upon the Act of 21 H. 8. and pursuant to the same, and by the Act 28 H. 8. cap. 2. this Act of 21 H. 8. was made perpetual; but by the Act of 1 E. 6. cap. 12. these Acts were both repealed; but again, by the Act of 5 Eliz. cap. 10. this Act of 21 H. 8. was re-enacted and revived; but it did not revive the Act of 27 H. 8. for taking away Clergy. But now by 12 Ann. cap. 7. Clergy in such Case is taken away from Facts committed in any House or Out-house, except as to Apprentices under the Age of fifteen Years robbing their Masters.

In the Construction of this Statute the following Opinions have been holden.

1. That it extends only to such as were Servants to the Owner of the Goods, both at the Time they were delivered, and also at the Time when they were stolen.

2. That it is strictly confined to such Goods as are delivered to keep; and therefore that a Receiver, who having received his Master's Rents runs away with them, or a Servant, who being intrusted to sell Goods,

(a) Or the Master's Wife, she being as well his Mistress as if she were

or to receive Money due on a Bond, sells the Goods, &c. and departs with the Money, is not within the Statute; but that a Servant who receives his Master's Goods from another (a) Servant, to keep for the Master, is as much guilty as if he had received them from the Master's own Hands; because such a Delivery is looked upon as a Delivery by the Master.

Sole. 1 Hale's Hist. P. C. 668.

1 Hawk. P.C. 92.

3. That it includes not the Wasting or Consuming of Goods, howsoever wilful it may be; nor the Taking away of an Obligation, or any other bare *Chose* in Action.

Cromp. 50.  
Dalt. cap. 102.  
1 Hawk. P.C. 92.

4. That it extends not to the Taking of such Things, whereof the actual Property is not in the Master at the Time; and therefore, that if a Servant having Money or Corn, &c. delivered to him, melt down the Money of his own Head, without the Command of his Master, into a Piece of Plate, or turn the Corn into Malt, and then run away with them, that he is not within the Statute; because the Property of these Things is so far changed, by altering them in such a Manner, that they cannot be known again, and the Master cannot afterwards take them, without being a Trespasser; but it is agreed, that if a Servant make a Suit of Clothes of Cloth, or a Pair of Shoes of Leather, delivered to him by the Master, and then run away with them, that he is within the Statute; because the Property is no Way altered; and even in the first Case, *Hawkins* seems to be of Opinion, that the Taking of the Plate and Malt is within the Statute; and that the whole Act of the Servant, taken together, should be deemed a Conversion of the Master's Goods to his own Use, with an Intent to steal them, which brings it within the express Letter of the Statute; and on which Foundation it hath been resolved, that a Servant who changes his Master's Money from Silver to Gold, and then runs away with it, is within the Statute.

### (N) Of the Master's Authority over his Servant, and how far he may correct and punish him.

58 H. 6. 25.  
1 Sid. 175.

(b) It is said, that the Master in his Justification must set forth the Retain-

er, the Place where, and in what Business, being Matters issuable. 1 Sid. 177. (c) Where the Plaintiff replied *non moderate castigavit*, held well, tho' not so pertinent an Issue as *immoderate castigavit*. 1 Vent. 70. 1 Sid. 444. 2 Keb. 623.

2 Med. 167.

IT is clearly agreed, that a Master may correct and punish his Servant in a reasonable Manner for abusive Language, neglect of Duty, &c. and that in an Action of Assault and Battery brought against him, he may justify, that he was (b) his Servant, gave provoking Language, &c. and that therefore *moderate castigavit*; and on Issue of (c) *immoderate castigavit*, if it appears in Evidence, that the Punishment was such as is usual from Masters to their Servants, the Master will be acquitted.

But as such Correction must be moderate, it has been held, that the Master cannot justify Wounding his Servant; as in Assault, Battery and Wounding, and Imprisonment, &c. Defendant justifies, for that he and the Plaintiff were Servants to the Sheriff of *Suff*; and that the Plaintiff, when he should have been attending in Court, was at a Conventicle; and that he, by Command of the Sheriff, *leviter & molliter manus imposuit* upon the Plaintiff, and brought him thence; which is the same Trespass, &c.



&c. and on Demurrer to this Plea it was held ill; because as to the Wounding he says nothing at all, and in that he cannot justify. 21 H. 6. 26.  
2 Inst. 316.

Also it hath been held, tho' a Master may beat his Servant, that yet he cannot delegate that Power to another; for tho' a Lord might beat his Villein, either with Cause or without, and he could have no Remedy, yet if another by his Command did it, the Villein might have had an Action. 2 H. 4. 4.  
11 H. 4. 75.  
9 Co. 76. a.  
2 Mod. 167.

From this Authority which a Master hath over his Servant, it is held in Law, that if a Master designeth moderate Correction to his Servant, and accordingly useth it, and the Servant, by some Misfortune, dieth thereof, this is not Murder, but *per Infortunium*; because the Law alloweth him to use moderate Correction; and therefore the deliberate Purpose thereof is not *ex malitia premeditata*. 1 Hale's Hist. P. C. 454.

But if the Master design an immoderate or unreasonable Correction, either in respect of the Measure, or Manner, or Instrument thereof, and the Servant die thereof; this *per (a) Hale* cannot be excused from Murder, if done with Deliberation and Design; nor from Manslaughter, if done hastily, passionately, and without Deliberation; and herein, says he, Consideration must be had of the Manner of the Provocation, the Danger of the Instrument which the Master useth, and the Age or Condition of the Servant that is stricken; and the like of a School-master towards his Scholar. (a) 1 Hale's Hist. P. C. 454.  
— And per Hawkins, where a School-master in cor-

recting his Scholar, or a Father his Son, or a Master his Servant, or an Officer in whipping a Criminal condemned to such Punishment, happens to occasion his Death, if such Persons in their Correction be so barbarous as to exceed all Bounds of Moderation, and thereby cause the Party's Death, they are guilty of Manslaughter at the least; and if they make use of an Instrument improper for Correction, and apparently endangering the Party's Life, as an Iron Bar, or Sword, &c. or kick him to the Ground, and then stamp on his Belly and kill him, they are guilty of Murder. 1 Hawk. P. C. 73-4. for which are cited Bracton, lib. — cap. 4. H. P. C. 31. Cromp. 28. Dalt. cap. 96. Kelw. 136. Kelyn. 65. 5 Mod. 287.

## (O) Of the Master's Remedies against others for enticing away, and other Injuries done in Relation to his Servant.

IT is clearly agreed, that from the Interest a Master has in the Labour and Service of his Servant, he may maintain an Action for enticing 21 H. 6. 31.  
Hob. 189.  
Moor 187. (b) or taking him away.

said, that for taking away a Man's Servant out of his actual Service, Trespass will lie; but that for enticing him, only an Action on the Case. (b) But it is 1 Salk. 380.

Also, if without any Inticement a Servant leave his Master, without Licence or just Cause, and J. S. knowing him to be his Servant, retains him, an Action lies. Noy 10 106.  
1 Leon. 240.  
Kelw. 180.  
2 Lev. 63.

But it hath been held, that an Indictment does not lie for enticing away a Servant, being a private Injury, which may be redressed by Civil Action. 1 Salk. 380.  
6 Mod. 99,  
182, 289  
The Queen ver. Daniel.

In Case the Plaintiff declared, that J. S. 19 Sept. 16 Car. 2. was retained as an Apprentice to serve the Plaintiff for nine Years, and continued in his said Service till the 31st of October, 21 Car. 2. when the Defendant procured the said J. S. to leave the Plaintiff's Service, &c. (c) *per quod* 2 Sand. 169,  
170.  
1 Lev. 299.  
Hambleton ver. Veece.  
(c) The

Plaintiff declared for a Battery of his Servant 19 Jan. &c. *per quod* he lost his Service for a long Time, viz. for the Space of six Months then next following, &c. Hob. 284. after Verdict for the Plaintiff,

Plaintiff, tho' the Original bore Tefte before the End of the fix Months, yet the Plaintiff had his Judgment; for the Vix. was more than

*quod* the Plaintiff *totum proficuum quod ratione servitii præd' J. S. per totum residuum termini recipere potuisset totaliter perdidit, &c.* and after (a) a Verdict for the Plaintiff, and general Damages given, tho' it appeared the Term was not expired, it was intended that Damages were given for all the Term, as well the Time to come as past; for the Damages must be intended to be taxed according to the Declaration; and if it should be intended otherwise, it would be uncertain to what Time they were taxed, whether to the Exhibition of the Bill, or Verdict given; and Judgment arrested accordingly.

needed, being not of the Substance of the Action but for Aggravation of Damages only. *All. 23. per Cur'*; but yet *vide Cro. Jac. 619. Yelv. 94.* (a) Where upon a Demurrer it may be help'd, for the Plaintiff may take Damages for the Departure only. *1 Mod. 271.*

*1 And. 13.* For the Battery of a Servant, the Master as well as Servant may bring  
*9 Co. 113.* an Action, and each shall recover Damages, for both are injured; the  
*10 Co. 131.* Servant in his Person, and the Master (b) by the Loss of his Servant's  
*Stile 94.* Labour; and therefore a Recovery in an Action brought by one of them,  
*2 Bulst. 198.* cannot be pleaded in Bar to an Action brought by the other.  
*1 Sid. 175.* (b) And as it  
 is this that intitles the Master to his Action, he must always declare *per quod servitium amisit. Cro. Jac. 618. 1 Rol. Rep. 393* — And therefore the Defendant may plead Not guilty, and give it in Evidence, that he did not lose his Service *2 Rol. Abr. 682.*

*Yelv 89, 90.* But if a Man beats another's Servant to that Degree that he dies  
*1 Brocwnl. 205.* thereof, the Master loses his Action, and must proceed by Indictment;  
*2 Rol. Abr. 568.* for the private Injury to him his drowned in the general Injury to the  
*1 Salk. 11.* Publick.

*1 Rol. Abr. 98.* If a Surgeon, in Consideration of a Sum of Money, undertakes to  
*1 Rol. Rep. 124.* cure my Servant of a Hurt, and he applies unwholsome Medicines  
*2 Bulst. 332.* thereto, on Purpose to make the Wound worfe, by which I lose the Service of my Servant for a long Time, I may have an Action on the Case against the Surgeon.

### (P) What a Master or Servant may justify doing in each other's Defence.

*1 Hale's Hist. P. C. 484.* FROM the Relationship between a Master and Servant, it hath been agreed, that a Master killing a Person in Defence of his Servant, or a Servant in Defence of his Master, are not guilty of Murder, and that in those Cases, the Act of the Assisted shall have the same Construction, as the Act of the Party assisted should have had, if it had been done by himself.

*2 Rol. Abr. 546.* Also a Servant may justify an Assault in Defence of his (c) Master;  
*Owen 151.* and by some Opinions, so may a Master in Defence of his Servant; but  
*Cont. 1 Salk. 407.* others hold that he cannot; because in such Case he may have an Action  
*(c)* *per quod servitium amisit.*

But he cannot justify in Defence of his Master's Son, because not servant to him. *Dalt. cap. 72. Crompt. 136.* — Nor in Defence of his Master's Goods. *2 Lutw. 1481.*

*1 Rol. Abr. 687.* A Servant shall not avoid a Deed made by Durefs to his Master, nor  
*2 Brocwnl 276.* *vice versa.*

*Bro. Mainte- nance 6. 14.* As to a Master's maintaining a Servant, or a Servant his Master, in  
*2 Rol. Abr. 116.* Suits and legal Proceedings, it is agreed, that a Master may go along  
*2 Forr 814* with his Servant, or with his Domestick Chaplain, to retain Counsel; also  
 he

he may pray one to be of Counsel for him, and may go with him, and stand with him, and aid him at the Trial; but ought not to speak in Court in Favour of his Cause: Also if the Servant be arrested, the Master may assist him with Money to keep him from Prison, that he may have the Benefit of his Service; but the Master cannot safely lay out Money for the Servant in a real Action, unless he have some of his Wages in his Hand; but these, with the Servant's Consent, he may safely disburse.

As to a Servant's Maintaining his Master, it is agreed, that a Person retained generally as a Servant, and not for a particular Occasion only, may lawfully ride about to speed his Master's Business; and may go to Counsel for him, and shew his Evidences to the Counsel, or to the Jury, and stand by him at a Trial; but cannot lawfully lay out his own Money in the Suit.

*Hell. 79.  
2 Rol. Abr.  
116.  
Kelw. 50.*

## Marriage and Divorce.

**M**ARRIAGE is a Compact between a Man and a Woman for the Procreation and Education of Children; or an Exchange of mutual Vows, performed in the Presence of God, and with proper Ceremonies; and seems to have been first instituted as necessary to the very Being of human Society; for without the Distinction of Families, there can be no Incouragement to Industry, nor any Foundation for the Care of acquiring Riches; and therefore all well ordered Societies have settled the Solemnities of Marriage, and ordained that the same should continue during Life; and the Reason is, because Children gradually arriving one after another, they have hardly done with the Care of their Education, till the Parents are unfit for second Marriages; and therefore it is convenient that Marriages should continue during Life, that the mutual Care of the Parents might be employed in making Provision for their Children; and that the Love and Respect of their Children might be repaid to both Parents, without Distraction or Confusion; which could not be well done, if the Marriage was to be disjoined, and their Interest was to sever after the Concern of Education was over: Besides, the Interest of Marriage could not be conveniently carried on, if there were a Prospect that the Marriage was any otherwise to be determined but by Death only; for each Person would be injuriously drawing out of the common Stock, to the Injury of their joint Concern, and to the Prejudice of the Education of their Off-spring; besides that, such a joint Interest cannot be well and commodiously carried on without a mutual Friendship and Endearment, which must be lessened and destroyed by the Prospect, that the Contract might be determined by the Humour of either Party. Hence it is, that Fornication and all other Lusts are unlawful, because Children are begotten without any Care or Preparation for their Education; and the Crime of Adultery receives this further Aggravation, that it not only intails a spurious Race on the Party, for whom he is under no Obligation to provide, but likewise destroys that Peace and mutual Endearment which ought always to subsist in the Marriage State.

We shall therefore consider what is herein enjoined or forbidden under the following Heads.

- (A) What Persons may marry within the Levitical Degrees.
- (B) Of Espousals and Marriage Contracts; and therein of the Difference between Contracts in præsentis and futuro, and the Remedies for the Violation thereof.
- (C) Of the Solemnization and Ceremonies requisite to a compleat Marriage; and therein of the Offence of performing the Ceremony without due Authority or Licence.
- (D) Of Offences against the Rights of Marriage: And herein,
  - 1. Of the Offence of a forcible Marriage.
  - 2. Of the Offence of marrying an Infant Female under the Age of sixteen, without Consent of Guardian.
  - 3. Of the Offence of procuring an improvident Marriage; and therein of Marriage-Broking Contracts and Agreements.
- (E) Marriage how long to continue; and therein of the several Kinds of Divorces: And herein,
  - 1. Of Elopement.
  - 2. Of the Offence of taking away a Wife, and of criminal Conversation.
  - 3. Of the several Kinds of Divorces.

(a) At what Age Persons may contract and intermarry, *vide* Head of *Infants*. — Of Marriages by Idiots and Lunatics, *vide* Head of *Idiots and Lunatics*.

(b) For the general Exposition of this Statute, *vide* Co. Lit. 24, 235. 2 Inst. 683-4. Hob. 181.

Vaugh. 206, 207.

## (A) What (a) Persons may marry within the Levitical Degrees:

Herein first, we must take Notice of the Statute of (b) 32 H. 8. cap. 38. by which it is enacted, ‘ That no Reservation or Prohibition, (God’s Law except) shall trouble or impeach any Marriage without the (c) Levitical Degrees; and that no Person, of what Estate, Degree or Condition soever he be, shall be admitted to any of the Spiritual Courts within the King’s Realm, or any his Grace’s other Lands and Dominions, to any Process, Plea or Allegation contrary to the Statute.

(c) But the Statute does not restrain the Ecclesiastical Courts from Divorces upon other Accounts; as upon the Account of Infidelity, Adultery, Precontract, &c. *Vaugh.* 206, &c.

Since this Statute, it hath been clearly agreed, that if the Spiritual Court proceeds to impeach or dissolve a Marriage out of the Levitical Degrees, that then the Temporal Courts are to prohibit them; for by that Statute all Marriages, that are out of those Degrees, are declared to be

be good and lawful; and therefore, if the Spiritual Court molest Persons in doing that which is declared lawful to be done by the Statutes of the Realm, they are by the Temporal Courts to be prohibited; because they exceed their Jurisdiction, thus bounded by the Temporal Law; but where the Law has not bounded them, their Jurisdiction still continues; and therefore within the Levitical Degrees they are still Judges of Incest.

We must likewise observe, that if a Person marry his Cousin within the Levitical Degrees, yet they continue Husband and Wife, till a Sentence of Divorce be pronounced.

The Degrees prohibited by the Levitical Law, are such as are said to be against the Law of Nature, and such as are against the Divine positive Law.

Those against the Law of Nature, are all Marriages between the ascending and descending Line *in infinitum*; and this is said to be contrary to the Law of Nature, because it tends to the Destruction of the natural Will of the Creator, which designed the Preservation and Continuance of such Inhabitants of the World as he originally created; and all Acts of Men that tend to the Destruction of such *Species*, as Murder of an innocent Person, are said to be against the Law of Nature; and therefore Incest, between the ascending and descending Line, is contrary to the Law of Nature; for the Mother would never have preserved and educated the Female Issue, if it had been admitted to the Father to have had Access to them; and Fathers would never have educated and preserved their Male Issue, if they might have ascended the Bed of their Mothers. There is also another Reason why this is called unnatural, and that is, because it destroys the natural Duties between Parents and Children; for the Parent could never preserve or maintain that Authority that is necessary for the Education and Government of his Child; nor the Child that Reverence that is due to the Parent in order to be educated and governed, if such indecent Familiarities were admitted. There likewise seems to be a natural Reason against this, or any near Intercourse between Collaterals, which is drawn from that which is observed in Brute Creatures, *viz.* that it is necessary to cross the Strain, in order to continue the *Species*. It may be, that there being the same Tone and Figure in the Blood, and a similar Conformation of Vessels, the Circulation of it becomes torpid and unactive; whereas a new Mixture of others of the same Kind, where there is a different Figure and Motion of the Blood and Spirits, may add a new Vigour and Ability to the Animal Oeconomy.

Those prohibited by the positive Divine Law, are all Collaterals to the third Degree; and tho' this be not contrary to the Law of Nature, yet it seems established on very strong Reasons; for if a Concourse between Brothers and Sisters might be allowed, or their Marriages be tolerated, the Necessity there is that they should be educated together, and the frequent Opportunities they have with each other, would fill every Family with Lewdness, and create Heart-burnings and unextinguishable Jealousies between Brothers and Sisters, where the Family was numerous; and it would confine every Family to itself, and hinder the propagating common Love and Charity among Mankind; because there would be a Danger of taking a Wife out of any Family, if Women were liable to be corrupted by such vicious Freedoms. This Prohibition is likewise carried to Uncles and Aunts, Nephews and Nieces; because upon the Death of the Father and Mother they come into the Education of Children *loco parentum*; and by Consequence it was necessary to propagate the same Reverence of Blood in such near Degrees; that the Uncle might have the same Regard and Command as a Father, and a Niece the same Duty as a Daughter; it was also necessary, in order to perfect the Union of Marriage, that the Husband should take the Wife's Relations in the same Degree, to be the same as his own without Distinction, and so *vice versa*.

1 *Rel. Abr.*  
340, 357.  
*Vaugh.* 208,  
220.

*Grot. de Jur*  
1, 5.  
*Vaugh.* 221,  
242, *et seq.*

*Vaugh.* 222.

versa; for if they are to be the same Person as was intended by the Law of God, they can have no Difference in Relations; and by Consequence, the Prohibition touching (a) Affinity must be carried as far as the Prohibition touching Consanguinity.

(a) According to the Text xviii  
*Levit. ver. 16. The Nakedness of thy Brother's Wife shalt thou not uncover, it is thy Brother's Nakedness.*

The Law in *Leviticus, cap. xviii. ver. 6.* is, *That none of you shall approach to any that is near of Kin, to uncover their Nakedness*; which Words being general, must be understood and expounded by the Examples from the 6th to the 20th Verse; among which we find many Prohibitions to Collaterals in the third Degree, both in Affinity and Consanguinity; but there is no Example of Collaterals in the fourth Degree, either in Affinity or Consanguinity; and therefore the Law of Marriage opens to Relations in the fourth Degree; and the Jewish Lawyers, in computing their Degrees, computed them according to the natural Order of Things; that is, from the *Præpositus* up to the common Stock, and so down to the other Relations; which is the fair and natural Order of computing Proximity; and in this Order of Computation, Cousin Germans are held to be of the fourth Degree, and to have Liberty to marry.

*Selden, Ux' Hebraica, lib. 1. cap. 4.*

*Vaugh. 210.*

This likewise was the ancient Sense of the Christian Church, and even of the Church of Rome in the Time of Pope Gregory; for in Writing to *Austin* Bishop of Canterbury he says, *In quarta generatione contracta matrimonia minime solverentur*; but afterwards, when they found that Dispensations for incestuous Marriages brought great Profit to the Church of Rome, and knowing it had obtained universally in the Christian Church, that it was lawful to marry in the fourth Degree, Pope *Alexander II.* began a new Computation of Degrees; and he said, that the Secular Computation, which was the Computation of the Civil Law, was not properly adapted to the Decisions touching Incestuous Marriages; but they ought to compute up to the common Stock, where the Relation joined, because there the Blood was connected; and therefore they computed the Degrees according to the Distance of the Person remotest from the common Stock; for according as the remotest was distant from the common Stock, so they computed the Relations between the Parties; so that the first Cousins that are in the fourth Degree, by the received Computation in the Mosaic and Civil Law, were now by the Canonical Computation thrown into the second Degree; and by this Alteration of the Computation of Degrees, they forbade not only first Cousins but second and third Cousins to marry, unless they obtained Dispensations.

The Intention of the Statute above-mentioned was to restore every Thing according to the Prohibition expressed in the Law of God; and plainly, the Levitical Computation of Degrees was in the Manner they computed in the Civil Law; and agreeably hereunto hath been the Resolutions in our Law.

*Vaugh. 502. Hill ver. Good. Carth. 271. S. P. admitted.*

Hence it hath been adjudged, that the Marriage of two Sisters, one after the other, was incestuous, being in the second Degree; altho' it was objected, that the Verse in xviii *Levit.* being, *thou shalt not take a Wife to her Sister to vex her, &c.* the Prohibition relating to Polygamy, to Jealousy and Vexing, the Reason thereof ceased with the Death of the first Wife; in the same Manner as if *Moses* had said, *thou shalt not take a Wife to her Sister to vex her*, besides the other in her Life-time; but herein the Court held, that tho' the Vexing, in one Part of the Text, related to the Life of the Wife, yet by another Part it is made unlawful for ever; and that from these Words, *None of you shall approach to any that is near of Kin to him, to uncover their Nakedness*; which makes the Nearness of Kin the chief Cause of the Prohibition, and is the Reason that runs through the whole Chapter; and that therefore the Vexing refers only to the

Life

Life of the Wife, but the Incestuous Copulation is the same after her Death, the Nearness of Kin still continuing.

So it hath been resolved, that marrying the Sister's Daughter is incestuous, being in the third Degree. *Ragon 4<sup>e</sup> Watkinson ver. Mergatrol. 2 Jan. 171. S. C.*

So it hath been resolved in Variety of Books and Cases, that the Marriage with the Wife's Sister's Daughter was incestuous, being likewise in the third Degree; and the Degree of Affinity being the same with that of Consanguinity. *Moor 207. Cro. Eliz. 228. 4 Leon. 16. S. C. Allen's Case, 2 Lev. 254. 3 Keb. 660. Hob. 181. Noy 29. 1 Sid. 434. 2 Jon. 118. 2 Skew. 70. 5 Mod. 448 3 Lev. 364. 2 Lutw 1075.*

But upon a Prohibition, for proceeding against a Person in the Ecclesiastical Court who had married the Widow and Relict of his Great Uncle, it was adjudged, that such Marriage, being in the fourth Degree, was out of the Levitical Law, and therefore lawful. *Vaugh. 206. 2 Vent. 9. Harrison & Ux' ver. Dr. Burwell.*

On a Motion for a Prohibition to the Court of the Bishop of Exeter, for presenting J. S. for Incest, who had married the Daughter of his Brother of the Half Blood; it was resolved that no Prohibition should go; for the Court said, tho' the Brothers were not of the Whole Blood, yet were they Brothers, and therefore the Marriage incestuous; they agreed, that if the Father marries the Mother, and the Son the Daughter, this was lawful enough; and North cited the Case of the Earl of Manchester, who had married his Great Aunt's Husband's second Wife; and this was held by Divines and Civilians a good Marriage, for *affinis mei affinis non est mihi affinis*. *Mitch. 30 Cur. 2 in C. B. Oxenham & Ux' ver. Glyn.*

On a Motion for a Prohibition, for proceeding against a Person in the Ecclesiastical Court, who had married his Sister's Bastard-Daughter; it was urged for the Prohibition, that tho' the Levitical Law forbids a Man to approach to any near of Kin, to uncover their Nakedness, yet that this cannot be intended of a Bastard, because he is of Kin to no Person whatsoever, &c. but the Court inclined not to grant a Prohibition. *5 Mod. 168. Comb. 356. Hains ver. Jescott.*

## (B) Of Espousals and Marriage Contracts; and therein of the Difference between Contracts in præsentî and futuro, and the Remedies for the Violation thereof.

Stimburne defines Espousals in this Manner, *Sponsalia sunt mutua re-* *Swinb. of E-*  
*promissio nuptiarum rite inter eos, quibus jure licet, facta*; which compre- *sponsal, sect.*  
hends 1<sup>st</sup>, That this Promise must be mutual; 2<sup>dly</sup>, That it must be <sup>11.</sup>  
done rite, or duly; 3<sup>dly</sup>, That it must be entered into by them who  
may lawfully marry.

Such Contracts are divided into Contracts *in præsentî* and Contracts *in futuro*.

A Contract *in præsentî*, or *per verba in præsentî*, as *I marry you, you and I are Man and Wife, &c.* is by the Civil Law esteemed *ipsum matrimonium*, and amounts to an actual Marriage; which the very Parties themselves cannot dissolve by Release, or other mutual Agreement; it being as much a Marriage in the Sight of God, as if it had been *in Facie Ecclesiæ*, with this Difference, that if they cohabit before Marriage *in Facie Ecclesiæ*, they are for that punishable by Ecclesiastical Censures; and if

after such Contract either of them lies with another, they will punish such Offender as an Adulterer.

*Savinò. fecit.*  
10, 11.

A Contract *in futuro*, as *I will marry you, &c.* may be enforced in the Spiritual Court, but such Contract either Party may release; also if either Party marry another Person, such second Marriage dissolves the Contract.

1 *Leor.* 147.  
1 *Rel. Abr.* 22.  
*Cro. Eliz.* 79.  
*Stile* 295.  
*Carter* 233.  
*Dickenson ver.*  
*Hole. roft.*

1 *Salk.* 24.  
5 *Mod.* 511.  
6 *Mod.* 172.  
1 *Salk.* 120,  
121.

But it hath been resolved, that an Action will lie at Common Law for the Violation of such an Executory Contract *per verba de futuro*, for the Temporal Loss to the Party; and altho' the Party hath a Remedy in the Spiritual Court. But it seems, that by bringing an Action at Common Law, and that appearing on Record, the Remedy in the Spiritual Court is actually released; for now in lieu of a Performance of the Contract he shall recover Damages: Also the Defendant shewing, that he hath been sued for the same Matter in the Spiritual Court, and producing a Sentence against the Plaintiff, the Plaintiff, notwithstanding any Proof of his, will be nonsuit; because that they were the proper Judges in the Spiritual Court, whether it were a Precontract or not.

*Carth.* 467.

Such Promises are good tho' the Time of Marriage be not agreed on; but in such Case it is necessary, to intitle the Party to his Action, to alledge that he offered to marry her, and that she refused.

*Carth.* 467.

1 *Salk.* 24.  
S. C.  
*Harrison ver.*  
*Cage & Ux.*  
5 *Mod.* 511.  
2 *Salk.* 437.  
S. P. and the  
Distinction  
between a Man and a Woman exploded.

In an Action against Husband and Wife, the Plaintiff declared, that he promised to marry the Defendant's Wife while Sole, and that she the same Time promised to take him for her Husband, and averr'd, that he tender'd himself, and that she refused, &c. it was objected, that Marriage was no Advancement to a Man, tho' it was to a Woman; also, that no Time was laid when this Agreement was to have been executed; but the Court over-ruled both Objections.

1 *Salk.* 24.

This Action must be founded on reciprocal Promises; and therefore if the Promise be on one Side only, it does not bind, being only *Nudum pactum*.

*Trin.* 5 *Geo.* 2.  
*Holt ver.*  
*Ward.*

But if a Man of full Age and a Female of fifteen promise to intermarry, and afterwards he marries another, an Action lies against him; for tho' such Promise may be said to be voidable, as to the Infant, yet it shall be binding on the Person of full Age, who shall be presumed to have acted with sufficient Caution; otherwise this Privilege allowed Infants, of rescinding and breaking through their Contracts, which was intended as an Advantage to them, might turn greatly to their Prejudice.

*Moor* 169.

4 *Co.* 29. S. C.  
1 *Sid.* 13. S. C.  
eited, and  
denied by  
*Tawisden*; &  
*Side* 1 *Salk.*

If *A.* contracts himself to *B.* and after marries *C.* and *B.* sues *A.* upon this Contract in the Spiritual Court, and there Sentence is given, that *A.* shall marry and cohabit with *B.* which he does accordingly; they are Baron and Feme, (*a*) without any Divorce between *A.* and *C.* for the Marriage of *A.* and *C.* was a meer Nullity.

*Side* 1 *Salk.*

120-1.

(*a*) But if a Woman maketh a Contract of Matrimony with *J. S.* and then marrieth with *J. D.* who is seised of Lands and dieth, she shall have Dower of his Lands; because such Marriage was not void, but voidable only, by Reason of the Precontract. *Moor* 226. *Perk.* 34.

3 *Lev.* 65.

but *Skin.* 196.  
seems cont.

It hath been held, that the Clause in the Statute of Frauds and Perjuries, 29 *Car.* 2. relating to Marriage-Agreements, extends as well to a Promise to marry, as to the Payment of Marriage-Portions.



(C) Of the Solemnization and Ceremonies requisite to a compleat Marriage; and therein of the Offence of performing the Ceremony without due Authority or Licence.

IN order to make the Marriage compleat, so as to intitle the Wife to Dower, the Issue to inherit, &c. the same must be celebrated *in Facie Ecclesie*; and therefore the private Contract, without the Priest's Blessing, makes no Marriage, tho' such Contract may be enforced in the Spiritual Court.

different Kinds of Trial, *vide Tit. Bafard.* (a) Before the Time of Pope Innocent the Third, there was no Solemnization of Marriage in the Church, but the Man came to the House where the Woman inhabited, and led her home to his own House, which was all the Ceremony then used. *After 1725 Per Goldingham, Doctor of the Civil Law, arguend.*

Also, tho' the Marriage be solemnized *in Facie Ecclesie*, yet if it were without Consent, it is void; and therefore if a Man takes *E. S. to Wife by Duress*, the same is void, tho' solemnized *in Facie Ecclesie*.  
*1 Pol. An. 340.  
 Co. Lit. 53.  
 6 Co. 22.  
 Keilw. 52.  
 Ljer 13. Cro. Car. 488, 493. 1 Sid. 65.*

*A. and B. being Sabbatarians, were married by one in their own Way, who used the Form of the Common Prayer, except the Ring, but was a meer Layman; the Wife dying, the Husband took out Administration to her; but upon Application of her Sister, the Letters of Administration were repealed, and the Sentence of Repeal affirmed by the Delegates; for the Husband, demanding a Right due to him as Husband, must bring himself within the Rules prescribed by that Jurisdiction to whom he applies; also the constant Form of pleading Marriage is, that it was per presbyterum sacris ordinibus constitutum; and an Act of Parliament was made confirming the Marriages contracted during the Usurpation.*

A Marriage solemnized by a Person in Priest's Orders is good and binding, tho' there was no Publication of Banns or Licence to dispence therewith; but herein it seems agreed, that not only the Party performing the Ceremony, but also the Parties married, being Lay Persons, are punishable by Ecclesiastical Censures; and for acting contrary to such antient Canons as have been receiv'd and allowed in this Kingdom; but it seems agreed, that the Canons of 21 Jac. 1. bind not the Laity, not having been universally received, and being made only in Convocation, where the Laity are not represented.

Also by the (b) 7 & 8 W. 3. cap. 35. sect. 2. it is enacted, 'That every Parson, Vicar or Curate, who shall marry any Persons in any Church or Chapel, exempt or not exempt, or in any other Place whatever, without Publication of the Banns of Matrimony between the respective Persons according to Law, or without Licence for the said Marriages first had and obtained, shall for every such Offence forfeit the Sum of One hundred Pounds.'

Persons erecting Offices for making Insurances on Marriages, 10 Ann. cap. 26. sect. 159.

And Sect. 3. it is further enacted by the said Statute, 'That every Parson, Vicar or Curate, who shall substitute or imploy, or knowingly and wittingly shall suffer and permit any other Minister to marry any Persons in any Church or Chapel, to such Parson, Vicar or Curate belonging

*1 Salk. 119.  
 Heydon ver. Gould; &c.  
 vide 2 Salk. 438  
 3 Lev. 5-6.  
 2 Show. 202.  
 5 Co. 32.  
 Co. Lit. 242.  
 1 Jac. 259.  
 2 Salk. 6-7.  
 6 Mod. 182.  
 (b) For the Punishment on Gaolers permitting such Marriages, *vid. 1 Ann. cap. 19. sect. 176.  
 — And on**

‘ belonging or appertaining, without Publication of Banns, or Licences of Marriage first had and obtained, shall for every such Offence forfeit the Sum of one Hundred Pounds; the aforesaid respective Forfeitures to be recovered by Action of Debt, Bill, Plaint or Information, in any of his Majesty’s Courts of Record; wherein no Effoin, Wager, or Protection of Law, or any more than one Imparance shall be allowed; one Moiety thereof to his Majesty, his Heirs and Successors, and the other Moiety to him or them who shall inform, or sue for the same.

And *sect.* 4. it is further enacted by the said Statute, ‘ That every Man so married without Licence, or Publication of Banns as aforesaid, shall forfeit the Sum of ten Pounds, to be recovered, together with Costs of Suit, in Manner as aforesaid, by any Person who shall inform or sue for the same; and likewise, that every Sexton or Parish-Clerk, who shall knowingly and wittingly aid, promote and assist at such Marriages, so celebrated without Banns or Licences, as aforesaid, shall forfeit the Sum of five Pounds; to be recovered with Costs of Suit, in Manner as aforesaid, by any Person who shall inform or sue for the same.

## (D) Of Offences against the Rights of Marriage: And herein,

### 1. Of the Offence of a forcible Marriage.

BY the 3 *H. 7. cap. 2. sect.* — it is enacted in the Words following: ‘ Where Women, as well Maidens as Widows and Wives, having Substances, some in Goods moveable, and some in Lands and Tenements, and some being Heirs apparent unto their Ancestors, for the Lucre of such Substances, be oftentimes taken by such Misdoers contrary to their Will, and after married to such Misdoers, or to other by their Assent, or defiled, to the great Displeasure of God, and contrary to the King’s Laws, and Disparagement of the said Women, and utter Heaviness and Discomfort of their Friends, and to the evil Ensamble of all other; it is therefore ordained, established and enacted by our Sovereign Lord the King, by the Advice of the Lords Spiritual and Temporal, and the Commons in the said Parliament assembled, and by Authority of the same, that what Person or Persons from henceforth, that taketh any Woman so against her Will unlawfully, that is to say, Maid, Widow or Wife, that such Taking, Procuring and Abetting the same, and also Receiving wittingly the same Woman so taken against her Will, and knowing the same, be Felony; and that such Misdoers, Takeis, and Procurators to the same, and Receitors, knowing the said Offence in Form aforesaid, be henceforth reputed and judged as principal Felons. Provided alway, that this Act extend not to any Person taking any Woman only claiming her as his Ward, or Bond-Woman. *Sect.* 3. and by 39 *Eliz. cap. 9.* ‘ All Persons who shall be Principals or Procurers, or Accessories before such Offence committed, are concluded from the Benefit of the Clergy.

In the Construction of the said Statute of 3 *H. 7.* the following Points have been resolved.

*Hob.* 182

*Cro. Car.* 485.

*Dalif.* 22.

1 *And.* 115. 3 *Inft.* 68. *Savil* 59. 12 *Co.* 20, 110. *Stat. Tri.* Vol. 5. fol. 468. *Swindson’s Case.*

the Taking was for Lucre; and also that she was married or defiled; for the enacting Clause, in saying, that what Person takes any Woman *so* against her Will, plainly restrains the Taking to such as is within the Preamble; (a) but it needs not set forth, that the Taking was with an Intention to marry or defile.

*offam maritand'*, are usually inserted in Indictments upon this Statute; and it is safest so to do. *Hale's Hist. P. C. 660.*

It is said in *Hale*, that to make the Offence Felony within this Statute, the Taking must be against her Will; but herein by *Hawkins*, that it is no Manner of Excuse, that the Woman at first was taken away with her own Consent; because if she afterwards refuse to continue with the Offender, and be forced against her Will, she may from that Time as properly be said to be taken against her Will, as if she had never given any Consent at all; for till the Force was put upon her she was in her own Power.

That it is not material, whether a Woman taken against her Will be at last married or defiled with her Consent, or not, if she were under the Force at the Time; because the Offender is in both Cases equally within the Words of the Statute, and shall not be construed to be out of the Meaning of it, for having prevail'd over the Weakness of a Woman, whom by so base Means he got into his Power.

That those who after the Fact receive the Offender, but not the Woman, are not Principals within this Statute; because the Words are, *receiving wittingly the same Woman so taken, &c.* but it seems clearly that they are Accessories after the Offence, according to the known Rules of Common Law.

That those who are only privy to the Marriage, but no ways Parties to the forcible Taking away, or consenting thereto, are not within the Statute.

That where a Woman is taken by Force in the County of *A.* and married in the County of *B.* the Offender may be indicted and found Guilty in the County of *B.* because the continuing of the Force there, amounts to a forcible Taking within the Statute.

It hath been adjudged, as is the constant Practice at this Day, that on an Indictment for a forcible Marriage, grounded on this Statute, the Wife may be a Witness against the Husband; for it being by Force, it cannot be said a Marriage *de Jure*, so as to make them one Person in Law.

*Grain*, lived with him, that thus married her, any considerable Time, her Examination might be more questionable. *Hale's Hist. P. C. 661.*

## 2. Of the Offence of marrying an Infant female under the Age of sixteen, without Consent of Guardian.

By the 4 & 5 *Pb. & Mar. cap. 8.* it is provided, ' that it shall not be lawful for any Person to take away any Maid, or Woman Child unmarried and within the Age of sixteen Years, from the Parents or Guardian in Socage, and that if any Woman Child or Maiden, being above the Age of twelve Years, and under the Age of sixteen, do at any Time assent or agree to such Person that shall make any Contract of Matrimony, (contrary to the Form of the Act,) that then the next of Kin of such Woman-Child or Maid, to whom the Inheritance should descend, return or come, after the Decease of the same Woman-Child or Maid, shall, from the Time of such Assent and Agreement, have, hold and enjoy all such Lands, Tenements and Hereditaments, as the said Woman-Child or Maid had in Possession, Reversion and Remainder, at the Time of such Assent and Agreement, during

‘ ring the Life of such Person that shall so contract Matrimony ; and  
 ‘ after the Decease of such Person so contracting Matrimony, that then  
 ‘ the said Land, &c. shall descend, revert, remain and come to such  
 ‘ Person or Persons as they should have done in case this Act had never  
 ‘ been made ; other than him only that so shall contract Matrimony.

### 3. Of the Offence of procuring an improvident Marriage ; and therein of Marriage-Broking Contracts and Agree- ments.

1 Lev. 257.  
 5 Mod. 221.

It is of such Consequence, that all Marriages should proceed from free Choice, and not from any Compulsion or sinister Means, that it hath been held a Matter indictable, or an Offence for which the Court will grant an Information, to procure an improvident or an unequal Marriage.

But for this  
 vide Abr. Eq.  
 89, 90.

And on this Foundation, that Marriage ought to be free, Marriage-Broking Bonds and Contracts have been declared to be void, and decreed to be given up and cancelled.

Shew. Par.  
 Ca. 76. Hall  
 ver. Patter.

So, tho’ it was decreed in Chancery, that a Bond of 1000*l.* Penalty, for the Payment of 500*l.* given for the procuring a Marriage between Persons of equal Rank, Fortune, &c. was good ; yet upon an Appeal to the House of Lords, the Decree was reversed ; for that such Bonds to Match-Makers are of dangerous Consequence, and tend to the Betraying and Ruining Persons of Fortune and Quality, and are not to be countenanced in Equity ; and that Marriage ought to be procured by the Mediation of Friends and Relations ; and that such Bonds would be of evil Example to Executors, Guardians, Trustees, Servants and others who have the Care of Children.

Abr. Eq. 90.

Nor will the Court only decree a Marriage-Broking Bond to be delivered up, but a Gratuity of fifty Guineas, actually paid, to be refunded ; for that such Bargains are in no Shape to be countenanced.

An Uncle gives his Niece by Will 1200*l.* the Niece marries, but antecedent to the Marriage, the Father takes a Bond from the then intended Husband to pay him 200*l.* in case the Daughter should happen to die without Issue Male, living her Husband ; the Daughter did die without Issue Male, living her Husband ; whereupon the Father sued the Husband at Law upon this Bond ; and the Husband brought his Bill in Equity to be relieved against this Bond, and had a Decree accordingly ; for it appearing that no Money was paid, nor Consideration for entering into it, the Court took it to be in Nature of a Marriage-Broking Bond, and so therefore ordered it to be deliver’d up.

## (E) Marriage how long to continue ; and there- in of the several Kinds of Divorces : And herein,

### 1. Of Elopement.

(a) That a  
 Wife may  
 have Alimo-  
 ny, without  
 any Separation,  
 Moor  
 874.

**M**arriage, for the Reasons already given, being to continue during Life, a Wife can in no (a) Case whatsoever leave her Husband ; for in doing it she breaks the most solemn Vow, which is made in the Presence of God and in the Face of the Church, that she will cleave to him during Life ; and therefore, if a Woman runs away from her Husband

band, without any (a) Provocation, he shall not answer for any (b) Con- (a) But if a  
tract she makes, nor be obliged to answer for her Necessaries. Husband  
turns a sav.

his Wife, or by ill Usage obliges her to go away, he gives her Credit wherever she goes, and must  
pay for Necessaries for her. 1 Salk. 118. but for this, vide Tit. Baron and Feme. (b) That a Court of  
Equity will not assist a Wife, who elopes, to Alimony, 1 Vern. 53.

Also, if a Woman elope from her Husband, she loses her Dower; but 2 Inst. 435.  
it seems, that Elopement was no Bar of Dower at the Common Law, Co. Lit. 32,  
tho' a Divorce were sued and obtained for the Adultery; but now by 40.  
the Statute of H. 2. cap. 34. it is expressly provided, that in such Case I. N. B. 150.  
the Wife shall lose her Dower; the Words of which are, *Si uxor sponte* 1 Rel. Abr.  
*reliquerit virum suum & abierit, & moretur cum adultero suo, amittat in* 680.  
*perpetuum actionem petendi dotem suam, quæ ei competere posset de tenementis*  
*viri sui, si super hoc convincatur, nisi vir suus sponte & absque coactione*  
*Ecclesiæ eam reconciliet, & secum cohabitare permittat, in quo casu restituatur*  
*ei actio;* and tho' she does not go away *sponte*, but is taken against her  
Will, yet if after she consents, and remains with the Adulterer, she shall  
lose her Dower; for the Remaining with him, without Reconciliation,  
is the Bar of Dower, not the Manner of the Going away; and this was  
the old Way of preventing the Crime; for they thought it unfit that  
such Wife, that did not share in the Labours of the Husband, should  
have any Family Provision.

In Dyer there is a Precedent of such Elopement pleaded, and Issue Dyer 107. a.  
taken upon the Reconciliation of the Husband; but it is there held,  
that the Defendant cannot give in Evidence any other Elopements than  
that which is pleaded; for there may be divers Elopements and divers  
Reconciliations; and Defendant, at his Peril, ought to take Issue on one  
only; that is, as I understand the Book, upon the last; for if there be  
divers Reconciliations, yet if she afterwards elope, yet the shewing that  
she was once reconciled after Elopement, will not take away what is set  
up in Bar of Dower.

If a Woman be ravished, and remain with the Ravisher against her Perk. 354.  
Will, she shall not lose her Dower; but if after such Ravishment she Brook 12.  
consent to remain with him, she shall lose it, tho' the Book thinks the 1 Rel. Abr.  
contrary; and in the Case cited by him, she answered only to the Elope- 680.  
ment, and not to the Remaining with the Adulterer; but if she volunta- 2 Inst. 436.  
rily goes away from her Husband, tho' she remain all her Life-time Co. Lit. 32. b.  
with the Adulterer against her Will; or if she remains not with him,  
but he turns her away, yet shall she lose her Dower; but if she be  
reconciled, as the Statute ordains, then she shall be endowed, tho' the  
Husband hath aliened the Land in the mean Time.

If she elopes, and lives in Adultery in any other the Manors or Lands (c) Perk. 355.  
of her Husband, some (c) Books say she shall not lose her Dower; either F. N. B. 150.  
because it cannot be intended a Running away from her Husband, when 1 Rel. Abr.  
she remains in any of his Manors or Lands, or because he is to take 680.  
Care that no such live there; but my Lord (d) Coke holds the contrary; (d) 2 Inst. 436.  
and says, tho' she cohabits with her Husband in the same House, yet  
without his Reconciliation *sponte*, she shall lose her Dower; *a fortiori* in  
the other Case; for the Adultery, and the Remaining with the Adulterer,  
are the Causes of her being barred of Dower; and so, tho' she do co-  
habit, and be reconciled to her Husband, yet if it be by Church Cen-  
sures, she shall lose her Dower; tho' (e) Rolle says, if she elopes, and (e) 1 Rel. Abr.  
after lives with her Husband for some Years till his Death, by his Con- 680.  
sent, without Compulsion of the Church, she shall not be barred of  
her Dower, tho' it be not averred, that she was reconciled to her Hus-  
band; which seems reasonable enough, the Permission to cohabit with  
him being an Argument and Proof of the Husband's Reconciliation.

2 Inst. 435.  
1 Rol. Abr.  
680.  
Dyer 106. b.  
in Margine.

If a Man grants his Wife, with her Goods, to another, and she lives with the Grantee all the Life-time of the Husband, yet she shall lose her Dower, by Reason of her living with him in Adultery; and in that Case, where such a Grant was pleaded, it was held, 1<sup>st</sup>, That the Grant was void. 2<sup>dly</sup>, That it did not amount to a Licence, or if it did, that it was void. 3<sup>dly</sup>, That after the Elopement, there shall be no Averment admitted *quod non fuit adulterium*; tho' the Grantee and the Woman married after the Husband's Death; and tho' in that Case, they brought Sentence of Purgation of the Adultery from the Spiritual Court, yet it was not allowed against such Presumption.

1 Rol. Abr.  
680.  
Green ver.  
Harvey.

If the Husband's Relations keep him from his Wife, so that she does not know what is become of him, and give out that he is dead, and thereupon procure her to release all Marriages and Interests which she can have in him as her Husband, and also persuade her to marry again, which she does, with one who has Notice that her first Husband is alive, but she herself has no Notice of it; tho' she lives in Adultery with this Man, and tho' her Husband be not out of the Realm, nor beyond the Seas, so that she ought to have taken Notice of his being alive; yet because she *non reliquit virum sponte*, as the Statute says, but by Perswasion of his Friends, not knowing herself but that he was dead, this is no such Elopement as will bar her of her Dower.

## 2. Of the Offence of taking away a Wife, and of Criminal Conversation.

2 Inst. 180-1,  
434.  
Dyer 256. b.

At Common Law, the Husband may have an Action of Trespass *de uxore abducta cum bonis viri*; also this Offence is prohibited by the Statute of *Westm. 2. cap. 13.* and a further Punishment inflicted than was at the Common Law; also by *Westm. 2. cap. 34.* it is punishable at the Suit of the King, by the Words following, *De mulieribus abductis cum bonis virorum suorum habeat Rex seftam de bonis sic asportatis.*

47 E. 3. Ac-  
tion sur l'Sta-  
tat, 57.  
2 Inst. 435.  
cont.

If the Wife be *infra annos nobiles*, viz. under the Age of twelve Years at the Time of taking away, some have holden, that the Husband shall not have a Writ *de uxore abducta cum bonis viri*; but my Lord Coke holds the contrary, and that she is *uxor* until Disagreement.

2 Inst. 434.

If the Wife be taken away, and after be divorced, or if she die, yet the Husband shall have his Action *De uxore abducta cum bonis viri*; for in this Action he shall not recover his Wife, but Damages; and he cannot have an Action for taking her away as his Servant, because the Law gives him an Action in another Form.

2 Inst. 435.  
Cro. Jac. 538,  
539. that it  
may be Cepit  
& abduxit as  
well as Rap-  
uit.

Also it is held, that tho' the Words of the Writ be *Rapuit*, &c. yet here it is taken for a violent Taking away, and not when carnal Knowledge is had; so as this Action may be brought against Women as well as Men.

Mich. 17 Car.  
2. at Oxford,  
in B. R. Wat-  
ker ver. Rich.  
Ent. 1654. in  
English.

In an Action of Trespass *de uxore abducta cum bonis viri sui*, the Jury found for the Plaintiff, *quoad* taking some Goods, but as to all the rest, for the Defendant; it was alledged 1<sup>st</sup>, That this Action concludes *contra formam statuti*, and so the Plaintiff makes his Case upon the Statute, and has failed in Proof; for the Verdict is for the Defendant, as to the Taking away the Wife, which is the only Matter provided against by any Statute. *Sed non allocatur*; for *per Cur.* if a Man brings an Action at Common Law, and concludes *contra formam statuti* generally, it shall not hurt; but if he recites a Statute in particular, and lays the Fact to be *contra formam stat' predict'*, there he must make his Case within the Statute, else he has failed of his Case; and it has been adjudged, that an Indictment of Barretry concluding *contra formam stat'* is good.

good, tho' there be no Statute that is exprefs against it. 2dly, That it does not lay *per quod Consortium amisit*. 3dly, That the Word *Ravish* in *Englsh* implies a carnal Knowledge only; (tho' in Latitude it signifies also a forcible Taking away,) and so the Matter amounts to a Felony of the Plaintiff's own shewing, for which he can have no Action of 'Trespafs; but to these the Court paid no Regard, because they were made immaterial by the Verdict.

Also the Husband alone may bring an Action for the Battery, Carrying away and Detaining of his Wife, *per quod solamen & consortium* of his said Wife *amisit*; because the Action is founded upon the special Damage done to himself, and will be no Bar to another Action brought by Baron and Feme, or by the Feme, after the Death of the Baron, for the same Battery.

*Cro. Car.* 89, 90. adjudged, and affirmed in *Cam' Scacc'*. *Cro. Jac.* 538. S. P. adjudged.

2 *R. L. Abr.* 556. 1 *Jon.* 440. *Lit. Rep.* 339. 2 *Rel. Rep.* 51. S. P. adjudged.

In Trespafs and false Imprisonment by Baron and Feme, *per quod negotia domestica* of the Husband *remanferunt infecta ad grave damnum ipsorum*; it was objected, that this being laid as a special Damage to the Husband, the Action ought to have been brought by him alone; but adjudged for the Plaintiffs after Verdict, being only Matter in Aggravation of Damages.

1 *Salk.* 119. *Russel* vs *Corne*.

In Trespafs by Baron and Feme, for Beating the Baron, they may declare, that it was *ad damnum ipsorum*, notwithstanding a Feme Covert can have no Damages, for this Action will survive.

1 *S. d.* 387. *Palm.* 389. 3 *Mod.* 120.

And as the Husband may bring an Action for the Battery, Carrying away and Detaining his Wife; so also may he have an Action against a Person for having criminal Conversation with her, altho' the Wife consent to the Adulterer; for this is a Matter in which she cannot assent, by Reason of the Injury to the Husband, and his Interest in her.

*Farell.* 79.

Also the Husband may not only bring an Action at Law for the criminal Conversation, in which he shall be repair'd in Damages, but may also proceed in the Ecclesiastical Court for the Adultery and Solicitation of Chastity; and the Proceedings in the one Court shall be no Bar to the other.

2 *Salk.* 553

But where there was an Indictment for Assaulting, Beating, Wounding and Endeavouring to ravish the Wife of *B.* upon which the Party was convicted; and afterwards the Husband brought an Action of Trespafs for the same Cause; and the Party being also libelled against in Spiritual Court for the same Fact, *viz.* for Soliciting her Chastity, moved for a Prohibition to the Proceedings in the Spiritual Court; and tho' it was urged for the Jurisdiction of the Spiritual Court, that they may punish for the Solicitation and Incontinence, and that this Suit was *pro salute anime*, the others for Fine and Damages; but *per Car'*, a Prohibition was granted; for it being an Attempt and Solicitation to Incontinence, coupled with Force and Violence, it does by Reason of the Force, which is Temporal, become a Temporal Crime *in toto*; as if one says, *Thou art a Whore and a Thief*, or *Thou keepest a Bawdy-House*, which are Temporal Matters, the Party shall not proceed in the Spiritual Court; whereas if it were only, *Thou art a Whore*, a Libel lies in the Spiritual Court; so if it be said of a Woman that she is a Bawd only, and not that she keeps a Bawdy-house. But *per Holt Ch. J.* If one commit Adultery, and the Husband bring Assault and Battery, this shall not hinder the Spiritual Court; for it is a criminal Proceeding there, and no Indictment lies at Common Law for Adultery.



## 3. Of the several Kinds of Divorces.

*Co Lit* 235. 1. Divorces are either such as (a) dissolve a *Vinculo Matrimonii*, and set the Parties intirely at Liberty, so that they may marry whom they please afterwards; or such as separate a *Mensa & Thoro*, from Bed and Board only; in which last the Marriage continues in Force, so that if either of them marry any other, such Marriage is void.  
*Cro. Car.* 462. (a) Where such Sentence of Divorce is given in the Spiritual Court, the Issue shall be perpetually bound, so long as that stands in Force; and shall not at Common Law be admitted to make any Proof to the contrary. 7 *Co.* 43. *Ken's Case.* *Jenk.* 289 *Cro. Jac.* 186.

47 *E.* 3. 78. A Divorce by Reason of a (b) Precontract dissolves a *Vinculo Matrimonii*; for the Party being under a prior Engagement, the second Marriage is null and void, and consequently the Issue of such second Marriage are Bastards.  
 18 *H.* 6. 34. 1 *Roll. Abr.* 360. (b) *Per* 32 *H. S. cap.* 38.

No Divorce could be for any Precontract after Marriage solemnized in the Face of the Church, and consummate with bodily Knowledge, or Fruit of Children; but *quoad* this Matter, this was repealed *per* 2 & 3 *E.* 6. *cap.* 23. and the whole Act *per* 1 & 2 *Ph. & Mar. cap.* 8 *parag.* 20. and the 32 *H. S.* *quoad* so much only as was not repealed by 2 & 3 *E.* 6. was revived *per* 1 *Eliz. cap.* 1. *parag.* 11. so that *quoad* this Matter, the 32 *H. S.* stands repealed.

*Co Lit.* 235. So a Divorce by Reason of Consanguinity and Affinity dissolves a *Vinculo Matrimonii*; such Marriage being against the Divine positive Law, and therefore void.  
*Vide supra* Letter (A).

*Co. Lit.* 235. So a Divorce by Reason of Frigidity, or Impotence, dissolves the Marriage absolutely (c) because the End of the Contract cannot be answered.  
 5 *Co.* 98. But for this Kind of Divorce, *vide* 5 *Co.* 9. *Moor* 225. 2 *Leon.* 169. 1 *And.* 185. *Dyer* 178. *pl.* 40. (c) But if a Man be divorced from one Woman *propter perpetuam generandi impotentiam*, and then marry another, and have Issue by the second Marriage, which continues without Divorce, the Issue are lawful; for a Man may be *habilis & inhabilis diversis temporibus*; and the second Marriage is not avoided by any Divorce, and therefore stands good in Law. 5 *Co.* 98. *Bury's Case.* *Noy* 72. *Moor* *pl.* 366. *S. C.* by the Name of *Morris* *ver.* *Webber.*

1 *Roll. Abr.* 681. A Divorce *Causa Professionis* is reckoned by some amongst the Causes that dissolve the *Vinculum Matrimonii*, the Monks and Nuns, by their being professed, having vowed perpetual Chastity; but others hold, that in some Cases it does not, and that in such the Wife shall be endowed; but it is said, this Divorce is now taken away by 32 *H. S. cap.* 38. and other Acts, made on Purpose to take away that, and other scrupulous Divorces.  
 2 *Leon.* 169. *Moor* 226. *Cro. Car.* 462. 2 *Inft.* 684, 687.

1 *Roll. Abr.* 357. And tho' these Kinds of Divorces dissolve a *Vinculo Matrimonii*, yet the Issue between them are not Bastards, 'till there be a Divorce actually had; for tho' such Marriages be unlawful, yet they remain good 'till Sentence of Divorce be pronounced; and consequently the Issue must be esteemed legitimate, 'till such a Dissolution.

Also, tho' a Divorce *Causa Præcontractus*, *Causa Consanguinitatis*, *Causa Affinitatis*, or *Causa Frigiditatis*, dissolves the *Vinculum Matrimonii*, and leave the Parties at Liberty to marry again; yet if either of the Parties die before such Sentence of Divorce be actually pronounced, it cannot be pronounced (d) after; and therefore if the Husband die before such Divorce, the Issue are legitimate, and his Wife *de facto* shall have Dower; (d) But tho' for it was *legitimum matrimonium quoad dotem*, and the Bishop ought to certify, that they were *legitimo matrimonio copulati*.

1 *Roll. Abr.* 681. *Co. Lit.* 32. a. 33. b. 7 *Co.* 70. 5 *Co.* 98. 2 *Leon.* 169. (d) But tho' in case of Incest a Divorce cannot be had after the Death of one of the Parties, so as to bastardize the Issue; yet the Spiritual Court may proceed to punish the Survivor for the Incest. *Cartb.* 271. 4 *Mod.* 182. 1 *Salk.* 121.



A Divorce *Propter adulterium* does not dissolve the Marriage, but only makes a Separation *a Mensa & Thoro*; left married Persons should commit the Crime in order to dissolve the Marriage; and tho' such a Divorce does not bastardize the Issue, yet the Children born in such a State of Separation are *prima facie* not presumed to be the Husband's, unless it can be proved that they cohabited afterwards; but such Divorce does not bar the Wife of Dower.

Co. Lit. 235.  
Cro. Car. 462.  
7 Co. 42.  
N.Y. 108.

So a Divorce *Propter sevitiam* or *Metum* is of the same Nature; and does not dissolve the Bond of Matrimony; but is only a Provision for the Woman's Safety, that she may avoid her Husband's Cruelty and ill Usage.

Cro. Car. 462.

## Merchant and Merchandize.

**A**S no one Man can turn his own Industry to all the several Varieties that are necessary for a convenient Livelihood, but must by a careful and laborious Diligence in any one Affair, or particular Branch of Business, acquire more than is necessary for his own Subsistence; and as the Necessities and Materials of Life are various, and not all of them to be acquired by the Labour of any one particular Person; and as they are likewise perishable, and not long to be preserved without Alteration and Corruption, hence arose the Necessity of Bartering and Exchanging, and that one Man should employ his Time in one Art and Means of living; and that That which was redundant from such Art of his should be communicated to others, in Exchange for the other Necessaries of Life which he wanted, and wherewith they abounded, and that the perishable Materials should be exchanged for those more permanent and durable, or to receive of the same hereafter, when the Party became old and unfit for Labour.

And as this Necessity of Permutation and Exchange begot at first the Notion of Merchandize, so when the several Ornaments of Life were brought to Light, the Ways of Traffick and Exchange grew more extended and enlarged; and civilized States brought from (a) other Countries such Materials as they themselves wanted, and which were the Produce of those Places; and such as tended to enrich and aggrandize themselves, and were necessary to a polite and adorned Way of living.

(a) It is Foreign Trade that renders us, says *Molloy*, rich, honourable

and great; that gives us a Name and Esteem in the World; that makes us Masters of the Treasures of other Nations and Countries, and begets and maintains our Ships and Seamen, the Walls and Bulwarks of our Country. *Molloy* 416.

Hence it is, that in every civilized and well regulated State, and especially in an Island, Trade and Merchandize should be protected and encouraged, and that it should be free to all Persons; as every one, who would live, is under a Kind of natural Necessity to labour, in which he has a Property, being the means of Livelihood; which to hinder him from

from, would be as cruel as to deprive him of Life it self; and therefore it seems agreed, from the fundamental Principals of our Government, that the King cannot regularly prohibit Trade, nor lay a Penny Imposition on it; but that every Man may use the Sea, and trade with other Nations, as freely as he may use the Air.

And this Freedom of Trade is not only allowed by the Common Law, but hath also been asserted and established by the Care and Wisdom of Princes and Parliaments; and to this Purpose it is provided by *Magna Charta*, cap. 30. 'That (a) all Merchants, (b) (if they were not openly prohibited before) shall have their safe and sure Conduct to depart, come and carry, buy and sell without any Manner of evil Tolls, by the old and rightful Customs, &c.

(a) This respects Aliens only; which strongly proves, that the *English* had this Liberty before; otherwise they would not have extended it to Aliens, and left the *English* without it. 2 *Inst.* 57. (b) This Prohibition must be by Act of Parliament, because it concerns the whole Realm, which is implied in the Word *Openly*, and relates to Aliens only. 2 *Inst.* 57.

(c) *Skin.* 335. 3 *Lev.* 352. 4 *Mod.* 176. *Sands* ver. *Child* and *Lyn* b. But notwithstanding this Freedom of Trade, yet it seems (c) agreed, that the King may in Time of War, and for the Publick Service and Safety, lay an Embargo on Ships, and imploy the Ships of his Subjects in the Publick Service; but this, says my Lord Chief Justice *Holt*, ought to be upon great Emergencies, and for the Publick Benefit, and not for the private Interest of any Person or Society: Also it seems agreed, that the King may, by his Writ of (d) *Ne exeat regnum*, retain a Subject from going out of the Realm; and may by his (e) Privy Seal command any of his Subjects to return out of a foreign Nation, on Pain of having their Lands seised, &c. It hath likewise been holden, that the King, by his (f) Prerogative, might restrain his Subjects from trading with an (g) Infidel Nation, State or People, without his Licence; and on this Foundation principally it was held, in the Case of (b) *Sands* and *The East-India Company*, that the King's Charter, which gave them an exclusive Right to trade to the *East-Indies*, was good; but this Doctrine seems now exploded, and that nothing can exclude the Subject from Trade, but an Act of Parliament.

not to restrain a Person from a lawful Act, such as Merchandize; nor is it ever universal, but always particular, and granted upon Oath made concerning a particular Person. *Skin.* 136. 3 *Mod.* 127. 4 *Mod.* 179. (e) For this *vide Dyer* 128. pl. 61. Lane 42. 3 *Mod.* 127. (f) In Sir *John Davis Rep.* 9. it is said, that the Reason of the King's being intitled to Customs, was his permitting Merchants to go beyond Sea when he could prohibit them. — But in *E. N. B.* it is said, that by the Common Law, every Subject may go out of the Kingdom for Merchandize or Travel, or other Cause, as he pleases, without Leave. (g) In *Grotius de bello & pace*, lib. 2. cap. 15. parag. 11. it is said, that a Government should take Care that there be no Intercourse by Correspondence with Infidels; and in *Calvin's Case*, 7 Co. 6. 17. Infidels are called *Perpetui inimici Regis*, and in 2 *Brownl.* 296. it is said by my Lord *Coke*, that no Subject of the King may trade with any Realm of Infidels, without the King's Licence, that he might not, says he, relinquish the Catholick Faith, and adhere to Infidelism; and says, that he had seen such a Licence in the Time of *E. 3.* — Others say, that Turks and Infidels are not *perpetui inimici*, nor is there any particular Enmity between them and us; for tho' there be a Difference between our Religion and theirs, that does not oblige us to be Enemies to their Persons. *Salk.* 46. — That they cannot be converted, if Conversation with them is not lawful: *Holt C. J.* to which the Rest of the Court seemed to agree. *Skin.* 336. — And that it is a Disparagement to the Christian Religion, to think that they should rather be converted by Infidels, than Infidels by them. 3 *Lev.* 354. (b) *Raym.* 488. 1 *Vern.* 127. 2 *Chan. Ca.* 165. *Skin.* 91, 132, 197, 223.

2 *Roll. Rep.* 113. And as the Freedom of Trade and Merchandize is supported by the Common Law, so likewise are there certain Customs and Privileges annexed thereto by the Common Law, and of which the Judges will take Notice *ex Officio*. But these Privileges are not to be extended (i) to every one who buys and sells; nor is he from thence, says *Molloy*, to be denominated a Merchant, which Appellation peculiarly belongs to him *viz.* Merchants Adventurers, Merchants Dormants, Merchants Travelling, and Merchants Residents. 2 *Brownl.* 99. *Per Coke*. — But it is said, that a Merchant includes all Sorts of Traders, as well and as properly as Merchant Adventurers; and that a Merchant Taylor is a common Term. 2 *Salk.* 445. *Per Holt*; & *vide Head of Bankrupts.*

who trafficks in the Way of Commerce by Importation or Exportation ; or otherwise, in the Way of Emption, Vendition, Barter, Permutation, or Exchange ; and who makes it his Living to buy and sell, and that by a continued Assiduity, or frequent Negotiation in the Myſtery of Merchandizing ; but thoſe, who buy Goods to reduce them by their own Art or Induſtry into other Forms than formerly they were of, are properly called Artificers, not Merchants.

It hath been adjudged, that a Gentleman being Abroad on his Travels, and drawing a Bill of Exchange, that this made him a Merchant within the Cuſtom as to a ſpecial Purpoſe, to make him reſponſible to the Party upon Non-payment ; and this the rather from the Inconveniencies that might enſue, and the Suſpicion that might increaſe amongſt foreign Merchants upon Bills of Exchange, if Perſons who took upon themſelves to draw ſuch Bills ſhould not be liable to the Payment thereof.

But as the Laws and Cuſtoms of Merchants are of various Kinds, and moſt of them chiefly known (a) to Merchants themſelves, we ſhall here (a) The Cuſtom of the Merchants is Part of the Common Law of this Kingdom, of which the Judges ought to take Notice ; and if any Doubt ariſe to them about their Cuſtom, they may ſend to the Merchants to know their Cuſtom, as they may ſend for the Civilians to know their Law. *Winch* 24. — May direct an Iſſue for Trial of a Cuſtom amongſt Merchants. *Hard.* 486.

- (A) Of Alien Merchants.
- (B) Of Principals and Factors.
- (C) Of Partners and Joint Traders.
- (D) Of Owners and Maſters of Ships.
- (E) Of Mariners.
- (F) Of Averages.
- (G) Of Hypothecation.
- (H) Of Charter-Parties.
- (I) Of Policies of Inſurance.
- (K) Of Bottomry Bonds.
- (L) Of Bills of Exchange : And herein,

1. Of the Nature and different Kinds of Bills of Exchange and negotiable Notes : And herein,

- 1. Of foreign Bills.
- 2. Of Inland Bills.
- 3. Of promiſſory and negotiable Notes.

2. What ſhall be ſaid a Bill of Exchange, or negotiable Note, within the Cuſtom of Merchants.

3. Who ſhall be ſaid liable to the Payment thereof, and therein of ſuing the Drawer, Indorſor, or Acceptor.

4. Who ſhall be ſaid intitled to the Money.

5. Of the Indorſement.

6. Of the Acceptance : And herein,

1. What ſhall be ſaid a good Acceptance.

2. Whoſe Acceptance ſhall bind.

3. Whether an Acceptance may be qualified.

7. Of the Protest: And herein,

1. Of the Necessity and Validity of the Protest.
2. At what Time to be made, and therein of giving Notice to the Drawer; of the Drawer's Refusal, so as to intitle the Party to Principal, Interest and Costs.

8. Of the Action and Remedy on a Bill of Exchange, and Manner of declaring and pleading therein.

### (A) Of Alien Merchants.

*Vid. Tit. Alien.*

(a) The Law of England rather contracts than extends the

Disability of Aliens; because the shutting out of Aliens tends to the Loss of People, which laboriously employed, are the true Riches of any Country. 1 *Vent.* 427. *per Hale*, Ch. I. — The King pardons his loving and obedient Subjects; this extends to Aliens, if here at the Time, tho' not made Denizens. *Per Hob.* 271. (b) For this *vid. supra*, and 2 *Inst.* 57. *Molloy* 417. (c) By the 2 *E.* 3. cap. 9. Merchant Strangers and others shall go and come with their Merchandize. — By 9 *E.* 3. cap. 1. All Merchant Strangers, and others, may freely buy and sell their Commodities from whencesoever they came without Interruption, notwithstanding Charters or Usage to the contrary, which Charters or Usage (if any be) the King, Lords and Commons hold to be of no Force, as being to the Damage of the King and his great Men, and to the Oppression of the Commons, &c.

*Co. Lit.* 129. b. 1 *And.* 25. *Dyer* 2. b.

And as Foreigners and Aliens are allowed to trade amongst us, so are they allowed to maintain personal Actions; because, otherwise they would be incapacitated to merchandize, but they cannot maintain any real Action, because not necessary that they should purchase Lands, or settle amongst us.

11 *E.* 3. Rot. 87. *Dyer* 2. b. in Margine.

An Alien Merchant may upon a Statute extend Lands, and upon Office the King shall not have them; and upon Ouster he shall have an Assize; for the main End and Design of both the Statute Staple and Merchant was to promote and encourage Trade, by providing a sure and speedy Remedy for Merchant Strangers, as well as Natives, to recover their Debts at the Day assigned for Payment.

*Co. Lit.* 2. b. (d) That he must be a Merchant. *Poph.* 36. 1 *Rot. lib.* 194. — For Leases of any dwelling House or Shop, made to Alien Artifi-

cer or Handicraftman, are void by 32 *H.* 8. cap. 16. sect. 13. and the Person taking such Lease, forfeits 100 *l.* and the Person letting, 100 *l.* for which *vid.* 1 *Sid.* 308, 309, 357. 2 *Keb.* 102, 116, 118. 1 *Sand.* 6, 8. 2 *Keb.* 315. 3 *Mod.* 94. (e) But he cannot take a Lease for Years of Land, Meadow, &c. not being necessary for his Trade or Traffick. *Co. Lit.* 2. b. 7 *Co.* 17. *Dyer* 2. b. cont. 1 *And.* 25. *Bendl.* 36. — By 27 *E.* 3. cap. 2. it is enacted, that all Merchant Strangers, and not Enemies, may safely dwell in the Realm, &c. upon which Statute, at a Reading in *Lincoln's Inn*, 35 *Eliz.* it was agreed, a Merchant Alien might take a Lease of a House with Gardens at Will, but not for Years; *per Dyer* 2. b. in Margine. (f) Not if he goes beyond Sea, and leaves Servants in his House during his Absence. *Dyer* 2. b.

A Merchant Stranger shall have an Action for saying he is a Bankrupt, *Yelv. 198.*  
for by Law he may have personal Actions; and these Words tend to im- *1 Bulf. 134.*  
pair his Credit in his Trade. *S. C.*

Also by the 21 *Jac. 1. cap. 19.* it is provided, that that Act, and all  
other Acts heretofore made against Bankrupts, shall extend to Strangers  
born, as well Aliens as Denizens, as effectually, as to natural-born Sub-  
jects, both to make them subject to the Laws as Bankrupts, as also to  
make them capable of the Benefit or Contribution as Creditors by these  
Laws.

The Sons of an Alien, tho' born here, being Merchants, for the first *Lit. Rep. 140.*  
Generation, shall pay alien (a) Customs and Duties, said to be the Prac- *Hard. 335.*  
tice of the Exchequer. *S. P.*

(a) For this  
*vid. Molloy 305, 322.*

But tho' Alien Merchants, in the Payment of Customs and otherwise, *Palm. 14.*  
lie under some Disadvantages different from natural Subjects; yet, in  
other Respects, are they said to have Advantages above them; in that by  
the Common Law an Action of Account lay for a Merchant Stranger  
against Executors; that a Defendant could not wage his Law to an  
Action of Debt brought by a Merchant Stranger, and that Merchants  
Strangers were not to be sworn in Leets, &c.

As to Merchant Strangers, whose Prince is in War with the Crown of *7 E. 4. 13, 14.*  
*England*, if they are found within the Realm at the beginning of the *Bro. Tit.*  
War, they shall be attached with a Privilege and Limitation without Harm *Property 38.*  
of Body or Goods, until it be known to the King, how Merchants of *2 Inst. 58.*  
*England* are used and intreated in their Country, and accordingly they *Molloy 417-8.*  
shall be used in *England*, the same being *Jus belli*; but for Merchant *Skin. 204.*  
Strangers that come into the Realm after War begun, they may be dealt  
withal as open Enemies.

If an Alien Enemy comes here *sub salvo conductu*, he may maintain an *1 Salk. 46.*  
Action; so if an Alien Amy comes hither in Time of Peace, *per licentiam* *Wells ver.*  
*Domini Regis*, as the *French* Protestants did, and lives here *sub protec-* *Williams.*  
*tione*, and a War afterwards happens between the two Nations, he may  
maintain an Action; for Suing is but a consequential Right of Protection;  
and therefore an Alien Enemy, that is here in Peace under (b) Protection, (b) But an  
may sue a Bond; *aliter* of one commorant in his own Country. *Alien Enemy*  
*who has such*

Protection, must plead it. *Erresl. 150. Sylvester's Case.*

## (B) Of Principals and Factors.

AS no one Person, whose Trade is extensive, can transact all his own *Molloy 421.*  
Affairs; so it is necessary for him to depute another in his Place, on  
whose Ability and Honesty he can rely; and such Person so deputed is  
called a Factor, who is in Nature of a Servant, whose Acts shall bind his  
Master or Principal, so far as he acts pursuant to the Authority given  
him.

If the Commission be general, as to *dispose, do, and deal therein as if* *Molloy 422.*  
*it were your own*, hereby the Factor is excused if a Loss happens; but if *1 Bulf. 103.*  
the Commission be to *sell and dispose*, hereby the Factor is not enabled to  
sell upon Tick, nor can he sell for an unreasonable Time, as ten or twenty  
Years, tho' there be the Words *as if it were your own*, but must sell ac-  
cording to the usual Time, for which Credit is given for the Commodi-  
ties he disposes of.

If in Account the Defendant pleads before Auditors, that the Goods *2 Mod. 100.*  
for which he is to account were *bona Peritura*, and notwithstanding his *adjudged.*  
Care

Care in keeping them were worse, and that they remained in his Hands for want of Buyers, and were in Danger of growing worse, and that therefore he sold them upon Credit to a Man beyond Sea; this is no good Plea, for a Factor cannot sell, even *bona Peritura*, upon (a) Credit, without a particular Commission so to do:  
 (a) It is the common Practice to give Factors Power to sell upon Credit. 1 *Bull.* 101.

2 *H. 4.* 12. *b.* In Favour of Trade and Merchandize, an Action of Account lies at Common Law against a Factor as against a Bailiff, in which he shall have all (b) reasonable Allowances.  
 11 *Co.* 90. *a.*  
*E. N. B.* 117.

2 *Rel. Abr.* 161. (b) Therefore it is a good Discharge before Auditors for a Factor to say, that in a Tempest, because the Ship was surcharged, the Goods were cast over Board into the Sea. 1 *Rel. Abr.* 124. *Bro. Tit. Account*, 10. — So, that he was robbed of the Goods without his Default or Negligence. *Co. Lit.* 89. — So, that he durst not buy for Fear of Loss. 1 *Rel. Abr.* 124.

1 *Rel. Abr.* 118. Also, if a Man by Obligation acknowledges that he has received Money *ad proficiendum & computandum*, the Obligee may either sue the (c) Bond, or have an Action of Account at his Election.  
*Dyer.* 20.  
*Cro. Eliz.* 644.

(c) Where a Man covenanted to render a true Account, &c. and held that an Action of Covenant lay on the Deed. 1 *Rel. Rep.* 52. 2 *Bull.* 256. — So an *Assumpsit* will lie on a Promise to dispose of Goods, and to give an Account thereof. 1 *Salk.* 9. *Carth.* 89. *Comb.* 149. — But where the Demand is of Consequence, and the Matter of an intricate Nature, it is most usual to resort to a Court of Equity, where Matters of Account are most commodiously adjusted, and more advantageously determined for both Parties; the Plaintiff being in that Court intitled to a Discovery of Books, Papers, the Defendant's Oath, &c. *Vide Tit. Account.*

*Molloy* 423. If goods are consigned to a Factor, and upon Arrival he makes a false Entry at the Custom-House, or land them without paying the Customs, whereby they become forfeited and are seized, whatever the Principal hereby suffers, the Factor must inevitably make good, altho' his Commission were general; but if the Factor makes his Entry according to the Invoice, or his Letter of Advice, and it falls out the same are mistaken, tho' the Goods are lost, yet is the Factor excused.  
*Cro. Jac.* 265.  
*Lan.* 65.

1 *Chan. Ca.* 25. *Smith ver. Oxenden.* Two Merchants, having certified the Customs to be so against 2 others, who held that the Benefit belonged to the Principal. 1 *Chan. Ca.* 76. *S. P. and Skin* 149. *S. P.* so held to have been determined by Lord Clarendon. — But North, L. K. said he was not satisfied herewith, for that tho' in the saving the Customs, the Factor ventured his own Life, yet the Principal's Goods were ventured also.

1 *Chan. Ca.* 50. *Boer ver. Landall.* But if a Home Factor be brought to Account, he shall not be allowed the Customs; unless he swear that he hath paid them; because it were a Matter of great Scandal, that any Thing should pass the Allowance of a Court of Justice, that is gotten by defrauding the Government.

*Molloy* 423. & *vide Tit. Master and Servant.* The Principal shall answer for his Factor in all Cases where he is privy to the Act or Wrong; and so in Contracts, if a Factor buy Goods on the Account of the Principal, especially where he has been used so to do, the Contract of the Factor will oblige the Principal to a Performance of the Bargain.

*Bridgm.* 125, 126. But if A. being possess'd of certain artificial and counterfeit Jewels of the Value of 168*l.* and knowing them to be such delivers them to B. his Servant, commanding him to transport the said Jewels to *Barbary*, and them to sell to the King of *Barbary*, or such other Person as would buy them, but gives B. no Charge to conceal their being counterfeit, and thereupon B. goes into *Barbary*, and knowing these Jewels to be counterfeit, shews them to C. for good and true Jewels, and affirming to C. that

C. that they were worth 810*l.* desires C. to sell them to the said King; whereupon C. does sell them to the said King for 810*l.* which Money C. pays B. and B. thereupon immediately returns to *England*, and pays the 810*l.* to A. his Master; and after the Jewels being discovered to be counterfeit, C. is imprisoned by the said King till he repays the 810*l.* out of his own Effects; of all which Matter C. gives Notice to A. and demands Satisfaction, &c. yet no Action lies against A. for Jewels are in themselves of an uncertain Value, and B. was not by A. particularly directed to C. and all that was done *quoad* C. was the voluntary Act of the Servant, for which the Master is not bound to answer.

It hath been ruled in Equity, that if one employs a Factor, and intrusts him with the Disposol of Merchandize, and the Factor receives the Money, and dies indebted, to Debts of a higher Nature, and it appears by Evidence, that this Money was vested in other Goods, and remains unpaid, those Goods shall be taken as Part of the Merchant's Estate, and not the Factor's; but if the Factor have the Money, it shall be looked upon as the Factor's Estate, and must first answer the Debts of superior Creditors, &c. for as Money has no Ear-mark, Equity can't follow that in Behalf of him who employed the Factor.

1 Salk. 162.  
*Whitecomb*  
ver. *Jacob.*

If A. employs B. as his Factor to sell Cloth, and B. sells the Cloth on Credit, and before the Money is paid, B. dies indebted by Specialty more than his Assets will pay; this Money shall be paid to A. and not to the Administrator of B. as Part of his Assets, but therout must be deducted what was due to B. for Commission; for a Factor is in Nature only of a Trustee for his Principal.

2 Vern. 638.  
*Burdett* ver.  
*Willet.*

The Plaintiff, being a Factor in *Blackwell-Hall*, advanced Money for his Principal, relying, as was surmised, on the Credit of Cloths resting in his Hands to reimburse himself; the Clothier died, his Administrator sued at Law for the Cloth, and the Factor prayed that he might be allowed on Account the Monies he advanced, but was dismissed; for if there are Debts of a higher Nature, it would be a *Devasavit* in the Administrator to pay or discount the Plaintiff's Debt.

2 Vern. 117.  
*Chapman* ver.  
*Derby.*

## (C) Of Partners and Joint Traders.

IF two or more ingage in a joint Undertaking in the Way of Trade, or enter into Copartnership, it is not necessary to provide against Survivorship; for, by a Maxim of the Common Law, *Jus accrescendi inter Mercatores locum non habet*; and this is for the Benefit of Trade and Commerce, that the Fruits of each Person's Labour and Industry should descend to their Children and Families.

1 Vern. 217.  
*Ex vide Tit.*  
*Joint-Tenants*  
and *Tenants*  
in *Common.*

But if two joint Merchants make B. their Factor, and one dies, leaving an Executor, this Executor and the Survivor cannot join in an Action (a) against the Factor; for tho' the Duty does not survive, yet the Remedy does; and therefore on Recovery, he must be accountable to the Executor for that.

2 Salk. 444.  
*Martin* ver.  
*Crumph.*  
(a) Nor can  
an Executor  
and the sur-  
viving Mar-

chant be jointly sued, because the first is to be charged *de bonis Testatoris*, and the other *de bonis Pro-*  
*prios.* *Carth.* 170, 171. 3 *Lev.* 290. 2 *Lev.* 228.

The Plaintiff's Husband (to whom she is Administratrix) and the Defendant were Copartners for many Years in the Trade of a Druggist; the Plaintiff brought her Bill for a Discovery of the Estate, and her Proportion and Dividend thereof, &c. the Defendant answered, and it appearing that many Debts owing to the joint Trade stood out, it was moved

1 Vern. 118  
*Estwick* ver.  
*Cunningly.*



on Behalf of the Plaintiff, that an able Attorney might be appointed to sue for, and recover those Debts; it being alledged in the Bill, that the Defendant carrying on a distinct Trade for himself, with the Persons that were Debtors to the joint Trade, to oblige them, he forbore to call in their Debts; and it was ordered accordingly, unless the Defendant, within a Week, would give Security to the Plaintiff, to answer her Moiety of the Debts that were standing out.

1 Salk. 126.  
Pinkney ver.  
Hall.

By the Custom of *England*, where there are two joint Traders, and one accepts a Bill, drawn on both for him and Partner, it binds both if it concerns the Trade; otherwise, if it concerns the Acceptor only in a distinct Interest and Respect.

2 Vern. 277.  
Lane ver.  
Williams.

*A.* and *B.* were Partners as Woollen-Drapers, *A.* received Money in the Shop of *S. S.* and gave a Note for it signed by himself and Partner; *A.* and *B.* being both dead, and *A.* not leaving sufficient Assets, it was held on a Bill brought by *S. S.* against the Executors of both the Partners, that this Note being given by one of the Partners, it should bind them both; and that tho' at Law it binds only the Executor of the surviving Partner, yet in Equity the Creditor may follow the Estate of the other, tho' no (a) Proof was made, that this Money was brought in to the Stock, or used in Trade.

(a) That the  
Act of one  
Partner shall  
be presumed the Act of the other, and shall bind him, unless he can shew a Disclaimor, and a Refusal to be concerned. 1 Salk. 292.

1 Salk. 392.  
Heydon ver.  
Heydon; &  
vide 1 Show.  
173-4.  
Comb. 217.

*A.* and *B.* are Copartners, and a Judgment is had against *A.* and the Goods of both taken in Execution; and it was held *per' cur.* that the Sheriff must seize all, because the Moieties are undivided; for if he seize but a Moiety and sell that, the other will have a Right to a Moiety of that Moiety; therefore he must seize the Whole, and sell a Moiety thereof undivided, and the Vendee will be Tenant in common with the other Partner.

2 Chan. Ca.  
228.  
2 Vern. 293,  
706.  
Pasch. 4  
Georg. 2.  
Grace ver.  
Hyam.

But tho' a Moiety of a joint Stock may be taken in Execution on a Judgment against one Partner; yet, if Copartners become Bankrupts, the joint Estate is to discharge the joint Debts in the first place, and the separate Estate to pay the separate Debts; and if there be no separate Estate, then the Residue of the joint Estate, after the joint Creditors are satisfied, to be applied among the separate Creditors, and so *vice versa*; for the Commissioners of Bankrupts are intrusted both with a legal and equitable Jurisdiction, and may therefore marshal the different Effects, and apply them in Discharge of the different Creditors according to Equity and Justice.

## (D) Of Owners and Masters of Ships.

Molloy 202,  
203.  
Skin. 230.  
2 Chan. Ca.  
36.

**I**F there are several Part-owners of a Ship, and some of them refuse to navigate the Ship, or to send her to Sea; those, who are willing, may compel the others in a Court of Admiralty, on giving Security to answer for the Ship in case she be lost; also, if a Partner dislikes the Voyage, but does not expressly prohibit it, and the Ship is lost in the Voyage, he shall have no Recompence for his Part; but if the Ship return, he shall have an Account for what is earned, and it shall be intended a Voyage with his Consent, without an express Prohibition proved.

Molloy 203.

But if the major Part of the Owners refuse to navigate the Ship, there, says *Molloy*, by Reason of the Inequality, they cannot be compelled; but then such Vessel is to be valued and sold in like Manner, as where Part of the Owners became deficient, or unable to set out the Ship.



If there are several Part-owners of a Ship, and the major Part of them are for sending her a Voyage to Sea, to which the Rest disagree; whereupon, according to the common Usage in such Cases, the greater Number suggest in the Admiralty Court the Disagreement of their Partners; and then according to their Usage there, they order certain Persons to appraise the Ship, who accordingly set a Value thereon; and then the major Part, who agreed to the Voyage, enter into a Recognizance, wherein they bind themselves jointly and severally, to the disagreeing Parties, in a Sum proportionable to their Shares, according to the Value set by the Appraisers, to secure the Shares in the Ship of those who disagree to the Voyage, against all Adventures; tho' there can be no Suit on this Agreement or Stipulation in the Admiralty Court, the Contract being made on Land, and therefore of Temporal Consuance; yet a special Action on the Case lies for the Violation thereof at Common Law.

A Master of a Ship is one, who for his Knowledge in Navigation, Fidelity and Discretion, hath the Government of the Ship committed to his Care and Management; but he hath no (a) Property either general or special by the constituting of him a Master; yet the Law looks upon him as an Officer, who must render and give an Account for the whole Charge, when once committed to his Care and Custody, and upon Failure to render Satisfaction; and therefore if Misfortunes happen, if they be either through Negligence, Wilfulness or Ignorance of himself, or his Mariners, he must be responsible.

in Proportion to their Shares, and not according to the Majority.

But where a Master of a Ship brought an Action on the Case, and declared, that the Ship was laden with Corn in such a Harbour, ready to sail for *Dantzick*, and that the Defendant entered and seized the Ship, and detained her, *per quod impeditus & obstructus fuit in Viago*; and it was held that it well lay; for tho' the Master has not the Property of the Ship, but the Owners, and he is only a particular Officer, and can only recover for his particular Loss; yet he may bring Trespass, as a Bailiff of Goods may; and then as Bailiff he can only declare on his Possession, which is sufficient to maintain Trespass.

If the Master of the Ship takes Goods on board for Hire, and is robbed in Port, he must answer the Damage; otherwise it is if he be robbed by Pirates on the High Sea; for then the Owner must be the Loser; for if he undertakes for Hire to carry the Goods, the Common Law cannot look upon him in a different Aspect from a common Carrier; for he cannot be looked upon as a meer Servant to the Owner, but rather as an Officer of the Ship, and to sell the *bona peritura*, which is beyond the Condition of a Servant: But the Civil Law of the Admiralty excuses the Masters when robbed by Pirates, or on losing the Goods by any inevitable Accident; for the Dangers of the Sea are so various and so formidable, that a Master shall not be understood to undertake against them, unless it had been included in the express Words of the Contract; for where, in a well-ordered Society, a Man undertakes for the Custody of another's Property, he secures him against all Loss; but where a Man is bound to encounter Dangers, which Civil Society cannot guard against, he cannot be supposed to undertake farther than for his Care; and by the general Custom of Commerce, the Merchant is the Person that runs the Venture, and not the Master of the Ship; and it is the Merchant that makes the Gain of the Venture.

And as the Master himself is answerable in the Cases *supra*, so likewise hath it been held, that the Owners are liable to the Freighters, in respect of the Freight, for the Embezzlements, &c. of the Master and Mariners.

*Carth.* 26.  
*Knight ver.*  
*Berry.*  
*Hard.* 473.  
S. P.  
6 *Mod.* 162.  
S. P.

*Molloy* 208.  
*Hob.* 11.

(a) But have usually Shares or Parts in the Vessel. *M. l. l.*  
*loy* 203. — He is eligible by the Part-owners

1 *Salk.* 10.  
*Pitts ver.*  
*Guince.*

1 *Vent.* 190,  
238.  
*Raym.* 220.  
3 *Keb.* 72,  
112, 135.  
1 *Mod.* 85.  
2 *Lev.* 69.  
S. C.  
*Mare* and  
*Slu. c.* 3 *Lev.*  
259. S. C.  
cited.

*Carth.* 48.  
2 *Salk.* 442  
3 *Lev.* 258.  
3 *Mod.* 322.  
*Baſon ver.*  
*Sandford.*

But

But this proving a great Discouragement to Trade, by the 7 Geo. 2. cap. 15. reciting that, *Whereas it is of the greatest Consequence and Importance to this Kingdom, to promote the Increase of the Number of Ships and Vessels, and to prevent any Discouragement to Merchants and others from being interested and concerned therein; and whereas it has been held, that in many Cases Owners of Ships or Vessels are answerable for Goods and Merchandize shipp'd; or put on Board the same, altho' the said Goods and Merchandize, after the same have been so put on board, should be made away with by the Masters or Mariners of the said Ships or Vessels, without the Knowledge or Privity of the Owner or Owners; by Means whereof, Merchants and others are greatly discouraged from adventuring their Fortunes, as Owners of Ships or Vessels, which will necessarily tend to the Prejudice of the Trade and Navigation of this Kingdom; therefore for ascertaining and settling how far Owners of Ships and Vessels shall be answerable for any Gold, Silver, Diamonds, Jewels, precious Stones, or other Goods or Merchandize which shall be made away with by the Masters or Mariners, without the Privity of the Owners thereof; It is enacted, ' That ' no Person or Persons who is, are or shall be Owner or Owners of any ' Ship or Vessel, shall be subject or liable to answer for, or make good ' to any one or more Person or Persons, any Loss or Damage by Reason ' of any Imbezilment, Secreting or making away with, (by the Master or ' Mariners, or any of them,) of any Gold, Silver, Diamonds, Jewels, ' precious Stones, or other Goods or Merchandize, which from and after ' the 24th of June 1734. shall be shipped, taken in, or put on board ' any Ship or Vessel, or for any Act, Matter or Thing, Damage or Forfeiture done, occasioned or incurred from and after the said 24th Day ' of June 1734. by the said Master or Mariners, or any of them, without the Privity and Knowledge of such Owner or Owners, further than ' the Value of the Ship or Vessel, with all her Appurtenances, and the ' full Amount of the Freight, due or to grow due, for and during the ' Voyage wherein such Imbezilment, Secreting or Making away with, ' as aforesaid, or other Maleverfaction of the Master or Mariners, shall ' be made, committed or done; any Law, &c.*

And *Seet. 2.* it is further enacted, ' That if several Freighters or Proprietors of any such Gold, Silver, Diamonds, Jewels, precious Stones, or other Goods or Merchandize, shall suffer any Loss or Damage by ' any of the Means aforesaid, in the same Voyage, and the Value of ' the Ship or Vessel, with all her Appurtenances, and the Amount of the ' Freight, due or to grow due, during such Voyage, shall not be sufficient to make full Compensation to all and every of them, then such ' Freighters or Proprietors shall receive their Satisfaction thereout in ' Average, in Proportion to their respective Losses or Damages; and in ' every such Case it shall and may be lawful, to and for such Freighters ' or Proprietors, or any of them, in Behalf of himself, and all other ' such Freighters or Proprietors, or to or for the Owners of such Ship ' or Vessel, or any of them, on Behalf of himself, and all the other ' Part-owners of such Ship or Vessel, to exhibit a Bill in any Court of ' Equity for a Discovery of the total Amount of such Losses or Damages, ' and also of the Value of such Ship or Vessel, Appurtenances and ' Freight, and for an equal Distribution and Payment thereof amongst ' such Freighters or Proprietors, in Proportion to their respective Losses ' or Damages, according to the Rules of Equity.

' Provided, *Seet. 3.* that if any such Bill shall be exhibited by or on the ' Behalf of the Part-owners of such Ship, the Plaintiff or Plaintiffs ' shall annex an *Affidavit* to such Bill or Bills, that he or they do not ' collude with any of the Defendants thereto; and shall thereby offer to ' pay the Value of such Ship or Vessel, Appurtenances and Freight, as ' such Court shall direct; and such Court shall thereupon take such ' Method for ascertaining such Value, as to them shall seem just; and ' shall

shall direct the Payment thereof in like Manner, as is now used and practised in Cases of Bills of Interpleader.

Provided also, *Seet. 3.* that nothing in this present Act contained shall extend, or be construed to extend to impeach, lessen or discharge any Remedy, which any Person or Persons now hath, or shall or may hereafter have, against all, every or any the Master and Mariners of such Ship or Vessel, for or in Respect of any Imbezilment, Secreting or Making away with any Gold, Silver, Diamonds, Jewels, precious Stones or Merchandize shipped, or loaded on board such Ship or Vessel, or on Account of any Fraud, Abuse or Maleverſation of and in such Master and Mariners respectively, but that it shall and may be lawful to and for every Person or Persons, so injured or damaged, to pursue and take such Remedy for the same, against the said Master and Mariners respectively, as he or they might have done before the making of this Act.

### (E) Of Mariners.

Mariners are Persons chosen and appointed by the Master to navigate the Ship, for whose Faults and Miscarriages he must answer; and as they are his Servants, he may correct and punish them according as the Usage is at Sea. *Molloy 209.*

But tho' the Master must answer for them, yet are the Owners likewise answerable for their Faults and Miscarriages; as if the Owner of a Ship victuals it, and furnishes it to Sea with Letters of Reprisal, and the Master and Mariners, when they are at Sea, commit Piracy upon a Friend of the King, without the Notice or Consent of the Owner, the Owner shall lose his Ship by the Admiral Law, of which our Law ought to take Notice. *1 Rol. Abr. 530. & vide 1 Rol. Rep. 285.*

By the Civil Law and Custom of Merchants, if the Ship be cast away, or perish through the Mariners Default, (a) they lose their Wages; so if taken by Pirates, or if they run away; for if it were not for this Policy, they would forsake the Ship in a Storm, and yield her up to Enemies in any Danger. *1 Sid. 179. 1 Mod. 93. 1 Vent. 146. (a) But whether the Executors of those Mari-*

ners, who died before the Ship was cast away, may recover the Wages due to their Testators, *Q. & vide 1 Sid. 179. 1 Keb. 684*

And by the 22 & 23 Car. 2. cap. 11. *seet. 7.* it is enacted, 'That if the Mariners or inferior Officers of any *English* Ship, laden with Goods and Merchandize, shall decline or refuse to fight and defend the Ship, when they shall be thereunto commanded by the Master or Commander thereof, or shall utter any Words to discourage the other Mariners from defending the Ship, every Mariner who shall be found guilty of declining or refusing as aforesaid, shall lose all his Wages due to him, together with such Goods as he hath in his Ship, and suffer Imprisonment, not exceeding the Space of six Months; and shall during such Time be kept to hard Labour for his or their Maintenance.

And *Seet. 9.* of the said Statute, 'Every Mariner, who shall have laid violent Hands on his Commander, whereby to hinder him from fighting in Defence of his Ship and Goods committed to his Trust, shall suffer Death as a Felon.

The Mariners may sue in the Admiralty Court for their Wages, altho' the Hiring was by the Master on Land; and this is allowed of in *Fa- 4 Inst. 147. 1 Vent. 146.*

343. 3 Mod. 244. 1 Salk 31 & vide 4 & 5 Ann. c. 14.

vour of Navigation, for here they may all join in the same Libel: Also, by the Law of the Admiralty, they have Remedy against the Ship and Owners, as well as against the Master; and it would be a great Discouragement to Sea-faring-men to oblige them to bring separate Actions, and those against a Master who may happen to be insolvent.

*Raym.* 3.

*1 Salk.* 33.

So of the other Officers under the Masters, as the Mate, Purser, Boat-swain, &c. for tho' they contract with the Master, yet it is on the Credit of the Ship.

*1 Rel. Abr.*

533.

So a Shipwright may sue in the Admiralty for (a) making a Ship.

(a) So for mending a Ship. *Cro. Car.* 296.

*6 Mod.* 238.

And if a Contract be with Seamen to go on a Voyage, and they in order thereunto work in a Harbour, and after the Voyage is intercepted through the Owner's Fault, as if the Ship be arrested for his Debt, &c. the Seamen shall sue for their Wages for the Work done in the Harbour, in pursuance of the Contract to go on a Voyage, in the Admiralty, as much as if they had gone the Voyage; *secus*, if the Retainer of them had been only to do the Work in the Harbour.

*1 Salk.* 31.

*Op. ver. Ad-*  
*dison.*

But if there be any special Agreement, by which the Mariners are to receive their Wages in any other Manner than is usual, or if the Agreement is under Seal, the Mariners cannot sue in the Admiralty.

*4 Inst.* 141.

*Raym.* 3.

*1 Salk.* 33.

*Carth.* 518.

Nor can the Master sue in the Admiralty Court; for his Contract is on the Credit of the Owners, and not like that of the Mariners, which is on the Credit of the Ship.

S. P. altho' the Owner was beyond Sea, and the Ship lay here; & *vide* *2 Salk.* 548.

## (F) Of Average.

*Molloy* 246,  
*&c.*

*2 Bulst.* 290.

(b) So like-  
wise Goods  
coming from  
infected  
Towns or  
Places may be cast over-board. *Molloy* 246.

Whenever a Ship is in Strefs of Weather, or in Danger, or just Fear of (b) Enemies, and the Master, to save Part of the Cargo, throws over-board some of the Goods in the Ship, those which are saved shall contribute in Proportion; and this common Calamity shall be equally born by all the Parties interested, which is called Average; and is allowed by the Civil Law, the Customs of Merchants, and our Law.

*Molloy* 250.

In this Contribution, not only the Master, Owners, and Freighters of the Ship shall bear a proportionable Share in the Loss, but also Passengers for such Wares as they have in the Ship; also Passengers, who have no Wares or Goods in the Ship, yet in regard they are a Burthen to the Ship, Estimate is to be made of his and their Apparel, Rings and Jewels, towards a Contribution of the Loss; and in general it is said, that every Thing shall contribute, except the Provisions of the Ship, and the Men who are necessary to work the Ship.

*Molloy* 247.

The Master ought to be careful, that only those Things of the least Value and greatest Weight be flung over-board; also he and the Crew, (or most of them) must swear that the Goods were cast over-board for, no other Cause but purely for the Safety of the Ship and Lading.

*Molloy* 249.

If to avoid the Danger of a Storm, the Master cuts down the Masts and Sails, and they falling into the Sea are lost, this Damage is to be made good by Ship and Lading, *pro rata*; otherwise if the Case happens by Storm, or other Casualties.

Also, if through the Riffing of the Ship, Casting over-board, and Lightning the Ship, any of the remaining Goods are spoiled, either with Wet or otherwise, those which are preserved must contribute towards the Loss of the Goods impaired, as well as to those which were intirely lost.

The Goods saved and lost are to be estimated according as the Goods saved were sold for, Freight and other necessary Charges being first deducted, and in such Proportion the Goods saved are to contribute.

If a Master of a Ship lets out his Ship to Freight, and then receives his Compliment, and afterwards takes in Goods without Leave of the Freighters, and a Storm arises at Sea, and Part of the Freighters Goods are cast over Board, the remaining Goods are not subject to the Average, but the Master must make good the Loss out of his own Purse.

Also Average is not due, unless the Goods are lost in such a Manner, that thereby the Residue in the Ship are saved; as if Goods are thrown over Board to lighten the Ship, or, by Composition, Part is given to a Pirate to save the rest; but if a Pirate takes Part by Violence, Average shall not be paid for them.

So where *A.* being one of the Owners of a Ship, loaded on board her 210 Tons of Oil, and *B.* loaded on board her 80 Bales of Silk upon a Freight, by Contract, both to be delivered at *London*, the Ship was pursued by Enemies and forced into an Harbour, &c. and the Master ordered the Silk on Shore, being the most valuable Commodity (tho' they lay under the Oils, and took up a great deal of Time to get at them;) the Ship and Oils were afterwards taken, and the Owner of the Oils brought his Bill in Equity to have Contribution from the Owner of the Silk; but in this Case, as the Loss of the Oils did not save the Silks, nor the saving the Silks lose the Oils, the Bill was dismissed.

If a Ship happens to be taken, and the Master, to redeem the Ship and Lading out of the Enemies or Pirates Hands, promises a certain Sum of Money, for Performance whereof himself becomes a Pledge or Captive in the Custody of the Captor; in this Case he is to be redeemed at the Costs and Charges of the Ship and Lading, and all are to be contributory for his (*a*) Ransom according to each Man's Interest.

(*a*) And as he may ransom the Ship and Goods, so may he retain the Goods for his Satisfaction, in the same Manner as he may detain the Goods for Freight; but if he once suffers them out of his Possession, he cannot afterwards retake them. 6 *Mod.* 12, 13.

So, where a Pirate takes Part of the Goods to spare the rest, Contribution must be paid; but if a Pirate takes by Violence Part of the Goods, the rest are not subject to Average, unless the Merchant hath made an exprefs Agreement to pay it after the Ship is robbed.

If *A.* and several others take their Passage in a Ferry-boat, and being upon the Water, a Tempest arises, so that they are in Danger of being drowned; upon which, to preserve their Lives, several of the Goods are cast over Board, among which a Pack of Goods of *A.*'s of great Value is thrown over; in this Case, there shall be no Average, but the Ferryman must answer for the Goods; because, for his Hire, he runs the Venture of the Voyage.

## (G) Of Hypothecation.

IF a Ship be at Sea and spring a Leak, or is otherwise in Danger of being lost, or the Voyage defeated for want of Provisions or other Necessaries; in these Cases of Extremity, the Master may pledge or

that it is so by the Laws of *Oleron*, of which our Law takes Notice hypothe-

(a) The Master may hypothecate either Ship or Goods, for the Master is intrusted with both, and represents the Traders as well as Owners of the Ship. 1 *Salk* 34.  
 (b) That he who is reputed Master may do the same. *Noy* 95.

*Molloy* 213. The Master cannot hypothecate the Ship or Goods for any Debt of his own, nor in any Case, but for the Preservation of the Ship and completing the Voyage.

1 *Sid.* 453.  
*per Hale.*  
 (c) But if he cannot hypothecate, he may sell so much of the Lading as is necessary, &c. *Molloy* 214.

*Molloy* 214. If the Vessel happens to be wrecked or cast away, and the Mariners, by their great Pains and Care, recover some of the Ruins and Lading, the Master in that Case may pledge the same, and distribute the Money among the Mariners, or so much as shall be necessary to the defraying of their Expences to their own Country; but if the Mariners no way contributed to the Salvage, then their Reward is sunk and lost with the Vessel; and if there be any considerable Part of the Lading preserved, he ought not to dismiss his Mariners till Advice from the Laders or Freighters.

(d) 6 *Mod.* 79.  
 1 *Salk.* 35.  
*cont.*  
 2 *Sid.* 161.  
 (e) *Noy* 95. But altho' Hypothecation of Ships be absolutely necessary for Navigation, without which Masters could not get Credit Abroad; yet a Master cannot make the Owner (d) personally liable by any Contract of his, but (e) the Ship and Cargo shall be liable where he hypothecates for Necessaries, altho' such Necessaries were not actually employed or laid out in the Service of the Ship or Voyage, and the Owners and Freighters must take their Remedy against the Master.

*Molloy* 214.  
 6 *Mod.* 79.  
*per vid.* 2.  
*Vern.* 643. The Master can only hypothecate, where the Calamity or Want of Necessaries happened after the Ship had put to Sea; and therefore the Admiralty Court is allowed to have Jurisdiction herein, so far as to subject the Ship, but cannot proceed against the Person otherwise, than as it is necessary to make him Party towards the Condemnation of the Ship.

1 *Salk.* 34.  
 3 *Mod.* 244.  
 6 *Mod.* 12.  
 25, 79. And therefore where *A.* contracted with *B.* for a Cable, which he delivered at *Ratcliff* upon *Thames*, and *B.* sued in the Admiralty, a Prohibition was granted, tho' it was insisted, that the Want of the Cable was occasioned by the Strefs of Weather at Sea; for here the Contract was at Land, and a Remedy for the Breach at Common Law; but had the Hypothecation been at *Rotterdam*, or any other foreign Port, the Remedy had been proper in the Admiralty Court.

## (H) Of Charter-Parties.

*Molloy* 217.  
*per.*  
 2 *Vent.* 196.  
*Stile* 133.  
 2 *Strew.* 384.  
*Palm.* 399.  
 2 *Roll. Abr.*  
 248. pl. 10.  
*Rep.* 161. A Charter-Party is an Agreement by Indenture, whereby the Owners, Master and Freighters of a Ship covenant with each other, that such a Ship shall be fit and ready to sail, take in such and such Lading, carry and transport the same to such Place or Places, in Consideration whereof, the Freighters or Merchants are to pay so much, &c. and such Charter-Party being only a Covenant or Agreement, shall be construed according

according to the Intention of the Parties, and the usual Customs of Merchants.

An Indenture of Charter-Party was made between Scudamore and others, Owners of the good Ship called *B.* whereof Robert Pitman was Master, of the one Part, and Vandestene of the other Part; in which Indenture the Plaintiff covenanted with the said Vandestene and Robert Pitman, and also Vandestene covenanted with the Plaintiff and Robert Pitman, and bound themselves to the Plaintiff and Robert Pitman for Performance of Covenants in 600 *l.* and the Conclusion of the said Indenture was, *In Witness whereof the Parties abovesaid to these present Indentures have put their hands;* and the said Robert Pitman to the said Indenture put his Hand and Seal, and delivered the same; the Defendant, in Bar of the said Action, pleaded the Release of Pitman, &c. whereupon the Plaintiff demurred, and it was adjudged, that the Release of Pitman did not bar the Plaintiff, because he was no (a) Party to the Indenture; and the Diversity was taken and agreed between an Indenture reciprocal between Parties on the one Side, and Parties on the other Side, as this was; for there no Bond, Covenant or Grant, can be made to or with any that is not Party to the Deed; but where the Deed indented is not reciprocal, but is without a *between*, &c. as *omnibus Christi fidelibus*, &c. there a Bond, Covenant or Grant may be made to divers several Persons.

So where an Action was brought on a Charter-Party, which was in this Manner, *This indented Charter-Party witnesseth, that Binley, Master, and Part-Owner of the Ship, with Consent of Cooker, the other Part-Owner, hath let the Ship to Child for such a Voyage, and Child covenants with Binley, nec non with Cooker to pay 300 *l.* Cooker brings the Action, and the Defendant Child pleads, that only he and Binley were the Parties to and sealed the Indenture; whereupon the Plaintiff demurred; & per totam curiam, tho' the Deed be indented, yet, not being inter partes, there may be a Covenant with a Stranger, as if it were a Deed Poll, or in the first Person, Know ye that I, &c. otherwise, where the Deed is between Parties, then no one, that is a Stranger, can take Advantage thereof by Way of Action.*

In an Action on a Charter-Party a Breach must be assigned, which the Party may do in the very Words of the Agreement; and if there be any Thing to be done by the Plaintiff, which, in the Nature of the Thing, is necessary to enable the Defendant to perform his Part of the Agreement, if the Plaintiff hath not done his Part, this will excuse the Defendant's Omission.

If, in an Action of Covenant, the Plaintiff declares upon a Charter-Party, by which the Plaintiff, being Master of a Ship, was to pay two Parts of the Port-Charges, and the Factor of the Defendant the other Part; and the Plaintiff shews, that he sailed from *L.* to *C.* and there paid all the Port-Charges, viz. two Parts for himself, and the other Part for the Defendant; and that the Defendant had not repaid him; this Breach is well assigned; for, when the Plaintiff says he paid the third Part, it shall not be intended the Defendant did, but that the Plaintiff was necessitated to pay it, or otherwise his Ship would be stayed in the Port.

If *A.* covenants to pay 3 *l.* per Tun for Goods imported, and for Performance thereof binds himself in a Penalty, and in an Action thereupon, the Plaintiff assigns for Breach the Non-payment for so many Tuns, and a Hogshead, which came to so much; this is naught, (b) for the Covenant is only to pay by the Ton; tho' it was said *per cur'* to be otherwise, if the Covenant had been to pay, *secundum ratam*, 3 *l.* per Ton.

be according to Freight for the like accustomed Voyage. *Molloy* 232. — And if a Ship for 200 Tons or thereabouts, the Addition of *thereabouts* is commonly reduced to be within 5 Ton more or less, as the Moiety of the Number *ten*, whereof the whole Number is compounded. *Molloy* 232.

1 Inst. 673.

2 Lev. 74.

S. C. cited, and admitted to be Law

(a) 1 Lev.

255.

2 Lev. 74.

3 Keb. 94.

115.

Cooker ver.

Child.

3 Lev. 159.

S. C. cited.

Vide Tit. Co-

venants, Litt.

(L.) and

2 Jon. 216

2 Jon. 186.

Bellamy ver.

Russel.

2 Lev. 124.

Allen 9. S. P.

(a) If Goods are sent A-board generally the Freight must be freighted



2 Vern. 210,  
212.

If a Charter be so worded, that there can be no Remedy thereon at Law ; yet the Party having a just Demand may be relieved in Equity ; as where by the Agreement there was no Freight to be paid for the outward bound Cargo, and when the Ship arrived beyond Sea, the Factor had no Goods at all to load the Ship with ; and the Court decreed Payment of the Freight.

2 Vern. 727.

So where the *East-India* Company took Bonds from the Mariners and Officers of a Ship not to demand their Wages, unless the Ship returned to the Port in *London* ; and the Ship arrived at a delivering Port, and was afterwards taken by the *French* ; and it was held by my Lord Chief Justice *Holt*, in an Action tried by him, and likewise in Chancery, that the Seamen and Officers should have their Wages, to the Time of the Arrival of the Ship at the delivering Port.

2 Vern. 242.  
Draddy ver.  
Deacon.

The Plaintiff, a Merchant in *London*, hired the Defendant's Ship to freight for a Voyage to *Bourdeaux*, at 3 *l.* 10 *s.* a Ton ; it happened, that an Imbargo was laid on all Merchant Ships for 6 Weeks ; the Ship afterwards proceeded on her Voyage to *Bourdeaux* ; and the Defendant not discovering what Agreement he had made with the Plaintiff in *England*, the Plaintiff's Factors and Correspondents there agree to allow the Defendant 6 *l.* 10 *s.* per Ton, upon which latter Agreement, the Defendant recovered at Law. A Bill being exhibited for Relief against this second and underhand Agreement, obtained, as was alledged, by Fraud, was dismissed ; for the Defendant was at Liberty to make a new Agreement, by Reason that the Performance of the first was obstructed by the Imbargo after laid on all Merchant Ships.

2 Chan. Ca.  
238.

A Master of a Ship, without the Owner, treated with the Plaintiff, a Merchant, for the Freight of the Ship at 80 Tons, and accordingly entered into a Charter-Party with him to sail from *London* to *Falmouth*, and thence to *Barcelona*, without altering the Voyage, and there to unlade at a certain Rate per Ton ; and for Performance, the Master binds the Ship, Tackle, &c. valued at 300 *l.* the Master deviates, and commits Barratry, by which the Merchant in Effect loseth his Voyage and Goods. The Merchant had a Sentence against the Master and Ship in *Barcelona*, which was confirmed in a higher Court in *Spain* ; and the Owner having brought Trover for the Ship, the Merchant exhibited his Bill to be relieved against this Action, and likewise another Action brought for Freight ; and it was held by my Lord Chancellor, that the Charter-Party having valued the Ship at a certain Rate, the Owner is not liable further, and the Master is liable for Deviation and Barratry ; for should it be otherwise, Masters would be Owners of all Mens Ships and Estates.

1 Rol. Abr.  
532.  
1 Rol. Rep.  
486. S. C.  
4 Inst. 135,  
139, 142.  
Hob. 212.  
Moor 450.  
like Point.

If a Charter-Party be made in *England*, to do certain Things on several Places on the Sea, tho' no Act is to be done in *England*, but all upon the Sea ; yet no Suit can be in the Admiralty Court for the Non-performance of the Agreement ; for the Contract is the Original, without which no Cause of Suit can be ; and this Contract is out of their Jurisdiction ; for where Part is triable by the Common Law, and Part by the Admiral Law, the Common Law shall be preferred.

## (I) Of Policies of Insurance.

INSURING is, where a Man, for a certain Sum, takes upon him the Risque that Goods are to run in Transportation from Place to Place ; and this Custom or Usage among Merchants, when they make any Adventures at Sea, to give a Premium or Consideration to Corporations erected for that Purpose, or to particular Persons, to have from such Corporations



or particular Persons, Assurance of or upon Ships, Goods or Merchandise adventured, or some of them, at such Rates or Prices as the Parties Assurers and the Parties assured can agree, hath prevailed Time out of Mind; and such Kind of Contract, or Dealing, is commonly called a (a) Policy of Assurance, or Insurance; and was at first introduced, that a Merchant having a Loss might not be undone, many bearing the Burthen together; and hath divers Times received the Countenance and Sanction of several (b) Acts of Parliament.

(c) That tho' it be a Specialty, yet it is a sacred Thing; being of great

Credit, and much for the Support, Conveniency and Advantage of Trade. *Stat. 54. 55. 1172. cap. 12. and 14 & 15 Car. 2. cap. 25* by which Commissioners were appointed for deciding of Differences arising upon Policies of Insurance; for which *vide 3 Infl. 165 4 Infl. 250. Stile 160. 1 Show 396. — 4 & 5 W. & M. cap. 15.* Penalties are inflicted on Persons undertaking, by Way of Insurance, to import prohibited Goods, without paying Customs. — *10 Ann. cap. 26.* By which Policies must be stamped. — *6 Geo. 1. cap. 18.* impowers his Majesty to grant two Charters for Insurance of Ships and Merchandise, under the Terms therein declared; by which the *Royal Exchange Assurance* and the *London Assurance*, were created. — *11 Geo. 1. cap. 30.* enables the Insurance Companies to plead the General Issue to Actions brought against them; enacts, that the Policy shall issue, or be made out, within three Days after the Insurance; that it shall be stamped, on Pain of 100*l.* and declares all promissory Notes for Insurances void.

As this Method of Insuring was at first set up for the Benefit of Trade, *Preced. Chan. 200.* so the Courts have been always careful that no ill Use has been made of it. Hence it hath been held, that if a Man has no Interest, and insures, the Insurance is void; altho' it be expressed in the Policy, *Interested or not Interested*; but it seems, that a Person, having some Interest in the Ship or Cargo, may insure five Times as much; because a Merchant cannot tell how much, or how little, his Factor may have in Readiness to lade on board his Ship. *2 Vern. 269.*

The Defendant had lent 300*l.* on a Bottomry-Bond, and afterwards insured 450*l.* on that Ship with the Plaintiff for six Guineas *per Cent. Premium*, as interested for Money lent, &c. the Ship out-lived the Time at which the Money was payable, and afterwards was lost in the *East-Indies*; the Defendant recovered the Money on the Bottomry-Bond; and afterwards sued the Insurers on their Policy, who brought their Bill to be relieved; for that the Money insured by the Policy, was the Money lent on the Bottomry; and that the Defendant was no otherwise interested in the Ship; and that the Money being paid, no Use ought to be made of the Policy; and the Court decreed the Policy to be delivered up. *Abr. Eq. 371. Goddard ver. Garret. 2 Vern. 269. S. C. & vide 2 Vern. 717.*

So where a Policy is a perfect Cheat, as where a Person having certain Intelligence that a Ship is lost, insures so much, this shall not bind the Insurer. *Molloy 254.*

So where an old Vessel is painted, and Goods of little or no Value put on board, and a large Sum insured, and the Ship is voluntarily sunk, the Insurers cannot recover. *Molloy 254.*

If in the Policy, the Ship is warranted to depart with Convoy, this must be (c) understood not only departing the first Port with Convoy, but also a Continuance with such Convoy during the Voyage, if possible; but if a Ship leaves the Port with Convoy, and is afterwards separated by Strefs of Weather, and taken by the Enemy, the Insurers are liable. *Carth. 216. 217. 2 Salk. 445. 3 Lev. 320. 4 Mod. 58. S. C. Jofferies ver.*

*Legenda.* (c) That the Clause warranted to depart with Convoy, must be construed according to the Usage among Merchants. *2 Salk. 445.*

On a Policy of Insurance, which was to insure the *William-Galley* in a Voyage from *Bremen* to the Port of *London*, warranted to depart with Convoy, the Case was: The Galley set sail from *Bremen* under Convoy of a *Dutch* Man of War to the *Eib*, where they were joined with two other *Dutch* Men of War, and several *Dutch* and *English* Merchant Ships; whence they sailed to the *Fexel*, where they found a Squadron of *English* Men of War, and an Admiral; after a Stay of nine Weeks they

*2 Salk 445. Bond ver. Gonfales, coram Holt C. J. at Guild hall.*

they set out from the *Texel*, and the Galley was separated in a Storm, and taken by a *French Privateer*; taken again by a *Dutch Privateer*, and paid 80*l.* Salvage; and it was ruled by *Holt Ch. J.* that the Voyage ought to be according to Usage; and that there going to the *Elb*, tho' in Fact out of the Way, was no Deviation; for till after the Year 1703. there was no Convoy for Ships directly from *Bremen* to *London*; and the Plaintiff had a Verdict.

2 Salk. 444.  
Green ver.  
Young.

If after a Policy of Insurance a Damage happens, and afterwards in the same Voyage a Deviation; yet the Assured shall recover for what happened before the Deviation; for the Policy is discharged from the Time of the Deviation only.

2 Vern. 716.  
Le Pypre ver.  
Farr.

On a Policy of Insurance on Goods by Agreement valued at 600*l.* and the Insured not to be obliged to prove any Interest; the Lord Chancellor ordered the Defendant to discover what Goods he put on board; for although the Defendant offered to renounce all Interest to the Insurers, yet he referred it to a Master to examine the Value of the Goods saved, and to deduct it out of the Value, or Sum of 600*l.* at which the Goods were valued by the Agreement.

2 Salk. 444.

A Ship insured was in her Voyage seized by the Government, and turned into a Fireship; the Question was, whether the Insurers were liable; *Holt Ch. J.* thought it was within the Word *Detention*; but the Cause was referred.

2 Vern. 176.  
per Hutchins  
Lord Commissioner.

Where a Policy of Insurance is against Restraint of Princes, that extends not where the Insured shall navigate against the Law of Countries, or where there shall be a Seizure for not paying Custom, or the like.

Skin. 411.  
412. Tomp-  
kins ver.  
Barnet.

If a Man pay Money on a Policy of Insurance, supposing a Loss where there was not any Loss; this shall be deemed Money received to the Use of the Insurer, for which he may maintain an Action.

1 Show. 156.

S. P. and that an *Indebitatus Assumpsit* lies for such Money paid on a void Policy; as where the Insured not having any Interest, yet insures so much, &c.

Skin. 243.  
Per Cur'.

A Policy of Insurance run, Until the Ship shall have ended and be discharged of her Voyage; Arrival at the Port to which she is bound is not a Discharge, until she is unladed.

Skin. 327.

In an Action upon a Charter-party, the Case was, That *J. S.* insured for him, and such who should have Goods upon such Ship; and *A. B.* brought an Action on this Charter-party, and made Averment he had Goods upon the Ship; and held good; but per *Holt Ch. J.* if the Goods were assured, as the Goods of an *Hamburgher*, who was an Ally, and the Goods were the Goods of a *Frenchman*, who was an Enemy; this is a Fraud, and the Assurance is not good.

Skin. 404.

At *Guild-hall*, in an Action upon the Case upon a Policy, the which warranted, that the Ship shall have four Passes, viz. a Pass from the King of *England*, from the King of *France*, from the King of *Poland*, and the States of *Holland*; and the Goods were to be the Goods of such a *Polish* Subject, on board the Ship, vocat' *The City of Warsaw*; an Action on this Policy being brought, it appeared upon the Evidence, that the Passes bore Date in *April* or *May*, and that the Ship, to which they applied these Passes, then was *reguant*, and vocat' by (a) another Name, and that she was not named *The City of Warsaw* before *August* following; and therefore these were not good and effectual Passes for this Ship, according to the Guarranty of the Policy, the which intended good Passes, and not elusory vain Passes; and they being a Fraud upon the Subscribers, the Policy will not bind them: Also another Objection was made, the which was, that the Passes were for Goods which belonged to the Subjects of the King of *Poland*, and so restrained only to them; but the Goods on board were not of the Subjects of *Poland* but of *Holland*, and therefore not within the Intent of the Policy: It was also insisted,

(a) A Mistake in the Name of the Ship, and afterward altered by Consent, the Insured recovered. 2 Salk. 444.

infisted, that the Policy being for Goods of such a one, without Account, they ought to prove that they had any Goods on board, or had shipped any Goods by Order of a third Person; though being without Account, they need not prove the Particulars; and that so was the Practice; which was not contradicted by *Holt Ch. J.*

## (K) Of Bottomry-Bonds.

**B**ottomry, or *Fœnus nauticum*, is so called from the Bottom of the Ship, a Part being put for the Whole, and is in Nature of a Mortgage of a Ship; by which the Mortgagor, or Obligor, in Consideration of a Sum of Money, obliges himself to pay so much on the safe Return of the Ship; but in case the Ship be lost, then the Obligee, or Mortgagee, to lose the whole Money, according to the Condition of the Bond; and these Kind of Contracts are held lawful, and are not usurious, tho' greater Interest be reserved than the Statutes allow, by Reason of the Hazard the Lender runs, and being found useful for Navigation and Commerce.

As where *A.* lends *B.* 100*l.* to freight a Ship abroad, and they agree, that if the Ship comes home safe *A.* shall have 150*l.* and that if she do not, that he shall lose the 100*l.* this is not Usury, but good by the Custom of Merchants; because of the great Perils of the Sea, and both Principal and Interest run the same Hazard of being lost; but if the Principal be secured, and the Interest only depend on an Hazard, if it be more than is lawful, it is Usury.

So where the Condition of a Bottomry-Bond was, that if the Obligor, or the Ship, or the Goods, return safe, then to pay more than the legal Interest; this was adjudged good by the Custom of Merchants, tho' it depends on many Contingencies; and tho' the Obligee may be said to run little Hazard; and tho' any of the Contingencies become impossible; as if the Obligor die before his Return, &c. yet the Bond remains payable, contrary to the general Rule of Law in such Cases; for the Law supplies those Words, *which shall first happen*, and forecloses the Election of the Obligor, and gives it to the Obligee to take his, on which of the Contingencies shall first happen.

The Plaintiff entered into a penal Bond of Bottomry to pay 40*l.* per Month for 50*l.* the Ship was to go from *Holland* to the *Spanish* Islands, and so to return for *England*, but if she perished, the Defendant was to lose his 50*l.* she went accordingly to the *Spanish* Islands, took in Moors at *Africk*, and upon that Occasion went to *Barbadoes*, and then perished at Sea; the Plaintiff being sued on the Bond and Penalty, sought Relief in Equity, pretending that the (a) Deviation was of Necessity; but his Bill was dismissed, saving as to the Penalty.

and is after lost, the Plaintiff, who had lent Money on her Hull, shall recover.

*J. S.* entered into a Bottomry-Bond, whereby he bound himself in Consideration of 400*l.* as well to perform the Voyage within six Months, as at the six Months End to pay the 400*l.* and 40*l.* Premium, in case the Vessel arrived safe, and was not lost in the Voyage; and it fell out, that *J. S.* never went the Voyage, whereby his Bond became forfeited; and he preferred a Bill to be relieved, and in regard the Ship lay all along in the Port of *London*, so that the Defendant run no Hazard of losing his Principal; the Lord Keeper decreed, that he should lose the Premium of 40*l.* and be contented with his ordinary Interest.

*Molloy 292.*

*5 Co. 70.*

*Skin. 153.*

*2 Rol. Rep. 48.*

*5 Co. 70. &c.*

*Cro. Jac. 208.*

*508.*

*1 Keb. 539.*

*711.*

*1 Lev. 54.*

*1 Sid. 27.*

*2 Chan. Ct.*

*130.*

(a) If a Ship deviates in

her Voyage,

*Skin. 262 3.*

*1 Vern. 263.*

*Dequildervet.*

*Depeyster.*

*Abr. Eq. 372.*  
*Dandy ver.*  
*Turner.*

A Part-owner of a Ship borrowed Money of the Plaintiff upon a Bottomry-Bond, payable on the Return of the Ship from the Voyage; she was then going in the Service of the *East-India* Company, and the *East-India* Company broke up the Ship in the *Indies*; the Owners brought their Action against the Company, and recovered Damages, but they did not amount to a full Satisfaction; and the Obligee brought his Bill to have his proportionable Satisfaction out of the Money recovered; but his Bill was dismissed, and he left to recover as well as he could at Law; the Court declaring, that they would never assist a Bottomry-Bond, which carried an unreasonable Interest.

## (L) Of Bills of Exchange: And herein,

### 1. Of the Nature and different Kinds of Bills of Exchange and negotiable Notes: And herein,

#### 1. Of Foreign Bills.

For the Antiquity of Exchange, *vide Molloy 277.*

*Malynes 269.* — That the true Measure of Exchange is *par pro pari*, or Value for Value. *Molloy*

274. — Where the King of Portugal lowered his Coin, this not to prejudice the Drawer here. *Skin.*  
274. — That originally there could be no Exchange, without the King's Licence. *Molloy 274.*

1 *Rel. Abr. 6.*  
*Cro. Jac. 306*  
*Cro. Car. 301.*

By this Custom, if a Merchant abroad draw a Bill on a Merchant here, or *vice versa*, requesting him to pay a certain Sum of Money, and the Drawer sets his Name to it; this amounts to a Promise to pay, and subjects him, tho' but a collateral Engagement, to an Action on the Non-payment.

*Cro. Car. 301.*

And if the Drawee, or he on whom the Bill is drawn, refuse to accept it, or having accepted it, refuse to pay it, the Payee, or he in whose Favour it is drawn, may protest it, and shall recover against the Drawer, not only the principal Sum, but likewise all Interest, Costs and Damages, by Reason of the Protest or Refusal of Acceptance, or Payment of the Money.

*Carth. 3.*  
*Renew ver.*  
*Axton.*  
1 *Show. 341.*  
*Comb. 195.*  
*S. P.*

(a) Nor are Bills of Exchange, for Value received, such Matters of Account, as are intended by the Exception in the Statute concerning Merchants Accounts. *Carth. 226.* But for this, *vide Tit. Limitation of Actions.*

But tho' the Custom of Merchants, in relation to Bills of Exchange, be established by the Common Law, and such Bills, being Securities for Money, are of great Credit among them; yet are they not allowed to be Securities of as high a Nature as Bonds or Specialties; and therefore it hath been adjudged, that a Bill of Exchange is within the Statute of (a) Limitations, and must be sued for within six Years after it becomes payable.

*Vide Head of Executors and Administrators.*

Also a Bill of Exchange is to be considered as a simple Contract Debt, in a Course of Administration, which an Executor or Administrator cannot discharge before Debts by Bond, without being guilty of a *Devastavit*.

So, if a Merchant in *London* draw a Bill of Exchange on his Correspondent in *Newcastle*, in Favour of *J. S.* and the Bill is refused, and *J. S.* dies intestate, his Administrator, on Letters of Administration taken out in *Durham*, cannot bring an Action, on the Custom of Merchants, against the Drawer, and lay the same in *London*; for that a Bill of Exchange is not equal to a Bond or Specialty, which are the Deceased's Goods, where they happen to be at his Death, but is a simple Contract, which follows the Person of the Debtor, and makes *bona notabilia* where the Debtor resides; and therefore Administration ought to have been taken out in *London*.

Also this Custom shall not prevail against the Privilege of Infants, so as to bind them; and accordingly it hath been adjudged, that if an Infant draw a Bill of Exchange, Infancy is a good Plea in Bar to an Action brought against him.

Bills of Exchange are usually drawn payable on Sight, so many Days after Sight, or after Date, or on single, double or treble (*a*) Usances; and it is frequent to draw 2 or 3 for the same Sum, and of the same Date, for Fear of Loss or Mis carriage, which carry a (*b*) Condition with them that only one shall be paid.

1 *Shew.* 317. — But yet varies according to the Customs of particular Countries; and therefore, where the Plaintiff declared on a Bill of Exchange drawn at *Amsterdam*, payable at *London*, at two Usances, and did not shew what the two Usances were, Judgment was given for the Defendant, for the Court could not take Notice of foreign Usances which varied, being longer in one Place than in another. 1 *Salk.* 151. *Burkley ver. Cambell.* (*b*) Therefore, if there are three Bills for the same Sum, and an Action is brought on one of them, and the Plaintiff declares, that the Money in *Bills præsita mentionat* is not paid; this is sufficient without averring, that it was not paid on the other Bills, because the Sum is the same in all the Bills. *Carth.* 510. 1 *Salk.* 130. adjudged.

*Carth.* 373.  
*Teowans ver.*  
*Bradshaw.*  
*Comb.* 392.  
*S. C.*

*Carth.* 160.  
*Williams ver.*  
*Harrison.*

*Melley* 276.  
(*a*) An Usance is said to be regularly a Month. *Melley* 277.

## 2. Of Inland Bills.

Inland Bills of Exchange are those drawn by one Merchant residing in one Part of the Kingdom, on another residing in some City or Town within the same Kingdom; and these also being found useful to Trade and Commerce, have been established on the same Foot with foreign Bills; but at Common Law they differed from them in this, that there was no Custom of protesting them, so as to subject the Drawer to Interest and Damages in Case of Non-payment, as there was on foreign Bills.

To remedy this Inconveniency, by the 9 & 10 *W. 3. cap.* 17. reciting, that great Damages and other Inconveniencies do frequently happen in the Course of Trade and Commerce, by Reason of Delays of Payment and other Neglects on Inland Bills of Exchange, It is enacted, 'That all and every Bill or Bills of Exchange, drawn in, or dated at and from any trading City or Town, or any other Place in the Kingdom of *England*, Dominion of *Wales*, or Town of *Berwick upon Tweed*, of the Sum of 5 *l.* or upwards, upon any Person or Persons of or in *London*, or any other trading City, Town, or any other Place (in which said Bill or Bills of Exchange, shall be acknowledged and expressed the said Value to be received,) and is, and shall be drawn payable at a certain Number of Days, Weeks, or Months after Date thereof; that from and after Presentation and Acceptance of the said Bill or Bills of Exchange, (which Acceptance shall be by the underwriting the same under the Party's Hand so accepting;) and after the Expiration of 3 Days after the said Bill or Bills shall become due, the Party to whom the said Bill or Bills are made payable, his Servant, Agent or Assigns may, and shall cause the said Bill or Bills to be protested by a Notary Publick, and in Default of such Notary Publick, by any other substantial Person of the City, Town, or Place, in the Presence of two or more credible Witnesses; Refusal or Neglect being first made of due Payment of the same; which Protest shall be made

6 *Mod.* 29.  
*So.*  
1 *Salk.* 131.

and

‘ and written under a fair written Copy of the said Bill of Exchange, in the Words or Form following.’ — *Know all Men, that I. A. B. on the Day of at the usual Place of Abode of the said have demanded Payment of the Bill, of which the Above is the Copy, which the said did not pay; wherefore I the said do hereby protest the said Bill dated at this Day of* ‘ which Protest so made as aforesaid, shall within 14 Days after making thereof be sent, or otherwise due Notice shall be given thereof to the Party from whom the said Bill or Bills were received, who is, upon producing such Protest, to repay the said Bill or Bills, together with all Interest and Charges from the Day such Bill or Bills were protested, for which Protest shall be paid a Sum, not exceeding the Sum of Six-pence; and in Default or Neglect of such Protest made and set, or due Notice given within the Days before limited, the Person so failing or neglecting thereof, is and shall be liable to all Costs, Damages and Interest, which do and shall accrue thereby.

‘ Provided, nevertheless, that in Case any such Inland Bill or Bills of Exchange shall happen to be lost or miscarried, within the Time before limited for Payment of the same, then the Drawer of the said Bill or Bills is, and shall be obliged to give another Bill or Bills of the same Tenour with those first given the Person or Persons, to whom they are and shall be so delivered, giving Security, if demanded, to the said Drawer, to indemnify him against all Persons whatsoever, in Case the said Bill or Bills of Exchange, so alledged to be lost or miscarried, shall be found again.’

But this Statute was deficient, in that it had no Effect, unless the Party on whom the Bill was drawn accepted it, by underwriting the same, which few or none cared to do.

To remedy which, by the 3 & 4 Ann. cap. 9. It is enacted, ‘ That in Case, upon presenting any such Bill or Bills of Exchange, the Party or Parties on whom the said shall be drawn, shall refuse to accept the same by underwriting the same as aforesaid, the Party to whom the said Bill or Bills are made payable, his Servant, Agent or Assigns, may and shall cause the said Bill or Bills to be protested for Non-acceptance; as in Case of Foreign Bills of Exchange; any Thing in the said Act, or any other Law to the contrary notwithstanding, for which Protest there shall be paid 2 s. and no more.

‘ Provided, that no Acceptance of any such Inland Bill of Exchange shall be sufficient to charge any Person whatsoever, unless the same be underwritten or indorsed in Writing thereupon; and if such Bill be not accepted by such Underwriting or Indorsement in Writing, no Drawer of any such Inland Bill shall be liable to pay any Costs, Damages or Interest thereupon, unless such Protest be made for Non-acceptance thereof, and within 14 Days after such Protest the same be sent, or otherwise Notice thereof be given to the Party from whom the Bill was received, or left in Writing at the Place of his or her usual Abode; and if such Bill be accepted, and not paid before the Expiration of 3 Days after the said Bill shall become due and payable, then no Drawer of such Bill shall be compellable to pay any Costs, Damages or Interest thereupon, unless a Protest be made and sent, or Notice thereof be given in Manner and Form abovementioned; nevertheless, every Drawer of such Bill shall be liable to make Payment of Costs, Damages and Interest upon such Inland Bill, if any one Protest be made for Non-acceptance or Non-payment thereof, and Notice thereof be sent, given, or left, as aforesaid.

‘ Provided, that no such Protest shall be necessary, either for Non-acceptance or Non-payment of any Inland Bill of Exchange, unless the Value be acknowledged, and expressed on such Bill to be received; and unless such Bill be drawn for the Payment of 20 l. or upwards,

‘ and that the Protest hereby required for Non-acceptance, shall be made  
 ‘ by such Persons as are appointed by the above Statute 9 & 10 W. 3.  
 ‘ And it is further enacted by the said Statute 3 & 4 Ann. That  
 ‘ if any Person doth accept any such Bill of Exchange, for, and in Satisfi-  
 ‘ faction of any former Debt, or Sum of Money formerly due to him,  
 ‘ the same shall be accounted and esteemed a full and compleat Payment  
 ‘ of such Debt; if such Person accepting of any such Bill for his Debt,  
 ‘ doth not take his due Course to obtain Payment thereof, by endeavour-  
 ‘ ing to get the same accepted and paid, and make his Protest as afore-  
 ‘ said, either for Non-acceptance or Non-payment thereof.  
 ‘ Provided, that nothing herein contained shall extend to Discharge  
 ‘ any Remedy that any Person may have against the Drawer, Acceptor  
 ‘ or Indorfor of such Bill.’

### 3. Of Promissory and negotiable Notes.

The Increase of Trade, and Necessity of Paper Credit, put Bankers  
 and others upon an Expedient of bringing promissory Notes within the  
 Custom of Merchants, and making them negotiable, as Inland Bills of  
 Exchange; but this the Judges would not admit of, promissory Notes  
 being only considered, by the Common Law, as Evidences of a Debt,  
 and not assignable or negotiable in their own Nature.

But it being found necessary to make use of this Kind of Credit, by  
 the (a) 3 & 4 Ann. cap. 9. reciting, that whereas it hath been held,  
 that Notes in Writing signed by the Party who makes the same, where-  
 by such Party promises to pay unto any other Person, or his Order, any  
 Sum of Money therein mentioned, are not assignable or indorsible over  
 within the Custom of Merchants to any other Person; and that such Per-  
 son, to whom the Sum of Money mentioned in such Note is payable,  
 cannot maintain an Action, by the Custom of Merchants, against the  
 Person who first made and signed the same; and that any Person to  
 whom such Note should be assigned, indorsed, or made payable, could  
 not, within the said Custom of Merchants, maintain any Action upon  
 such Note against the Person who first drew and signed the same; there-  
 fore to the Intent, to encourage Trade and Commerce, which will be  
 much advanced, if such Notes shall have the same Effect as Inland Bills of  
 Exchange, and shall be negotiated in like Manner, It is enacted, ‘ That all  
 ‘ Notes in Writing, that shall be made and signed by any Person or Per-  
 ‘ sons, Body Politick or Corporate, or by the Servant or Agent of any  
 ‘ Corporation, Banker, Goldsmith, Merchant or Trader, who is usually  
 ‘ intrusted by him, her or them, to sign such promissory Notes for him  
 ‘ her or them, whereby such Person or Persons, Body Politick and Cor-  
 ‘ porate, his, her or their Servant or Agent as aforesaid, doth, or shall pro-  
 ‘ mise to pay to any other Person or Persons, Body Politick and Cor-  
 ‘ porate, his, her or their Order, or unto Bearer, any Sum of Money  
 ‘ mentioned in such Note, shall be taken and construed to be, by Vertue  
 ‘ thereof, due and payable to any such Person or Persons, Body Politick  
 ‘ and Corporate, to whom the same is made payable; and also every  
 ‘ such Note payable to any Person or Persons, Body Politick and Cor-  
 ‘ porate, his, her or their Order, shall be assignable or indorsible over, in  
 ‘ the same Manner as Inland Bills of Exchange are or may be accord-  
 ‘ ing to the Custom of Merchants; and that the Person or Persons, Body  
 ‘ Politick and Corporate, to whom such Sum of Money is or shall be by  
 ‘ such Note made payable, shall and may maintain an Action for the  
 ‘ same in such Manner, as he, she or they might do upon an Inland Bill  
 ‘ of Exchange, made or drawn according to the Custom of Merchants,  
 ‘ against the Person or Persons, Body Politick and Corporate, who or  
 ‘ whose



‘ whose Servant or Agent, as aforesaid, signed the same; and that any  
 ‘ Person or Persons, Body Corporate and Politick, to whom such Note  
 ‘ that is payable to any Person or Persons, Body Politick and Corpo-  
 ‘ rate, his her or their Order, is indorsed or assigned, or the Money  
 ‘ therein mentioned, ordered to be paid by Indorsement thercon, shall and  
 ‘ may maintain his, her or their Action for such Sum of Money, either  
 ‘ against the Person or Persons, Body Politick and Corporate, who or  
 ‘ whose Servant or Agent as aforesaid signed such Note, or against any  
 ‘ of the Persons that indorsed the same, in like Manner as in Case of  
 ‘ Inland Bills of Exchange; and in every such Action, the Plaintiff or  
 ‘ Plaintiffs shall recover his, her or their Damages and Costs of Suit; and  
 ‘ if such Plaintiff or Plaintiffs shall be nonsuited, or a Verdict be given  
 ‘ against him, her or them, the Defendant or Defendants shall recover his  
 ‘ her or their Costs against the Plaintiff or Plaintiffs; and every such  
 ‘ Plaintiff or Plaintiffs, Defendant or Defendants respectively recovering,  
 ‘ may sue out Execution for such Damages and Costs by *Capias*, *Fieri*  
 ‘ *facias*, or *Elegit*.

And it is further enacted by the said Statute, ‘ That all and every such  
 ‘ Actions shall be commenced, sued, and brought within such Time, as is  
 ‘ appointed for commencing or suing Actions upon the Case, by the Sta-  
 ‘ tute 21 Jac. 1. Of Limitations.

‘ Provided, that no Body Politick or Corporate shall have Power, by  
 ‘ Virtue of this Act, to issue or give out any Notes by themselves or their  
 ‘ Servants, other than such as they might have issued, if this Act had  
 ‘ never been made.’

*Trin. 6. Ann.*  
*Ash ver. Bar-*  
*ron, in B. R.*

It hath been adjudged, that a Note wrote by the Plaintiff, and sub-  
 scribed by the Defendant, is a Note *made and signed* by the Defendant  
 within this Act; for the Signing or Subscribing is the Lien, and the Wri-  
 ting or making is only the mechanical Part of it.

## 2. What shall be said a Bill of Exchange, or negotiable Note, within the Custom of Merchants.

*Carth. 510.*  
*1 Salk. 128.*  
*Starky ver.*  
*Cheefeman.*

As the Custom of Merchants hath established these Bills and Notes,  
 so hath it prescribed their Form, and required that the same should be  
 in Writing, and drawn by the Party, or those having legal Authority  
 from him; and such Drawing raises a Contract to pay the Money with-  
 out any express Promise.

*Ca. Law and*  
*Eq. 287.*

As to the Form of the Bill, it is said, that the same Strictness and  
 Nicety are not required in penning of Bills current between Merchant  
 and Merchant, as in Deeds, Wills, &c. on the other Hand, it may hap-  
 pen, that a Writing may have the Form of a Bill of Exchange, and yet  
 be otherwise.

*Pasch. 10*  
*Georg. 1.*  
*Jenney ver.*  
*Hale, in B. R.*  
*adjudged.*

As if *A.* draw a Bill upon *B.* in this Form, *Sir, you are to pay S. S. so*  
*much of the Money belonging to the Governours and Company of Devonshire*  
*Miners, &c.* this is no such Bill of Exchange, as will intitle *S. S.* to an  
 Action against the Drawer on the Custom of Merchants; for 'tis only  
 a Direction or Appointment to the Cashier to pay the Money, and that  
 out of a particular Fund, and doth not answer the Necessity of Trade,  
 not being a negotiable Bill, or made indorsible over; and charging the  
 Drawer on such a Note, would be liable to this further Inconveniency,  
 that hereby every one, who gives his Steward an Order or Authority to  
 pay Money, might be charged for Non-payment.

*Pasch. 1 Geo 1.*  
*Jesslyn ver.*  
*Lacie, in B.*  
*R. adjudged.*

So a Bill drawn by *A.* upon *B.* requiring him to pay *C.* 7*l.* every  
 Month out of the Annuity, or growing Fund of the Drawer, is no Bill  
 of Exchange, nor the Drawee liable, tho' he accepted such Bill; for it  
 concerns neither Trade, nor Credit, but is to be paid out of the growing  
 Substistence



Subsistence of the Drawer; so that if the Party die, or the Fund be taken away, the Payment is to cease and determine.

Also it hath been resolved, that if *A.* give a Note to *B.* for the Payment of a Sum of Money when he the said *A.* should marry such a one; *B.* cannot bring an Action on such Note, and declare as on a Bill of Exchange, setting forth the Custom of Merchants, &c. for that in Truth there is no such Custom, being only an Agreement founded on a Marriage-Brokerage, and to pay Money on a collateral Contingency; which Contingency cannot be called Trading, so as to come within the Custom of Merchants.

But it hath been held, that a Note drawn in these Words, *I promise to Account with J. S. or his Order, for 50l. Value received by me, &c.* is a good negotiable Note, within the Statute (a) 3 & 4 Ann. and that the Word *Account* shall be construed the same as to *pay*, and not to render an Account, as Factor or Bailiff; and the rather, because he is not only accountable to *J. S.* but likewise to his *Order*; which he cannot be as Factor or Bailiff, and therefore it must be to pay the Money to the Indorsee, or Order of *J. S.*

a Promise to pay *J. S.* 50l. or Surrender the Principal, is not a negotiable Note within this Statute. — So in the Case of *Appleby* ver. *Eddolth*, a Note in these Words, *I promise to pay J. S. so much Money, if my Brother doth not pay it within such a Time*, was held not to be a negotiable Note within the said Statute; because the Drawer's becoming a Debtor depended on a Contingency, and was not so originally. 1 Mod. Ca. L. & E. 362 3.

It hath been resolved, that a Bill of Exchange drawn by a Gentleman, who is no Trader, shall notwithstanding make him responsible within the Custom of Merchants; for otherwise, Persons of Distinction travelling abroad would suffer in their Credit; and it might bring a general Inconveniency on Trade itself; when it came to be known to Foreign Merchants, that there were some who, tho' they took upon themselves to draw Bills of Exchange, yet were not liable to the Payment thereof.

### 3. Who shall be said liable to the Payment thereof; and therein of suing the Drawer, Indorfor, or Acceptor.

It is clear, that (b) every Drawer of a Bill is liable to the Payment thereof, as is every (c) Acceptor and Indorfor; also, (d) if there are several Indorfors of the same Bill, the last Indorsee may bring his Action against the first Indorfor, or any of them; for the Indorsement is *quasi* a new Bill, or at least a Warranty, as some Books express it, by the Indorfor, that the Bill shall be paid.

cepted it, cannot afterwards revoke it. *Molloy* 283. (d) *Skin.* 343.

So if a Bill be drawn upon *A.* and he accepts it, and afterwards refuses Payment, upon which the Bill is protested, the Person to whom it is payable may bring several Actions against the Acceptor and the Drawer; for the Protest is no Discharge of the Acceptor.

But tho' the Drawer, Acceptor and Indorfor, are all liable, yet the Party can have but one Satisfaction; yet until such Satisfaction is actually had, he may sue all, or any of them; and accordingly it was adjudged in the *Exchequer-Chamber*, where the Case was, An Indorsee sued the Drawer, and had Judgment against him; and he also brought an Action against the Indorfor, to which the Indorfor pleaded the Judgment against the Drawer; but the Plea was held ill; for that the Judgment

4 Mod. 242.  
Comb. 227.  
S. C. *Pearson*  
ver. *Garret*.

*Pasch* 11 Geo.  
1. *Morris*  
ver. *Lea*.  
(a) But it is  
said to have  
been resolved,  
in the  
Case of *Smitb*  
ver. *Bokeme*,  
1 Geo. 1. that  
this Statute.

*Carth.* 82.  
1 *Shew.* 125.  
*Witterly* ver.  
*Sarsfield*.  
Comb. 45.  
152. S. C.  
ill reported

(b) That  
if several  
Drawers sub-  
scribe, all  
are liable.  
*Molloy* 278.

(c) And having  
once ac-

(d) *Skin.* 343.

*Molloy* 273.

3 Mod. 86.  
1 *Lutw.* 880,  
882.  
*Skin.* 255.  
Co. 4. 32. S. C.  
*Clexten* ver.  
*Sew* 11.

ment was no Satisfaction, without which the Party could not be barred of the Remedy which he had against the other.

*Molloy* 281,  
285.

(a) So if one  
subscribe for  
the Honour  
of him who  
subscribes  
for the Ho-  
nour of the  
Drawer.

*Carth.* 129,  
130.

*Lut.* 196.

*Ca. L. & Eq.*  
*Loviere* ver.  
*Laubray.*

And not only the Drawer, Acceptor and Indorfor are liable, but also by the Custom of Merchants, if one Merchant draw a Bill which is protested, and another hearing thereof declare that he, for the Honour of the (a) Drawer, will pay the Contents; and thereupon subscribes in these or the like Words, *I the under-written do bind my self as Principal, according to the Custom of Merchants, for the Sum mentioned in the Bill of Exchange, whereupon this Protest is made, &c.* this shall as effectually bind him, as if he had been the original Drawer; and by this the Person to whom the Bill is payable hath his Remedy, both against such Person, as Surety, and also against the Principal; but the Principal, or original Drawer, is liable to him who thus subscribes for his Honour.

If *A.* draw a Bill on *B.* who has Effects of his in his Hands, and *B.* accepts the Bill, which is afterwards protested for Non-payment, and the Bill is afterwards indorsed to *A.* the Drawer, he may maintain an Action as Indorfor against *B.* but if there had been no Effects of *A.*'s in the Hands of *B.* so that the Acceptance was only for the Honour of *A.* the Drawer, he could have no Action; for thereby the Money would be recovered only to be repaid again.

1 *Salk.* 126.  
cont.

1 *Salk.* 133.

It hath been held by some Opinions, that tho' an Indorfor be liable, that yet, in an Action against him, it must be alledged in the Declaration, that the Money was demanded of the Drawer, he being the Principal Debtor, and the Indorfor only a Surety, warranting Payment in case the Drawer made Default; but the better Opinion seems to be, that this is not material, every Indorfor being to be considered as making a new Bill, or Note, on whose Credit alone perhaps the Money was given, and the Drawer not at all known to the Indorfee; but it seems to be more advisable, to give it in Evidence, that there was a Demand on the Drawer, or an Endeavour to find him out; but this also has been thought by (b) some not to be necessary.

(b) The  
Chief Ju-

stices *Holt*, *Raymond* and *Eyre* held, that a Demand on the Drawer was requisite to be given in Evidence, the Indorfor's Engagement being only conditional. — But *Parker*, *Pratt* and *King* held it not to be necessary; said by Lord *Hardwick*, *Mitch.* 10 *Geo.* 2. to have been so ruled by them at the Sittings; and of the latter Opinion he seemed to be himself; and held it clearly, not to be necessary to alledge it in Pleading.

#### 4. Who shall be said intitled to the Money.

*Carth.* 130.

The Money is to be paid to him in whose Favour the Bill is drawn, or to the Indorfee, in case it be indorsed over; of which Indorsement it seems the Drawer, Acceptor and Drawee must take Notice at their Peril; also, if there are several Indorsors and Indorfees, the last Indorfee is intitled to the Money.

1 *Show.* 165.  
*Dekers* ver.  
*Harriat.*

If a Bill of Exchange is made payable to *A.* who indorses it to *B.* who indorses it to *C.* which is protested for Non-payment; *B.* may bring an Action on this Bill, notwithstanding his Indorsement.

*Carth.* 5.  
*Skm.* 264.  
1 *Show* 5. S.C.  
*Evans* ver.

*Cramlington*,  
adjudged  
and affirmed

in the *Exchequer Chamber.* 2 *Vent.* 309. S. C. adjudged; it appearing that the Bill was indorsed before any Seizure, or Writ of Extent issued out, and that an Indorsement on such Bill was good, by the Custom of Merchants.

rest, and no (a) legal Remedy for the Money; and B. is only responsible in Equity to C. for the Breach of Trust.

(a) So in  
Debt on a  
single Bill

made to A. to the Use of him and B. the Defendant pleads a Release made to him by B. and on Demurrer it was adjudged for the Plaintiff without Difficulty; for B. is no Party to the Deed, and therefore can neither sue nor Release it; but it is an equitable Trust for him, and suable in the Chancery, if A. will not let him have Part of the Money; and the Book of E. 4. cited, that he might release in such Case, was denied to be Law. 1 Lev. 235. *Offly ver. Ward.*

### 5. Of the Indorsement.

Indorsement is a Term known in Law, which, by the Custom of Merchants, transfers the Property of the Bill or Note to the Indorsee; and is usually made on the Back of the Bill, and must be in Writing; but the Law hath not appropriated any set (b) Form of Words, as necessary to this Ceremony; and therefore it hath been held, that if a Man write on the Back of a Bill of Exchange, *this is to be paid to J. S. or, the Content of this Bill is to be paid to J. S.* and sets his Hand to it, this is a good Indorsement.

*Molloy* 281.  
*Farej.* 86, 87

(b) An Indorsement set forth in these Words, *Indorsavit super Billam illam content' billa*

*illius solvend'*, is sufficient after Verdict, without shewing that it was subscribed. 1 Salk. 130.

So if A. having a Bill of Exchange, writes his Name on the Back of it, and sends it to J. S. his Friend, to get it accepted, which is done accordingly; A. notwithstanding his Name, may bring an Action against the Acceptor; altho' objected, that the Property was transferred to J. S. for J. S. had it in his Power, either to act as Servant or Assignee; and if he had filled up the Blank Space, making the Bill payable to him, that would have witnessed his Election to have received it as Indorsee; but that being omitted, his Intention is presumed to act only as Servant to A. whose Name he would use only in order to write the Acquittance over it.

1 Salk. 126.  
Clark ver.  
Pigot.  
*Molloy* 281.  
S. P. and  
said to be an  
usual Practice  
among  
Merchants.

A Bill payable to a Man's Order is payable to himself, and he may bring an Action thereon, averring that he made no Order, &c.

1 Salk. 130.  
Comb. 401.

So where a Bill of Exchange was indorsed in this Manner, *Pay the Contents of this Bill unto the Order of J. S.* who brought his Action as Indorsee, averring he had made no Order to any Body to receive the Money; and on Demurrer, because that J. S. could not maintain an Action, because the Indorsement was not to him, but to his Order, the Court held the Action well brought against the Indorfor; and that among Tradesmen, this Form of Indorsement is commonly used, altho' it is intended to be made payable to the Person whose Order is mentioned.

*Carth.* 403.  
*Fisher* ver.  
*Pomfrett.*

As to the Indorsing of Bills, a Difference has been taken between a Bill payable to J. S. or Bearer, and J. S. or Order; that the first is not assignable by the Contract, so as to enable the Indorsee to bring an Action, if the Drawer refuse to pay; because there is no such Authority given to the Party by the first Contract; and the Effect of it is only to discharge the Drawee, if he pays it to the Bearer, tho' he comes to it by Trover, Theft or otherwise; but when the Bill is payable to J. S. or Order, there an express Power is given to the Party to assign, and the Indorsee may maintain an Action.

1 Salk. 125.  
3 Lev. 299  
*Skin.* 343  
1 Salk. 133.  
Comb. 204,  
466.

Also, tho' an Assignment of a Bill, payable to J. S. or Bearer, be no good Assignment to charge the Drawer with an Action on the Bill, yet it is a good Bill between the Indorfor and Indorsee, and the Indorfor is liable to an Action for the Money; for the Indorsement is in Nature of a new Bill.

1 Salk. 125,  
133.  
*Skin.* 343,  
411.

So it hath been adjudged, that an Indorsee of a Bill, payable to J. S. or Bearer, may maintain an Action against the Drawer; on alledging a special Custom, that such Bill should bind him; which Custom is so found, or confessed by the Defendant.

1 Salk. 125.  
3 Lev. 299.

- <sup>1</sup> Salk. 128. Also, in Cases of Bills purchased at a Discount, there is said to be this Difference, that if it be a Bill payable to *A.* or Bearer, it is an absolute Purchase; but if to *A.* or Order, and it is indorsed Blank, and filled up with an Assignment, the Indorser must warrant it as much as if there had been no Discount.
- <sup>1</sup> Salk. 126. A Bank-Bill payable to *A.* or Bearer, being given to *A.* and lost, was found by a Stranger, who transferred it to *C.* for a valuable Consideration; *C.* got a new Bill in his own Name; and *per Holt* Ch. J. *A.* may have Trover against the Stranger who found the Bill, for he had no Title; tho' Payment to him would have indemnified the Bank; but *A.* cannot maintain Trover against *C.* by Reason of the Course of Trade, which creates a Property in the Assignee, or Bearer.
- Ca. L. and Eq. 246. A Note payable to a Feme Sole, or Order, who afterwards marries, can only be indorsed by the Husband.
- Earth. 466. It hath been adjudged, that a Bill of Exchange, or promissory Note, cannot be indorsed over for Part, so as to subject the Party to several Actions; as if *A.* having a Bill of Exchange upon *B.* indorses Part of it to *J. S.* *J. S.* cannot bring an Action for his Part; altho' he alledge a Custom amongst Merchants for such Kind of Indorsements; for the Contract being intire, and subjecting him only to one Man's Action, no Custom can make him liable to two or more Actions for the same Debt.
- Hawkins ver. Cardy. <sup>1</sup> Salk. 65. S. C. where it is said, that the Plaintiff should have acknowledged Satisfaction for the Rest.

## 6. Of the Acceptance : And herein,

### 1. What shall be said a good Acceptance.

- Cro. Jac. 308. Hard. 487. It hath been already observed, that an Acceptance, by the Custom of Merchants, as effectually binds the Acceptor, as if he had been the original Drawer; and that having once accepted it he cannot afterwards revoke it; so that herein only we are to see, what Act of his will amount to an Acceptance.
- Molloy 278. And herein it is said, that every small Matter will amount to an Acceptance; and that any Words will be sufficient for that Purpose, which shews the Party's Assent or Agreement to pay the Bill; as if, upon the Tender thereof to him, he subscribes *accepted*, or, *accepted by me A. B.* or, *I accept the Bill, and will pay it according to the Contents*; these clearly amount to an Acceptance.
- Comb. 401. So if the Party under-writes the Bill presented such a Day, or only the Day of the Month; this is such an Acknowledgment of the Bill as amounts to an Acceptance.
- Molloy 280. So if the Party says, *Leave your Bill with me, and I will accept it, or Call for it to Morrow, and it shall be accepted*; these Words, according to the Custom of Merchants, as effectually bind, as if he had actually signed or subscribed his Name according to the usual Manner.
- Molloy 279, 280. said to have been so ruled by Hale Ch. J. But if a Man says, *Leave your Bill with me, I will look over my Accounts and Books between the Drawer and I, and call to Morrow, and accordingly the Bill shall be accepted*; this does not amount to a compleat Acceptance; for the Mention of his Books and Accounts, shews plainly that he intended only to accept the Bill, in case he had Effects of the Drawer's in his Hands.
- Mich. 12 Geo. 1. Wilkinfon ver. Lutwich, cor. Raymond C. J. at Nisi Prius. But where the Drawee wrote a Letter to the Person, in whose Favour the Bill was drawn, to this Purport, *That if he would let him write to Ireland first, he would pay him*; this was held a good Acceptance.
- Mich. 6 Geo. 1. Car ver. Coleman in B. R. So where a Foreign Bill was drawn on the Defendant, and being returned for Want of Acceptance, Defendant said, *That if the Bill came back again, he would pay it*; this was ruled a good Acceptance.

It seems clear, that a parol Acceptance is sufficient at Common Law to charge the Acceptor; also it hath been adjudged, since the Statute 3 & 4 Anne, *supra*, that an Indorsee of an Inland Bill of Exchange may maintain an Action against the Acceptor, on a parol Acceptance, as to the principal Sum, tho' not as to Interest and Costs; for the Act being made to give a further Remedy, for Interest, Damages and Costs against the Drawer, cannot be supposed to take any Advantage from the Payee which he had before; and therefore the true Construction of the (a) Act is, that to charge the Drawer with Interest and Costs, the Drawee must refuse to accept it in Writing; nevertheless, if he accepts the Bill by Parol, he is liable to the principal Sum in the Bill, as he would have been before the Act.

*Mich. 8 Geo. 2. Lumley ver. Palmer in B. R.*

(a) So on the Statute of 9 & 10 W. 3. which gives Damages and Costs, in

case of a Protest, it hath been held, That that Statute did not take away the Party's Remedy against the Drawer, if there was no Protest, as to the principal Sum, but only as to the Damages and Costs. 4 Mod. 80, 81. 1 Salk 131. *Brough ver. Parkin.*

## 2. Whole Acceptance Shall bind.

A Bill drawn on two, must regularly have a joint Acceptance; but if there are two joint Traders, and one accepts a Bill drawn on both, for him and Partner, this shall bind both, if it concerns the Trade; otherwise if it concerns the Acceptor only in a distinct Interest and Respect.

*Melley 279. 284. 1 Salk. 126. Pinkney ver. Hall.*

If a Book-keeper or Servant having Authority, or usually transacting Business of this Nature for his Master, accept a Bill of Exchange, this shall bind his Master.

*Melley 282. But for this vide Tit. Master and Servant.*

A Bill of Exchange was drawn by A. Agent to the York-Buildings Company in Scotland, on B. their Cashier in London, in the Words following, To \_\_\_\_\_, Cashier to the Honourable Governor and Assistants of the York-Buildings Company, at their House in Winchester-street: Sir, Pray pay to J. S. or his Order 200 l. and place it to the Account of the Company, for Value received, as per Advice from your humble Servant. The Letter of Advice; referred to, was directed to the Governor and Company, informing them of the Draught made upon B. in Favour of J. S. but it did not appear, that this was the usual Method of drawing Bills on the Company; B. accepted the Bill generally; and this Bill having been indorsed over, and an Action thereon brought by the Indorsee against B. the Question was, whether this Acceptance should charge him in his own Right, or not. And it was held that it should; this being in every Respect a good Bill of Exchange; and only the Drawer, Payee and Acceptor concerned in it, as far as appears on the Face of the Bill; for tho' it may be for the Advantage of the Company, yet they are not liable to the Payment of it; nor is the Person in whose Favour it was drawn, or the Indorsee, obliged to take Notice of such Advantage, or of any Transactions between them and their Cashier, or how they stand liable to each; for were it allowed, that an Indorsee must be put to seek a Pay-master that bears no visible Part in the Transaction, this would be such a Prejudice to Trade, and Paper-Credit made so blind and hazardous a Thing, that no Man in his Senses would ever be engaged in it; and as to the Letter of Advice, this was held to be only a private Transaction between the Drawer and a Stranger; which it is not to be imagined the Payee or Indorsee could be privy to, and therefore cannot be any Prejudice to them; nor a Circumstance fit for the Consideration of a Jury, before whom nothing ought to be laid, in Cases of this Kind, but what all Persons concerned in the Transaction may be reasonably supposed to know; and those are all Things visible on the Bill, but no Circumstance extrinsick to it.

*Melley 282. Thomas ver. Bishop in B. R.*

## 3. Whether

## 3. Whether an Acceptance may be qualified.

Comb. 452.  
Petit ver.  
Benfon.

It is held, that an Acceptance may be qualified, as thus; I accept this Bill, Half to be paid in Money, and Half in Bills, and this is good by the Custom of Merchants; for he, who may refuse the Bill totally, may accept it in Part; but he to whom the Bill is due, may refuse such Acceptance, and Protest is so to charge the Drawer. Also it is said, that after such Acceptance and Refusal of Payment, he hath the same Liberty of charging the Drawer, that he had in Case the Bill had been accepted absolutely and Payment refused.

1 Molloy 283.

So the Drawee may accept the Bill, to pay it at longer Day than that on which it is made payable, and this shall bind him; but herein Care must be taken, that the Drawee, by such Acceptance or Agreement, be not a Sufferer.

Molloy 285.  
per Pemberton, Ch. J.

A Bill was drawn payable the first of *January*; the Person on whom the Bill was drawn accepts the Bill, to be paid the first of *March*; the Servant brings back the Bill; the Master perceiving this enlarged Acceptance, strikes out the first of *March*, and puts in the first of *January*, and then sends the Bill to be paid; the Acceptor then refuses; whereupon the Person to whom the Monies were to be paid, strikes out the first of *January*, and puts in the first of *March* again; in an Action brought on this Bill, the Question was, whether these Alterations did not destroy the Bill; and ruled it did not.

Carth. 459,  
460.

1 Salk. 127,  
129.

1 Lutw. 233.  
Jackson ver.  
Pigot.

If *A.* draw a Bill payable such a Day, and the Drawee accept it some Time after, he is liable; and in an Action against him the Plaintiff may declare, that *secundum tenorem & effectum Billæ* he did not pay, &c. for the Effect of the Bill is the Payment, and not the Day of Payment.

## 7. Of the Protest: And herein,

## 1. Of the Necessity and Validity of the Protest.

Molloy 279.  
6 Mod. 80.  
1 Salk. 131.

A Protest does not raise any Debt, but only serves to give formal Notice, that the Bill is not accepted, or accepted and not paid; and this by the Common Law was, and is still necessary on every foreign Bill before the Drawer can be charged; but it was not required on any Inland Bill, before the Statute of 9 & 10 W. 3. nor does the Want of it since that Statute destroy the Remedy, which the Party had before against the Drawer, but only deprives him of Interest and Costs against the Drawer, unless there be Notice by Protest, as that Statute prescribes.

Molloy 285.

(a) Alledging  
in Pleading,  
that the Par-  
ty, on whom  
the Bill was  
drawn, *non  
fuit inventus*,  
is sufficient

He, to whom the Bill is payable, must regularly resort to the Drawee, and desire him to accept the Bill, before there can be a Protest; but if he be dead, or cannot be (a) found, these are good Causes for protesting the Bill; also, if after Acceptance the Drawee dies, there is to be a Demand of his Executors or Administrators, and in Default of Payment, a Protest; and in Case the Money becomes due before an Executor or Administrator can be appointed, yet this Delay is sufficient Cause to protest the Bill.

to intitle the Party to a Protest, without shewing that Enquiry was made after him; for this shall be intended, being according to the Custom of Merchants, and is therefore the usual Form of Pleading in those Cases. Carth. 510.

Molloy 285.

But if he, to whom the Money is to be paid, dies, there can be no Protest before Probate of his Will or Administration granted; for none but his

his Executors or Administrators can give a legal Discharge or Acquittance for the Money, and consequently none others can sue for or demand the same; and tho' Security be offered to indemnify the Drawee against the Executors or Administrators, yet is he not obliged to accept thereof, being a Matter left entirely to his own Discretion, to judge and determine on the Sufficiency of such Security; and in this Case it is said, that if a publick Notary protest the Bill, an Action on the Case lies against him.

If a Bill be left with a Merchant to accept, which is (a) lost or mislaid, he to whom it is payable, is to request the Merchant to give him a Note for the Payment, according to the Time limited in the Bill; otherwise there must be two Protests, the one for Non-acceptance, and the other for Non-payment; and tho' such Note be given, yet, if the Merchant happens to fail, there must be a Protest for the Non-payment, in order to charge the Drawer.

*Molloy* 181.  
(a) Where a Bill is casually lost, and no new one can be had, and the Party on whom it is drawn, does not in-

sist on having the original Bill, but refuses Payment for another Reason; a Protest made on a Copy is sufficient. 1 *Shew.* 164.

The Protest is usually made by some Publick Notary, and such Protest is, *prima facie*, good Evidence that the Bill was not accepted, or if accepted, that it was not paid, and sufficient to put the Proof on the other Side.

*Molloy* 281.  
*Skin.* 272.

And as, by the Custom of Merchants, Publick Notaries usually protest Bills, it hath been held, that Pleading *Protestavit seu Protestari causavit* is sufficient; and that the Party may plead *Protestavit*, and give in Evidence that the publick Notary did it.

*Comb.* 153.

## 2. At what Time to be made, and therein of giving Notice to the Drawer of the Drawee's Refusal, so as to intitle the Party to Principal, Interest and Costs.

A Protest on a foreign Bill of Exchange is absolutely necessary to intitle the Party to recover against the Drawer, not only Interest and Costs, but likewise the principal Sum; and for this Purpose the Bill must be presented in a reasonable Time; and in Case of Refusal of Acceptance, or in Case the Drawee cannot be found, it must be protested in reasonable Time, and Notice of such Protest, as also Notice of a Protest after Acceptance and Non-payment given to the Drawer in a reasonable Time; for tho' the Drawer is bound to the Party to whom the Bill is payable, 'till Payment be actually made, yet it is with this Condition and proviso, says *Molloy*, that Protest be made in due Time, and a lawful and ingenious Diligence used for the obtaining Payment of the Money; and the Reason hereof is, that the Drawer might have had Effects, or other Means of his, upon whom he drew, to reimburse himself the Bill, which since, for Want of timely Notice, he hath remitted or lost, it were unreasonable the Drawer should suffer thro' his Neglect; but as to the exact Time herein, the Law hath not determined it, but the same is to be left to a Jury, who are to govern themselves according to the Customs of Merchants in these Cases, and the Usages of particular (b) Countries.

*Molloy* 284.  
1 *Vent.* 45.  
*Skin.* 411.

if a Bill be not presented in 2 Months, the Drawer is not answerable, and in *Holland* in so many Weeks. 1 *Shew.* 165.

(b) It is said, that in *France*

As to Inland Bills, tho' a Protest was not necessary by the Common Law, in order to sue the Drawer, and is only now necessary by the Statute 9 & 10 *W.* and 3 & 4 *Ann. ut supra*, to intitle the Party to Interest and Costs; yet convenient Notice must be given by the Party, to whom the Bill is payable, to the Drawer, of the Drawee's Refusal of Payment, and if any Damages accrue to the Drawer for Want of such

6 *Mot.* 80, 91.  
1 *Salk.* 131.  
*Comb.* 384.  
*Cartb.* 510.  
1 *Shew.* 513.



Notice, it must be born by the Person to whom the Bill is payable; but this also must be left to a Jury, who are to determine herein, according to the Circumstances and the Customs of Merchants.

1 Salk. 127.  
Allen ver.  
Dokarra at  
Guldball.

*A.* drew a Bill on *B.* payable in 3 Days, *B.* broke; the Person, to whom the Bill was payable, kept it by him 4 Years, and then brought *Assumpsit* against the Drawer; & *per Treby*, Ch. J. When one draws a Bill of Exchange, he subjects himself to the Payment, if the Person on whom it was drawn, refuses either to accept or pay; yet that is with this Limitation, that if the Bill be not paid in convenient Time, the Person to whom it is payable shall give the Drawer Notice thereof; for otherwise the Law will imply the Bill paid, because there is a Trust between the Parties; and it might be prejudicial to Commerce, if a Bill may rise up to charge the Drawer at any Distance of Time, when in the mean Time all Reckonings and Accounts are adjusted between the Drawer and Drawee.

Molloy 284.

1 Show. 164.  
S. P. that the  
third Day is  
the Day of  
Grace.

6 Mod. 156.  
*per cur*

Merchants generally allow 3 Days after a Bill becomes due for the Payment, and for Non-payment within 3 Days Protest is made, but is not sent away till the next Post after the Time of Payment is expired, and if *Saturday* be the 3d Day, no Protest is made till *Monday*.

Interest upon a Bill of Exchange commences from the Demand made; and therefore if there was no Demand made till Action brought, Defendant may plead Tender and Refusal, and *uncore Prist*, and so discharge himself of Interest; but if it be the Defendant's Fault, that Demand could not be made, as if he were out of the Kingdom, there Want of Demand ought not to prejudice the Plaintiff.

## 8. Of the Action and Remedy on a Bill of Exchange, and Manner of Declaring and Pleading therein.

Hard. 485

1 Mod. 281.

1 Vent. 152.

1 Lev. 298.

2 Keb. 695,

713, 758,

822.

1 Salk. 125.

2 Lutw.

1594.

Skin. 255.

6 Mod. 129.

1 Vent. 153.

(a) So if

Goods deli-

vered.

1 Rol. Abr. 32.

accepted.

Co. Lit. 182.

2 Inst. 404.

Yelv. 136.

4 Co. 76.

Cro. Car. 301.

Hard. 486.

Salk. 125,

127.

Lutw. 233.

Carth. 83,

269.

5 Mod. 367.

It seems to be agreed, that against the Drawer an Action of Debt, or a general *Indebitatus Assumpsit* will lie, for he having received the Money, the Law raises a Contract, and lays him under an Obligation to pay it; but it hath been adjudged, that neither an Action of Debt, nor an *Indebitatus Assumpsit* will lie against the Acceptor of a Bill of Exchange, and that therefore the Remedy against him must be by a special Action on the Case, founded on the Custom of Merchants; for the Acceptance is only a collateral Engagement to pay the Debt for another, in the same Manner as a Promise by a Stranger to pay, &c. if the Creditor will forbear his Debt.

But tho' a general *Indebitatus Assumpsit* will not lie against the Acceptor of a Bill of Exchange, yet, if *A.* delivers Money to *B.* to pay over to *C.* and gives *C.* a Bill of Exchange drawn upon *B.* and *B.* accepts it, *C.* may have an *Indebitatus Assumpsit* against *B.* (a) as having received Money to his Use, but must not declare only upon the Bill of Exchange

As to the Manner of declaring on a Bill of Exchange, this is said to have varied the Declaration in some Cases being general, sometimes special, and laid with an express Promise, and at other Times without; but it seems to be now settled, that the Custom of Merchants, concerning Bills of Exchange, being Part of the Common Law, of which the Judges will take Notice *ex officio*, it is unnecessary to set forth the Custom specially in the Declaration, and that it is sufficient to say, that such a Person, according to the Usage and Custom of Merchants, drew the Bill.

1 Show. 127. 3 Mod. 226.



## Misnomer and Addition.

**T**HE Names of Men, at this Day, are only Sounds for Distinction Sake, tho' perhaps they originally imported something more, as some natural Qualities, Features or Relations; but now there is no other Use of them, but to mark out the Families or Individuals we speak of, and to difference them from all others; since therefore they are the only Marks and *Indicium* of Things that human Kind can understand each other by, we must see what Certainty the Law requires herein, and what the Effects and Consequences are of the Omission of the Name, or false Specification of the Party; and this we shall do under the following Heads.

- (A) What Names are the same, and may or may not be mistaken.
- (B) What Names and Additions are required by Law, and must be truly inserted: And herein,
  - 1. Of the Difference between the Christian Name and Surname.
  - 2. Of the Addition of the Estate or Degree.
  - 3. Of the Addition of the Mystery.
  - 4. Of the Addition of the Town, Hamlet, Place or County.
  - 5. Of Additions which are only Conveyances to the Action.
- (C) Where the Name is truly put at first, and afterwards varied from.
- (D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.
- (E) At what Time the Mistake must be taken Advantage of, and how the same is salved.
- (F) Of the Manner of taking Advantage of, and Pleading a Misnomer or Want of Addition.
- (G) Who may take Advantage thereof.

(A) What

(A) What Names are the same, and may or may not be mistaken.

*Cro. Jac.* 425.  
2 *Rel. Abr.*  
135.  
*Piers Griffith*  
ver. *Hugh*  
*Middleton.*

IF two Names are in an original Derivation the same, and are taken promiscuously to be the same in common Use, tho' they differ in Sound, yet there is no Variance; and therefore where *Piers Griffith* brought an *audita Querela*, to which an Outlawry was pleaded by the Name of *Peter Griffith*, the Plea was allowed; for it appears by Acts of Parliament, that *Piers* and *Peter* have been used promiscuously, as signifying the same Person.

2 *Rel. Abr.*  
135.

So *Saunders* and *Alexander*, *Jane* and *Joan*, *Jean* and *John*, *Garret*, *Gerat* and *Gerald*, are the same Names.

1 *Leon.* 147.  
2 *Rel. Abr.*  
135.

But *Ralph* and *Randall*, *Randolphus* and *Randalphus*, *Sibel* and *Isabella*, have been held to be distinct Names; and so of others, in which there is a substantial Variance in Sound, Original, and common Use.

2 *Rel. Abr.*  
135.

So *Agnes* and *Anne* are different Names; and therefore if one declare against *J. S.* and *Agnes* his Wife, and on the Record of *Nisi prius* it is against *Anne* his Wife, this is a material Variance and not amendable.

*Id.* Head of  
Amendment.

If there are two *English* Names that are distinct, and one *Latin* Name for them both, such Name shall serve for both, as *Jacobus* for *James* and *Jacob*, altho' two distinct *English* Names.

2 *Rel. Abr.*  
136.  
3 *Keb.* 278.  
1 *Med.* 107.

(B) What Names and Additions are required by Law, and must be truly inserted: And herein,

1. Of the Difference between the Christian Name and Surname.

*Cro. Jac.* 558,  
640.  
*Owen* 107.  
*Dyer* 279.  
5 *Co.* 43.  
*Poph.* 57.  
*Noy* 135.  
*Cro. Eliz.* 57,  
222.

IF the Christian Name be wholly mistaken, this is regularly fatal to all legal Instruments, as well Declarations and Pleadings, as Grants and Obligations; and the Reason is, because it is repugnant to the Rules of the Christian Religion, that there should be a Christian without a Name of Baptism, or that such Person should have 2 Christian Names, since our Church allows of no Re-baptizing; and therefore if a Person enters into a Bond by a wrong Christian Name, he cannot be declared against by the Name in the Obligation, and his true Name brought in an *Alias*, for that supposes the Possibility of two Christian Names; and you cannot declare against the Party by his right Name, and aver he made the Deed by his wrong Name; for that is to set up an Averment contrary to the Deed; and there is this Sanction allowed to every solemn Contract, that it cannot be opposed but by a Thing of equal Validity; and if he be impleaded by the Name in the Deed, he may plead that he is another Person, and that it is not his Deed.

60. *Lit.* 5.  
2 *Rel. Abr.*  
135. Judge  
*Gawdy's*  
Case, who  
was christen-  
ed by the  
Name of

But tho' Persons cannot have two Christian Names at one and the same Time, yet they may, according to the Institution of the Church, receive one Name at their Baptism, and another at their Confirmation; for tho' it allows no Re-baptizing to make double Names, yet it doth not force Men to (a) abide by the Names given them by their Godfathers, when they come themselves to make Profession of their Religion.

*Thomas*, and confirmed by the Name of *Francis*. (a) But a Person, by taking a new Name of Confirmation, does not lose his Name of Baptism. 6 *Med.* 115-6.

The Mistake of the Surname does not vitiate, because there is no Repugnancy that a Person should have different Surnames; and therefore if *John Gape* enters into an Obligation by the Name of *John Gate*, he may be impleaded by the Name in the Deed, and his real Name brought in by an *Alias*, and then the Name in the Deed he cannot deny, because he is estopped to say any Thing contrary to his own Deed.

The Declaration must be of the Name in the Obligation, with an *Alias* of the real Name; for the Declaration must shew the Cause of Complaint as it is; therefore it must in all Things follow the Obligation, and the Intent of the *Alias* is only to shew he has been differently called from the Name in the Obligation; and therefore, if a Man oblige himself by the Name of *J. S. Esq*; and afterwards he is made a Knight, the Plaintiff may declare against *J. S. Knight*, alias *J. S. Esquire*.

A Person cannot take Advantage of a mistaken Surname in an Indictment, either by Plea in Abatement or otherwise, notwithstanding such Surname have no Affinity with his true one, and he was never known by it; and in this Respect an Indictment differs from an Appeal, whereof it is certain, that a Misnomer of a Surname may be pleaded in Abatement, as well as any other Misnomer whatsoever.

## 2. Of the Addition of the Estate or Degree.

It seems, that the Common Law in no Case required any other Description of a Person, than by his Christian Name and Surname, unless he were of the Degree of a Knight or some higher Dignity; but the Names of Dignity were always required, being Marks of Distinction imposed by publick Authority, and therefore make up the very Name of the Person to whom they are given, and they are of two Sorts; 1<sup>st</sup>, Such Marks of Distinction as exclude the Surname, so that the Persons may not seem to be of any common Family; and such are the Names of Earls, Dukes, &c. 2<sup>dly</sup>, Such Marks of Distinction as are also imposed by the supreme Power, and Parcel of the Name itself, but do not exclude the Surname, such as Knight, Baronet, &c. and these Marks of Distinction were always to be made use of as Part of the Name in all legal Proceedings; and so curious was the Law herein, that if a Plaintiff in any Action, gained a new Name of Dignity, hanging a Writ, he made it abatable; but this Inconvenience is remedied by 1 *E. 6. cap. 7. sect. 3.* by which it is enacted, 'That if any Plaintiff, in any Manner of Action, shall be made a Duke, Archbishop, Marquess, Earl, Viscount, Baron, Bishop, (a) Knight, Justice of either Bench, or Serjeant at Law, depending the same Action, that such Action for such Cause shall not be abatable or abated.'

(a) But it hath been holden, that the Dignity of a Baro.

net is not within the Statute, because there was no such Dignity at the Time of the making of it. 1 *Sid. 40. Lit. Rep. St. Cro. Car. 104.*

But Names of Worship, such as Esq; Gentleman and Yeoman, since they are only Names of Distinction in popular Use, and not given by the publick Authority of the supreme Power, the Law doth not count them Parcel of the Name, and therefore were not necessary at Common Law.

In the Time of *H. 5.* it was perceived, that the Christian and Surname were not sufficient Determinations of Persons, and did not sufficiently avoid the Confusion that might happen by the Mistake of Persons; and that an innocent Person might, upon a Process or Execution, be distrained upon having the same Name, with the real Defendant; and therefore by the 1 *H. 5. cap. 5.* It is enacted, 'That in every original Writ of Actions, personal Appeals and Indictments, and in which the Exi-

2 *Inst. 670.*  
2 *Rob. Rep. 225.*

gent shall be awarded, to the Names of the Defendants in such Writs Original, Appeals and Indictments, Additions shall be made for their Estate or Degree, or Mystery, and of the Towns or Hamlets, or Places and Counties of the which they were or be, or in which they be or were conversant; and if by Process upon the said Original Writs, Appeals or Indictments, in the which the said Additions be omitted, any Outlawries be pronounced, that they be void, frustrate and holden for none; and that before the Outlawries pronounced, the said Writs and Indictments shall be abated by the Exception of the Party, wherein the said Additions be omitted.

(a) But it is said to be no Fault to give an Esq; the Addition of Gentleman, & *fit e converso*. Bro. Addition 44.

2 Inst. 665.  
6 Mod. 85.

This Law doth not extend to the Names of Plaintiffs, for they were in no Mischief or Danger to be mistaken, nor does it extend to real or mixt Actions; because here the Possessors were impleaded who were sufficiently specified, and so no other Mark of Distinction is needful; besides, no Man can in the Process possibly be grieved, because there is no Process but of Distress upon the Land, and no (b) Imprisonment at all in these Actions.

(b) In an Assize, if the Disseisin be

found with Force, so that a *Capias pro Fine* and *Exigent* lies for the King; yet, because the Original is in the Realty, the Defendant shall have no Addition within this Act. 2 Inst. 665. — So there needs none in an inferior Court where Process of Outlawry does not lie. Moor 354. pl. 478. — Nor needs there any in any Action where Outlawry does not lie. Bro. Addition 2.

2 Inst. 669.  
2 Hawk. P.  
C. 135.

As to the Estate and Degree required by the Statute to be added, we must observe, that State is defined by the Civilians the Capacity of moral Persons; for, as natural Persons have a certain Space in which their natural Existence is placed, and in which they perform their natural Actions; so have Persons in a Community, a certain State or Capacity, in which they are supposed to exist, to perform their moral Acts and exercise all civil Relations; and therefore where one, who is neither by Birth, Office, Creation or Reputation, an Esq; or Gentleman, is named with either of these Additions; or where a Gentleman, by Birth, who follows a Trade or Husbandry, is named with the Addition of the Trade or Husbandry, and not of Gentleman; or where a Peer who has more than one Name of Dignity, is not named by the most noble; or where a Gentleman or Gentlewoman is named Spinster, or a Yeoman is named Gentleman; and such Matter is pleaded in Abatement, and found for the Person who pleads it; the Writ shall abate.

Cro. Car. 371.  
1 Jon. 346.  
Vit. 6 Mod.  
105.  
Carth. 14.  
Jefferies ver  
Snow. Comb.  
65. S. C.

It hath been adjudged to be a good Plea in Abatement to a Writ or Indictment against one by the Name of *J. S. Knight*, that he is a Baronet and no Knight.

So in Trespass against the Defendant by the Name of *William Snow*, Baronet, who pleaded in Abatement, that at the Time of the Bill purchased he was, and yet is a Knight and Baronet; and because he is not called Knight as well as Baronet, he prayed Judgment, &c. and upon Demurrer to this Plea, the Court were of Opinion that it was good.

1 Leon. 249.  
Cro. Eliz.  
542.

So if a Man be impleaded by the Name of *J. S.* where he is Garter King at Arms; this is not good, because it is not only a Name of Office, but of Dignity and Grant, made to him by the Words, *Creatus, Coronatus* and *Nomen imponimus*, &c.

2 Inst. 666.

A Bishop may be described by the Name of his Bishoprick, without the Addition of his Surname; but a Parson must be impleaded by Christian and Surname, and not *John*, Parson of *D.* because Bodies Politick are founded by Publick Authority to Political Ends; therefore the Bishop, the Superintendant of the Diocese, is made a Body Politick to subserve

serve all the Purposes of Government in the Care of Religion; and it is not thought necessary to give every Person such a Capacity.

A Bishop of an *Irish* Diocese may be as well described by the Addition of his Bishoprick, as an *English* Bishop may by the Addition of an *English* one; but it seems clear, that no one can be well described by the Addition of a Temporal Dignity in *Ireland*, or any other Nation, besides our own; because no such Dignity can give a Man a higher Title here than that of Esquire.

The Degree of a Serjeant at Law is certainly a good Addition; and so, as is generally holden, is a Degree in either University; yet a Doctor in Divinity may be described by the Addition of Clerk, as well as by that of Doctor. *Armiger, Generosus, Yeoman, Labourer*, are good Additions of the Estate and Degree of a Man, but not for that of a Woman. *Generosa, Widow, single Woman, Wife of J. S. Spinster*, are good Additions of the Estate and Degree of a Woman; and, as some say, Spinster is a good Addition for the Estate and Degree of a Man; but neither Burgefs, Citizens nor Servant, are good Additions, as being too general.

If several Defendants, of different Names, have the same Addition, it is safest to repeat the Addition after each Name; and if a Father have the same Name and Addition with his Son, the Writ against the Son is abatable; unless the Addition of *Puifne* be added to the other Additions: But if a Father be a Defendant, there is no need of the Addition of *Eigne*: Also, if the Son be declared against *in Custodia Marefcballi*, there is no need of the Addition of *Puifne*, unless the Father be also in the Custody of the Marshal.

It hath been held a fatal Fault, to apply the Addition to the Name which comes under the *Alias dictus* only, and not to the first Name; but it is said not to be material, whether any Addition be put to the Name which comes under the *Alias dictus*, or not; because what is so expressed is not material.

The Additions of the Estate, Degree and Mystery of the Party are not sufficient, unless they be the same which he had at the Time of the Writ; and in this Respect such Additions differ from that of Place, which is sufficiently shewn, by naming the Defendant late of such a Place.

Also, it must plainly appear that the Addition is referred to the Party; and therefore it is not well expressed by the Addition of his Mystery, naming him *B. A. son of A. of B. Butcher*; because Butcher refers to *A.* rather than to the Son.

### 3. Of the Addition of the Mystery.

It seems agreed, that the Word *Mystery* includes all lawful Arts, Trades and Occupations; and that if one, under the Degree of a Gentleman, have divers of such Arts, Trades or Occupations, he may be named by any of them.

The Additions of this Kind, which are said to be clearly good, are those of Husbandman, Merchant, Broker, Taylor, Point-maker, Smith, Miller, Carpenter, Cook, Brewer, Baker, Butcher, Parish-Clerk, Mercer, Fishmonger, Dyer, Schoolmaster, Scrivener, and such like.

The Additions of this Kind, which are said to be clearly insufficient, are those of Maintainer, Extortioner, Thief, Vagabond, Heretick, Common Informer, and such like.

But the following Additions of this Kind are said to be questionable: 1<sup>st</sup>, Farmer; which by the better Opinion seems to be an insufficient Addition; because if any Mystery be implied in the Notion of it, it is that of Husbandry, of which Husbandman is the proper Addition.

2<sup>dly</sup>,

2 Hawk P.C.  
188. and fe-  
veral Autho-  
rities there  
cited.

2dly, Chamberlain, Butler and Pantler; which are holden to be insufficient Additions; because they denote only a special Kind of Officer or Servant; and imply nothing which, in the common Understanding of the Words, comes under the Notion of a Mystery; and from this Ground it seems to follow, that neither Groom nor Page are good Additions; and yet in some of the old Books they seem to have been so admitted.

2 Hawk. P.C.  
188 9.

3dly, Hostler; which hath been holden to be a good Addition, and seems properly enough to come under the Notion of a Mystery; and tho' it hath been resolved, that any one who keeps an Inn, may be sued by the Addition of a Labourer, upon the Custom of the Realm, for Want of due Care of the Goods of his Guests; because whoever keeps a common Inn, is in that Respect liable to answer for such Defects, by whatsoever Addition he may be stiled; yet this does by no Means prove that such Person may not as well be sued by the Addition of Hostler, but only that he may be sued as well under any other Addition.

#### 4. Of the Addition of the Town, Hamlet, Place or County.

2 Hawk. P.C.  
189

2 Hale's Hist.  
P. C. 175.

2 Inst. 669.

Eyer 213.

Cro. Jac. 167.

2 Hawk. P.C.  
189.

It is a good Addition of this Kind, to name the Party late of such a Town; in which Respect this Addition differs from that of the Estate, Degree or Mystery; and it is said, that if a Defendant be named of *A.* and late of *B.* it is sufficient to prove either Addition.

The Addition of Place is sufficiently shewn by naming the Defendant *de Londino*, or *de Norwico*; but not by naming him *Londini* or *Bristoliz*, for that imports only that he belongs to such Town, but not that he lives there; nor by naming him of a Town which is not a County of it self, without shewing the County. If it name him of a Parish which contains several Towns, he may plead such Matter in Abatement; for the Statute says, that the Addition shall be of the Town or Hamlet; but a Parish shall be intended to contain no more than one Town, unless the contrary be shewn.

2 Hawk. P.C.  
189.

If there be two Towns in a County, the one called *Great Dale*, the other *Little Dale*, and the Defendant be named only of *Dale*; he may plead, that there are two *Dales* in the County, called *Great Dale* and *Little Dale*, and none without an Addition; and as some say, he may plead that there is no such Town as *Dale*, either in this Case, or where there is but one Town called *Little Dale*, and he is named of *Dale*.

2 Hawk. P.C.  
189.

If a Defendant live in a Hamlet, which is so far Part of a Town, that those who live in it are indifferently stiled sometimes of the Hamlet, and sometimes of the Town; it seems to be in the Election of the Plaintiff, to name him either of the Hamlet or of the Town.

2 Hawk. P.C.  
189.

If a Defendant live in a Place known by a special Name, out of a Town or Hamlet, he may be named of such Place.

2 Hawk. P.C.  
189.

The Habitation of the Wife is sufficiently shewn by shewing that of the Husband.

#### 5. Of Additions which are only Conveyances to the Action.

Vide Tit. Ex-  
ecutors and  
Administra-  
tors.

When any particular Character or Relation gives any Person Rights and Privileges, or makes him subject to any Burthen to demand the one or be liable to the other, the particular Character or Relation ought to be set forth; for since it is the Cause of the Action, it must certainly be material; and therefore when Persons sue or are sued, as Heirs, Executors or Administrators, they must be named as such, for these are neces-  
sary

fary Conveyances or Inducements to the Action, which if mistaken is fatal.

But where the Inducement is not necessary, but Surplusage only, as *Vide Tit. Heir and Ancestor.* if an Action of Detinue of Charters be brought against *J. C.* and the Writ is *Præcipe J. C. filio & heredi* of *R. C.* and he counts of a Bailment to the Defendant himself; the Defendant pleads, that he was Son and Heir to *W. C.* and not to *R. C.* this is no good Plea, because he is charged with an Injury done by himself; but if he had been charged upon any Covenant of his Ancestors, as their Representative, there the Periphrasis, or Inducement, must have been rightly formed; for otherwise the Plaintiff doth not intitle himself to his Action; and there this had been a good *•* Plea. *Cro. Eliz. 333.*

If this Inducement be not at first in a Declaration, yet if it afterwards appears, that the Party is charged as Executor, this is sufficient; as if an Action of Covenant be brought against *J. S.* Executor, and he be not named at first *J. S.* Executor of the Last Will and Testament; but afterwards it is shewn, that the Testator did covenant and bind himself, his Executor, &c. and made *J. S.* his Executor, and died; and assigns a Breach; this is sufficient without a formal Nomination. *1 Saund. 111. Dean ver. Guire.*

If an Action of Account be brought against a Parson, they need not call him Parson of *Dale*; but if an Assize be brought against a Parson or Prebend, for Land that he hath in Right of his Church, he must be named Parson or Prebend of the said Church. *2 Inst. 666.*

So if an Attorney of the Common Pleas brings a Writ of Debt, he need not name himself Attorney; but if he brings a Writ of Privilege, he ought. *Vide Head of Privilege.*

### (C) Where the Name is truly put at first, and afterwards varied from.

THE Name must be truly put at first; for if that be omitted, there is a Complaint against no Person; therefore, where in an *Assumpsit* *J. Law* declares thus; *J. L. queritur de Thom' Saunders, &c. cum in consideratione quod idem J. L. would marry the Daughter of the said Thomas Saunders, super se assumpsit* to pay him 100*l.* the Declaration is bad, tho' after a Verdict; because it does not say, *Prædict' Thom. Saunders super se, &c.* for no Body is expressly charged with Assuming; and when it is indifferent, whether there can be an Injury, or no, it is not by the Court to be supposed. *Cro. Eliz. 913. Law ver. Saunders.*

But if the Plaintiff counts against *J. S. quod præd' J. S.* was seised of the Manor of *Dale*, without saying *prædict' J. S.* or *de manerio prædict'*; this after a Verdict, shall be taken to be so; for he being named to be seised, and this by Verdict being found, it is necessary it should be intended *J. S.* mentioned, for here it cannot possibly be taken indifferently either Way. *Cro. Eliz. 192. Watts's Calc.*

If *J. W.* declares against *T. W.* and the Judgment is *Quod prædict' T. recuperet*, *T.* shall be amended and made *John*; and Note, that by the Statute 16 & 17 *Car. 2. cap. 18.* it is expressly provided, that Judgment shall not be reversed for any Mistake in Christian Name, or Surname, in any Declaration, Plaint or Pleading. *Hob 327. Cro. Jac. 662. Cro. Eliz. 865. Vide Tit. Amendment and Feofail.*

But this must be understood where the Record is before them, for otherwise it may be very fatal to a just Cause; as if *A.* brings an *Assumpsit* against *B.* and declares he was Bail for him at the Suit of *W. Ad-derly*; and the Defendant assumed to save him harmless, and that the

Plaintiff was taken in Execution and paid the Debt; upon *non Assumpsit* pleaded it was found, that the Defendant was arrested by the same *William Adderly*, but they declared against him by the Name of *William Adderby*, and the Plaintiff became Bail for him, &c. In this Case the Opinion of the Court was, that the Defendant was not chargeable; for *Adderby* and *Adderly* shall not be intended the same Person, at whose Suit the Plaintiff became Bail; for the Verdict hath no Credit against a Record, and therefore it cannot reconcile the Difference that appeared to be between the Records; but in this Case, if it had been before the Court, it might have been amended.

*Cro. Eliz.* 865. If the Surname in the Judgment differs from the Surname in the Declaration, yet it shall be amended; for in the Judgment the Christian Name need only be mentioned, and the Surname is redundant, and then *utile per inutile non vitiatur*; as if a Declaration be against *John Morgan Wolf*, and the Judgment be against *John Morgan*, this is well enough; so if a Declaration against *Henry Skinner*, and Judgment be entered *quod Henricus Soimer recuperet 10 l.* assessed by the Jury, and *5 l. eidem Henrico Skinner de Incremento*, this is well enough.

*Cro. Eliz.* 57. The Variance of the Surname in the Process to the Sheriff destroys not the Verdict, otherwise it is in the Variance of the Christian Name; for, when any Man is named by two different Surnames on Record, it shall be intended he has two different Surnames, as by Law he may have; therefore if a *Venire facias* be to one by the Name of *George Thompson*, and in the *Disfringas* he be named *Gregory Thompson*, and he appear and is sworn, the Verdict is not good; but if there be two different Surnames in the Record, they shall be intended his real Names, and then the Verdict shall not be avoided; as if a Man be named in the *Venire facias*, *Thomas Barker of B.* and in the *Disfringas*, *Thomas Carter of B.* and he appears and is sworn, and tries the Issue, the Verdict is good notwithstanding.

*1 Rol. Abr.* 196. So if the Christian Name be wrong in the *Disfringas*, or in the Panel returned, or in the Panel of the Jury sworn, if it can be proved to be the same Man that was intended to be returned in the *Venire*, having there his right Christian Name, it may be amended.

*3 Bulf.* 18.  
*Hob.* 64.  
*1 Brownl.* 174.

### (D) Of the Difference between a Mistake in Grants, Obligations, &c. and Judicial Proceedings.

*Co. Lit.* 3. IF the Christian Name be wholly mistaken, this, as has already been observed, is not only fatal in Judicial Proceedings, but also in Grants, Obligations, &c. and therefore if *Edward* obliges himself by the Name of *Edmund* it is ill.

*Co. Lit.* 3. But in Grants, &c. if there be such sufficient Marks of Distinction, that the Grant would be good without any Name at all, there a Mistake of the Christian Name or Surname, being only Surplussage, will not vitiate, according to the Rule *Utile per inutile non vitiatur*; and therefore a Grant to *George*, Bishop of *Norwich*, where his Name is *John*, or to *Henry*, Earl of *Pembroke*, where his Name is *Robert*, is good.

*2 Rol. Abr.* 43. So a Grant to a Man and his Wife is good, without naming her by the Name of Baptism; so if a Grant be made to *T.* and *Elen* his Wife, where in Truth her Name is *Emlyn*, yet the Grant is good; for being called the Wife of *T.* reduces it to a sufficient Certainty.

*Co. Lit.* 3.



So in a Devise, tho' the Christian Name be mistaken, yet, if there be a sufficient Specification of the Party, the Devise is good; because it must be construed according to the Intent of the Devisor; and therefore if a Devise be made to *Abraham*, the eldest Son of *B.* where his Name is *William*, this is a good Devise. 1 Leon. 18. Vid Tit. Devise.

But in Pleading in these Cases, the Christian Name ought to be shewn; for the Death of the Individual is a good Plea in Abatement, which often falls out where the same Office, Dignity or Relation continues in another. Co. Lit. 5.

If there be Father and Son of the same Name, and the Father grants an Annuity by his Name without any Addition, it shall be intended the Grant of the Father; and if the Son, being of the same Name with his Father, grant an Annuity without any Addition, yet the Grant is good, for he cannot deny his own Deed. Perk. Sect. 7.

If *A.* be created an Herald, and in the Patent he is called *Chester*, a Grant or Obligation made to him by the Name of *Chester* is good, for this sufficiently distinguishes him from other Men. 2 Rel. Abr. 44.

If a Grant be made to a Father and his Son, he having but one Son, the Grant is good for the apparent Certainty of it; but if the Father has several Sons, or if a Grant be made to a Man's Cousin or Friend, these are void for Uncertainty. Cro. Jac. 374.

If *J. S.* reciting by his Deed, that his Name is *J. S.* by the same Deed grants an Annuity by the Name of *Tho. S.* this is a good Grant, for the Writ shall be brought upon the whole Deed. Perk. Sect. 40.

So if *J. S.* Knight, reciting by his Deed, that he is a Yeoman, grants an Annuity, the Grant is good. Perk. Sect. 40.

A Grant to a Duke's eldest Son by the Name of a Marquess, or to the eldest Son of a Marquess by the Name of an Earl, &c. is good, because of the common Curtesy of *England*, and their Places in Heraldry. Carth. 440.

So where a Conveyance was made of a Reversion to *Ralph Evers*, Knight, Lord *Evers*, and he brought an Action of Covenant, to which the Defendant pleaded, that at the Time of the Grant he was not *Cognitus & reputatus per nomen Mil'*, and it was held to be no good Plea; for the Person is sufficiently expressed by Lord *Evers*, and the Addition of Knight, tho' false, doth not take away the Description of the true Person. 1 Bull. 21. Cro. Car. 240. Lord Evers ver. Strickland.

But it was adjudged in *C. B.* and affirmed by 3 Judges in *B. R.* where the Party set forth his Title to an Advowson, by Virtue of Letters Patent granted to *A. tunc Armigero & postea Militi*, and upon Oyer of the Letters Patent it appeared, that the Grant was made to *A.* Knight, that it could not be intended the same Person, because Knight is a Name of Dignity, but *Armiger* or Esquire a Name of Worship; and if he is afterwards made a Knight, the Name of Esq; is thereby extinguished, and consequently that a Grant made by the King to *A.* Knight, when there was no such Man a Knight, was a void Grant. Carth. 440. 5 Mod. 297. 2 Salk. 560. The King ver. Bishop of Chester. But Rekeby Justice held, that he might take by a Grant made unto him by the

Name of Knight, & sic vice versa, si constat de Persona, ut res magis valeat, &c.—And Note; this Judgment was reversed in Parliament, because it was only a Mistake in the Pleader, the Party being in Truth a Knight at the Time of the Grant. Carth. 440.

## (E) At What Time the Mistake must be taken Advantage of, and how the same is solved.

IT seems agreed, that he who would take Advantage of a Misnomer, or the Want of a proper Addition, must do it before he pleads to Issue; for the Addition is ordained by the Statute, that the Party who happens

2 Ro. Rep. 225. to be outlawed may have Notice ; but if he appears and takes no Exception, *constat de Persona*, and he thereby waves any Benefit he may have Case.

1 Hawk. P. by the Misnomer or Want of Addition.

C. 190.

2 Hal. Hist. P. C. 175. 1 Sid. 247. 1 Keb. 885. 1 Show. 394. Comb. 188.

Pasch. 7 Geo. 2. in B. R. Halcock ver. Dubois.

The Defendant was served with Process by the Name of *Dubois*, Plaintiff entered an Appearance for him, and obtained Judgment by Default ; and on Motion to set aside the Judgment, upon an Affidavit that his Name was *Davois*, the Court refused it, and said, that such Kind of Motions would destroy all Pleas in Abatement ; since the late Act enabling the Plaintiff to appear for the Defendant, his Appearance by the Name of *Dubois* is the same, as if entered by the Defendant himself.

### (F) Of the Manner of taking Advantage of, and Pleading a Misnomer or Want of Addition.

Finch 363.

9 H. 5. 1. pl. 3.

(a) That the safest Way in Criminal Cases, is to allow the Par-

ty's Plea of Misnomer, both as to his Surname and as to his Christian Name ; for he that pleads Mis-

nomer for either, must in the same Plea set forth what his true Name is, and then he concludes himself ; and if the Grand Jury be not discharged, the Indictment may presently be amended by the Grand Jury, and returned according to the Name he gives himself. 2 Hal. Hist. P. C. 176. — That the Party accused may take Advantage of the Misnomer, or Want of Addition, but yet must plead over to the Felony ; but tho' such Plea be found for him, he is not to be discharged, but must be indicted over again ; neither shall such Plea, if found against him, be peremptory, but he shall be tried on his Plea in chief. 2 Hawk. P. C. 367.

Gouldsb. 86.

Skin. 620.

1 Salk. 6, 63.

4 Mod. 347.

1 Hal. Hist.

P. C. 175.

Also he who pleads in Abatement, must not only set forth his right Name, but must also alledge, that by such Name he was known and called at the Time of the Purchase of the Writ.

He, who will take Advantage of the Misnomer of his Christian Name, Addition, or Surname, must do it upon his Arraignment, and the Entry must be special, *viz. Super quo venit Robertus Williams, qui indictatus est per nomen Johannis Williams, & dicit quod ubi in indictamento supponitur quod quidam Johannes Williams vi & armis, &c. Ipsius nomen est Robertus & non Johannes* ; for if he should say, *venit predictus Johannes Williams*, he concludes himself, and cannot plead that his Name is *Robert*.

Carth. 207.

Tallant ver.

Germyn.

So where the Defendant pleaded Misnomer in Abatement in this Form, *& predict f. Germyn* (with an *n* at the End) *venit & defend*, &c. *& dicit*, that his Name is *Germyn* (without an *n*) and not *Germyn prout*, &c. and upon Demurrer to this Plea it was adjudged against him ; for that he had admitted his Name to be *Germyn*, by his appearing and making Defence by that Name ; but that if he would have taken Advantage of the Misnomer, he should have pleaded in this Manner, *& predict Johannes Germyn, qui per nomen J. Germyn superius implacitatur, venit & dicit quod*, and for this Default a *Respondeas Ouster* was awarded.

Mish. 9.

Geo. 2. in B.

R. Hamberton ver. Cot-

teral.

So where the Defendant was sued by the Name of *Edward Cotteral*, and pleaded in Abatement that his Name was *John*, but introduced his Plea, and the afore said — *Cotteral* (leaving out his Christian Name) comes and defends the Force and Injury, when and so forth ; and it was held,

held, that the Defendant saying *Et predict'* ——— *Cotterel*, must be understood *Et predict'* *Edwardus Cotterel*, by which he confesses his Name to be *Edward*; and if he would have taken Advantage of the Misnomer, he should have said *Et predict'* *Johannes*, who was sued by the Name of *Edward*.

If there be a Mistake in the Christian Name and Surname, the Defendant may take Advantage of both, and his Plea on that Account shall not be held to be double; as where Trover was brought against the Defendant by the Name of *Christopher Mature*, and he pleaded in Abatement, that his Name was *John Metter*, and that he was known by that Name; *absque hoc*, that he was named by the Name of *Christopher Mature*; and on Demurrer to this Plea, because of Duplicity, and because no *Venue* was laid where he was baptized, it was held, *1st*, That there being a Mistake in both Names, the Defendant could not take Advantage thereof, in a better Manner than he has done; for he is not bound to admit one of the Names right, which if he did, he would not then give the Plaintiff a better Writ, the *Prænomén* and *Cognomen* being only one Description of the same Person; and tho' there is no Precedent, where Misnomer has been pleaded both in the Christian Name and Surname, yet that may be because it is a Matter that has rarely happened; and for this were cited *1 Lutw. 10. Thom. Ent. 1. 1 Salk. 6. 2dly*, That there was no Necessity of laying a *Venue*, this being a Matter relating to the Person, which must be tried where the Action is laid; and for this were cited *Raft. Ent. 29. Hern's Plead. 9. 1 Salk. 6. 6 Mod. 115.*

*Trinito Geo. in B. R. Read ver Mature.*

## (G) Who may take Advantage thereof.

THE Defendant, tho' his Name is mistaken, is not obliged to take (a) Advantage of it; and therefore if he be impleaded by a wrong Name, and afterwards impleaded by his right Name, he may plead in Bar the former Judgment, and aver, that he is *una Et eadem persona*.

(a) *J. Villars*, who pretended himself to be Earl of Bucking-

*ham*, was arrested by the Name of *J. Villars, Armiger*; and, on Motion, the Court gave him Leave to put in Bail, without joining in the Recognizance, and thereby not estop himself. *1 Salk. 5, 7. Farel. 38.*

So if a Person be indicted and acquitted of a Crime, and afterwards he is indicted for the same Offence, in which second Indictment the Crime is described to be the same in Substance with some Variation of the Name, Addition, &c. he may make good the Variance, by averring, that he was the same Person meant in both. *2 Hawk. P.C. 369.*

If a Person killed be described by his proper Name and Surname in the first Indictment, and by a different Surname in the second, such Variance may also be help'd, by an Averment, that the Person so differently named was one and the same Person; to which it is advisable to add, that he was known as well by the Name in the first, as by that in the second Indictment. *2 Hawk. P.C. 369.*

If a Defendant appear *gratis*, and by Attorney, to an Information, he may plead a Misnomer in Abatement, as well as if he had appeared in Person; for if he be not the Person intended, his Plea may be rejected, and Judgment signed by *Nihil dicit*; but the Attorney General, by accepting his Plea, admits him to be the Defendant, and shall not after-

wards say, that it doth not appear but that the Plea might be put in by a Stranger.

<sup>1</sup> *Lutw.* 36. One Defendant cannot plead Misnomer of his Companion; for the other Defendant may admit himself to be the Person in the Writ.

<sup>2</sup> *Hale's Hist. P. C.* 177. So if several Persons be indicted for one Offence, Misnomer, or Want of Addition of one, quasheth the Indictment only against him, and the Rest shall be put to answer; for they are in Law as several Indictments.

## Monopoly,

(A) Monopoly, what it is, and how restrained by the Common Law.

(B) How restrained by Statute.

(A) Monopoly, what it is, and how restrained by the Common Law.

<sup>3</sup> *Inst.* 181.

*Noy* 182.

(a) Monopoly and Ingrossing differ only in this, that the first is by Patent

from the King, the other by Act of the Subject, between Party and Party; but are both equally injurious to Trade, and the Freedom of the Subject, and therefore are equally restrained by the Common Law. *Skin.* 169.

**A**

Monopoly is described by my Lord *Coke* to be an Institution or Allowance by the King by his (a) Grant, Commission or otherwise, to any Person or Persons, Bodies Politick or Corporate, of or for the sole Buying, Selling, Making, Working or Using of any Thing, whereby any Person or Persons, Bodies Politick or Corporate, are sought to be restrained of any Freedom or Liberty they had before, or hindered in their lawful Trade.

<sup>1</sup> *Hawk. P. C.*

231.

*Townsend's Collection of Proceedings in Parliament* 244, 245.

(b) And it is

held to be further restrained by the Common Law, by subjecting those who are guilty thereof to a Fine and Imprisonment for the Offence, as being *Malum in se*, and contrary to the antient and fundamental Laws of the Kindom; and it is said, that there are Precedents of Prosecutions of this Kind, in former Days. <sup>3</sup> *Inst.* 181. <sup>2</sup> *Inst.* 47, 61.

And upon this Ground it hath been resolved, that the King's Grant to any particular Corporation, of the sole Importation of any Merchandize, is void, whether such Merchandize be prohibited by Statute or not.

2 *Rel. Abr.*  
214  
3 *Inst.* 182.  
2 *Inst.* 61.

Hence also it seems, that the King's Charter, empowering particular Persons to trade to and from such a Place, is void, so far as it gives such Persons an exclusive Right of trading, and debarring all others; and it seems now agreed, that nothing can exclude a Subject from Trade, but an Act of Parliament.

*Raym.* 489.  
2 *Chan. Ca.*  
165.  
1 *Vern.* 127.  
*Sands ver.*  
*East India*  
*Company. Skin.* 165, 226, 234. 3 *Mod.* 126.

Also it hath been adjudged, that the King's Grant of the sole Making, Importing and Selling of playing Cards, is void; notwithstanding the Pretence, that the Playing with them is a Matter meerly of Pleasure and Recreation, and often much abused; and therefore proper to be restrained; for since the Playing with them is, in it self, lawful and innocent, and the Making of them an honest and laborious Trade, there is no more Reason why any Subject should be hindered from getting his Livelihood by this than any other Employment.

11 *Co.* 84.  
*Moor* 671.  
*Noy* 173.  
2 *Inst.* 47.

And for the like Reasons also it hath been resolved, that the Grant of the sole Ingrossing of Wills and Inventories in a Spiritual Court, or of the sole Making of Bills, Pleas and Writs in a Court of Law, to any particular Person, is void.

2 *Rel. Abr.*  
214.  
1 *Jon.* 231.  
3 *Mod.* 75.

But it seemeth clear, that the King may, for a reasonable Time, make a good Grant to any one of the sole Use of any Art invented, or first brought into the Realm, by the Grantee.

*Noy* 182.  
1 *Hawk. P.C.*  
231.

Also it seems to be the better Opinion, that the King may grant to particular Persons the sole Use of some particular Employments; (as of (a) Printing the Holy Scriptures, and Law-Books, &c.) whereof an unrestrained Liberty might be of dangerous Consequence to the Publick.

1 *Mod.* 256.  
3 *Keb.* 792.  
3 *Mod.* 75.  
(a) The  
Reasons

hereof given are, that the Invention of Printing was new; that it concerned the State, and was Matter of Publick Care; that it was in the Nature of a Proclamation, and none could make Proclamations but the King; that as to Law-Books, the King has the Making of Judges, Serjeants and Officers of Law; that they are printed in a particular Language and Character, with Abbreviations, &c. Vide 2 *Chan. Ca.* 67. *Skin.* 234.

## (B) Now restrained by Statute.

BY the 21 *Jac. 1. cap. 3.* it is declared and enacted, ' That all Monopolies, and all Commissions, Grants, Licences, Charters and Letters Patents to any Person or Persons, Bodies Politick or Corporate whatsoever, of or for the sole Buying, Selling, Making, Working or Using of any Thing within this Realm or *Wales*, or of any other Monopolies, and all Proclamations, Inhibitions, Restraints, Warrants of Assistance, and all other Matters whatsoever, any way tending to the Instituting, Strengthening, Furthering or Countenancing of the same, or any of them, are altogether contrary to the Laws of this Realm, and so are and shall be utterly void, and of none Effect, and in no wise to be put in Ure and Execution.

And *Stat. 2.* ' That all Persons, Bodies Politick and Corporate whatsoever, shall be disabled and incapable to have, use, exercise or put in Ure any Monopoly, or any such Commission, Grant or Licence, &c. or other Thing tending as aforesaid, or any Liberty, Power or Faculty, grounded or pretended to be grounded upon them, or any of them.

And

(a) In the  
Construction  
hereof it is

held by my Lord Coke, that all Matters of this Kind ought to be tried in the Courts of Common Law only, and not at the Council-Table, or in the Court of Chancery, or any other Court of like Nature. 3 *Inft.* 182. But for this, *vide* Jurisdiction of the Court of Chancery, *Tit. Courts and their Jurisdiction.*

And it is further declared and enacted, *Seff.* 3. ‘ That all Monopolies, and all such Commissions, Grants and Licences, &c. and all other Things tending as aforesaid, and the Force and Validity of them ought to be, and shall be examined, heard, tried and determined by and according to the (a) Common Laws of this Realm, and not otherwise.

And it is further enacted, *Seff.* 4. ‘ That if any Person shall be hindered, grieved, disturbed, or disquieted, or his Goods or Chattels any way seised, attached, distrained, taken, carried away or detained by Occasion or Pretext of any Monopoly, or of any such Commission, Grant or Licence, &c. other Matter or Thing, tending as aforesaid, and will sue to be relieved in any of the Premises, he shall have his Remedy for the same at the Common Law, by Action grounded on the said Statute, to be heard and determined in the King’s Bench, Common Pleas or Exchequer, against the Party by whom he shall be so hindered or grieved, &c. or by whom his Goods shall be so seised or attached, &c. wherein every such Person, which shall be so hindered or grieved, &c. or whose Goods shall be so seised or attached, &c. shall recover three Times so much as the Damages which he sustained by Means of such Hinderance, &c. and double Costs; and in such Suits, or for the Staying or Delaying thereof, no Effoin, Protection, Wager of Law, Aid Prayer, Privilege, Injunction, or Order of Restraint shall be in any wise prayed, granted, admitted or allowed, nor any more than one Imparlance; and if any Person shall, after Notice that the Action depending is grounded upon the said Statute, cause or procure any Action at the Common Law grounded thereon to be stayed or delayed before Judgment, by Colour or Means of any Order, Warrant, Power or Authority, save only of the Court wherein such Action shall be depending; or after Judgment shall cause or procure the Execution to be stay’d or delayed by Colour or Means of any Order, Warrant, Power or Authority, save only by Writ of Error or Attaint, that then the said Person or Persons so offending shall incur a *Pierced*.

3 *Inft.* 183.

It is said, that the first Branch of this last Clause, relating to the Delay of Causes of this Kind before Judgment, not only extendeth to the Privy Council, Chancery, Exchequer Chamber, and the like, but also to those who shall procure any Warrant from the King for such Purpose; and it is said, that the latter Branch, relating to the Delaying of Execution after Judgment, extendeth even to the Judges of the Court where the Cause is depending.

(b) Manu-  
factures new-  
ly brought  
into the  
Realm from  
beyond Sea  
are included,  
tho’ they  
had been

long practised there before; for the Statute speaks of new Manufactures within this Realm, and was made to encourage new Devices useful to the Kingdom; and whether learned by Travel or Study, it is the same Thing. 2 *Salk.* 447.

‘ such Privilege, but that the same shall be of such Force, as they should  
‘ be if the said Act had never been made, and of none other.

It hath been resolved, that no new Invention, concerning the Working *3 Inst. 184.*  
of any Manufacture, is within the Meaning of this Exception, unless it  
be substantially new, and not barely an additional Improvement of an  
old one.

Also it hath been holden, that a new Invention to do as much Work *3 Inst. 184.*  
in a Day by an Engine, as formerly used to employ many Hands, is  
not within the said Exception; because it is inconvenient, in turning  
so many labouring Men to Idleness.

Also it seems clear, that no old Manufacture, in Use before, can be *3 Inst. 184.*  
prohibited in any Grant of the sole Use of any such new Invention.

And it is farther provided, *Stat. 7.* ‘ That nothing in the said Act  
‘ contained shall extend to any Grant or Privilege, Power or Autho-  
‘ rity whatsoever, before the said Act made, granted, allowed or con-  
‘ firmed by any Act of Parliament, so long as the same shall continu-  
‘ in Force.

Provided also, *Stat. 9.* ‘ That nothing in the said Act contained shall be  
‘ in any wise prejudicial to any City, Borough or Town Corporate within  
‘ this Realm, concerning any Grants, Charters, or Letters Patents, to  
‘ them made, or concerning any Custom used by or within them, or  
‘ unto any Corporations, Companies or Fellowships of any Art, Trade,  
‘ Occupation or Mystery, or to any Companies or Societies of Merchants  
‘ within this Realm, erected for the Maintenance, Enlargement or or-  
‘ dering of any Trade or Merchandize, but that the same Charters,  
‘ Customs, Corporations, &c. and their Liberties and Immunities shall  
‘ be of such Force and Effect, as they were before the making of the said  
‘ Act, and of none other; any Thing before in the said Act contained to  
‘ the contrary in any wise notwithstanding.

And it is further provided, *Stat. 10.* ‘ That nothing in the said Act  
‘ contained shall extend to any Letters Patents, or Grants of Privilege  
‘ concerning Printing, nor to any Commission, Grants, or Letters Pa-  
‘ tents concerning the Digging, making or compounding of Salt-Peter  
‘ or Gun-Powder, or the casting or making of Ordnance, or Shot for  
‘ Ordnance; nor to any Grant or Letters Patents of any Office, erected  
‘ before the making of the said Statute, and then in Being and put in  
‘ Execution, other than such Offices as had been decreed by Proclamation;  
‘ but that all such Grants, &c. shall be of the like Force and Effect, and  
‘ no other, as if the said Act had never been made.

But it is enacted by *16 Car. 1. cap. 21.* ‘ That it shall be lawful for  
‘ all Persons, as well Strangers as natural-born Subjects, to import any  
‘ Quantities of Gun-Powder whatsoever, paying such Customs and Du-  
‘ ties for the same as by Parliament shall be limited; and that it shall be  
‘ lawful for all his Majesty’s Subjects of this his Realm of *England*, to  
‘ make and sell any Quantities of Gun-Powder at his Pleasure, and also  
‘ to bring into this Kingdom any Quantities of Salt-Peter, Brimstone,  
‘ or any other Materials for the making of Gun-Powder; and that if  
‘ any Person shall put in Execution any Letters Patents, Proclamations,  
‘ Edict, Act, Order, Warrant, Restraint, or other Inhibition whatso-  
‘ ever, whereby the Importation of Gun-Powder, Salt-Peter, Brimstone,  
‘ or other the Materials aforementioned, shall be any ways prohibited or  
‘ restrained, shall incur a *Præmunire*.

And it is further provided by the said Statute of *21 Jac. 1. cap. 3.*  
*Stat. 11, 12.* ‘ That nothing in the said Act contained, shall extend to  
‘ any Commission or Grant concerning the Digging, compounding or ma-  
‘ king of Allum or Allum Mines, &c. nor concerning the licencing of  
‘ the keeping of any Tavern or selling of Wines, to be spent in the  
‘ Mansion-House, or other Place in the Tenure or Occupation of the  
‘ Party selling the same; and a further Provision is made in the latter

‘ Part of the Statute, for some particular Grants to particular Corporations and Persons, as *Newcastle upon Tyne, &c.*’

3 *Inst.* 185. But it is said, that the said Clause relating to Allum was needless; because all such Mines belong of Course to the Persons in whose Grounds they are, and therefore no Privilege concerning them can be granted but in the King’s own Ground.

## Mortgage.

- (A) Of the Original and several Kinds of Mortgages.
- (B) What shall be deemed a Mortgage, or an Estate redeemable.
- (C) Of the Nature of a Mortgage, as to the distinct Interests of the Mortgagor and Mortgagee.
- (D) Of the legal Performance of the Condition.
- (E) Of the Equity of Redemption and Foreclosure :  
And herein,
  - 1. Who may redeem, and by whom the Mortgage Money shall be paid.
  - 2. To whom the Mortgage Money shall be paid.
  - 3. Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers; and therein of their Remedies against each other, as well as against the Mortgagor.
  - 4. How far the Purchasing in a precedent Mortgage or Incumbrance will protect such Purchaser, and intitle him to a Precedency of Redemption.
  - 5. Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed.
  - 6. At what Time the Redemption must be.
  - 7. Of the Manner of Redeeming and Foreclosing.
- (F) Mortgagees and their Assignees, how to account, and what Allowances to make.



## (A) Of the Original and several Kinds of Mortgages.

**T**HE Notion of Mortgaging and Redemption seems to be of *Cumans* 11, *Jewish* Extraction, and from them derived to the *Greeks* and 12. *Romans*; the Plan of the *Mosaic* Law constitutes a just and equal Agrarian, that the Lands may continue in the same Tribes and Families, and the People might not be diverted by any exorbitant Acts and Inventions from the Exercise of Agriculture, in which innocent Employment they were to be continually educated; and therefore whoever were compelled by Want to sell, could transfer no Estate in the Lands, farther than to the next general Jubile, which returned once in 50 Years; wherefore they computed till the Jubile, and according to the Distance from thence, such was the Interest that could be transferred to the Buyer; but the Vendor had Power at any Time to redeem, paying the Value of the Lands to the Jubile; but tho' he did not redeem at the Year of Jubile, yet the Lands came back again free to the Vendor and his Heirs.

But our Notion of Mortgaging and Redemption seems to have come more immediately from the Civil Law, and therefore it will be necessary herein to consider the Distinctions in that Law between Pledges and Things hypothecated. *Justin. 592.*

The *Pignus* or Pledge was, when any Thing was obliged for Money lent, and the Possession passed to the Creditor.

The *Hypotheca* was, when the Thing was obliged for Money lent, and the Possession remained with the Debtor. Now in Case of Goods pawned, the Creditor was obliged to the same Diligence in keeping them, as he used about his own; so that if the Goods were lost by the Negligence of the Creditor, an Action lay as for a Deposit; for the Property being transferred to the Creditor for a particular Purpose, he was to keep them as his own. *Vid. Tit. Bailment.*

If the Debtor did not redeem the Thing pledged, the Creditor was to foreclose the Redemption of the Debtor; and if the Money was not paid, the Creditor had his *Actio Pignoratitia*, or *Hypothecaria*, which, when he had pursued, and obtained Sentence thereon, he might sell as his own Property; but there was this Difference between the *Actio Pignoratitia* and *Hypothecaria*; that the *Actio Pignoratitia* was only on the Person of the Debtor to foreclose him, because the *Pignus* was already in the Possession of the Creditor; but the *Actio Hypothecaria* was *tam in rem, quam in Personam*, and was given *ad Pignus Prosequendum contra quemcumque Possessorem*; because herein the Creditor had not the Possession of the Pledge, but it remained to the Debtor; and 'till Sentence was obtained in these Actions, the Creditor could not obtain the Property of the Pledge; and if the Money was paid before Sentence, the Pledge was subject to Redemption; and where the same Thing was pledged to several, those were said to be *Potiores in Pignore*, to whom the Things were first hypothecated. *Digest. Lib. 20. Tit. 6. Corvin. 269, 270-271.*

If the Money was tendered or paid to the Creditor, the Contract of Pignoration was dissolved, and the Debtor might have the Pledge back, as a Thing lent; so that seems to have introduced the Notion among us of the Debtor's Right to Redemption, and with them the Usucaption, or the Right of Prescription, did not extinguish the Pledge, unless a Stranger had held it for 30 Years, or the Debtor had held it for 40 Years. *Digest. Lib. 20. Tit. 6.*

In the Feudal Law the Rule was, *Feudalia, invito Domino, aut Agnatis, non recte subjiciuntur Hypothecæ, quamvis fructus posse esse receptum est*, and the *Corvin. 268*

the Reason of this Rule was, because the Feud was filled with a Tenant from the Lord's original Bounty, on whom he depended for his personal Service in War and Peace; and therefore the Feudary could not obtrude a Tenant on him without his Leave, who might be less capable of those Services; and therefore as the Tenant could not originally alien without Licence, so he could not mortgage.

But when a Licence of Alienation was given about the Time of H. 3. and it became a Maxim in Law, that the Purity of a Fee Simple imported a Power of disposing of it as the Owner pleased; there were two Ways of mortgaging Lands introduced, which *Littleton* distinguishes by the Names of *Vadium Vivum* and *Vadium Mortuum*.

Co. Lit. 205.  
Vid. Madd.  
formatur. 136.

The *Vadium Vivum* is, where a Man borrows 100 l. of another, and makes an Estate of Lands to him, 'till he hath received the said Sum of the Issues and Profits of the Lands; and it is called *Vadium Vivum*, because neither the Money nor the Land dieth; for the Lands are constantly paying off the Money, and the Lands are not left as a dead Pledge, in Case the Money be not paid. This seems to have been the antient Way of pledging Lands; for they held, that Lands could not be hypothecated; and therefore they used to subject the *Usufructus*, which continued originally during the Life of the Feudary; but when there was a free Liberty given of Alienation, then the Feudary could pledge the *Usufructus* of the Land at pleasure; but because in this Way of Pledging, the Lender received his Money by Degrees, and in small Parcels, which was very troublesome; and those that put Money to Usury, are generally willing to receive the Whole in a gross Sum; and therefore this Way of Pledging is now out of use.

Lit. Sect. 332.  
Co. Lit. 205.

The *Vadium Mortuum* is so called by *Littleton*, because it is doubtful, whether the Feoffor will pay the Money at the Day limited or not; and if he do not pay, then the Land, which is but in Pledge upon Condition, for the Payment of the Money, is taken from him for ever, and so dead to him; and if he do pay it, then the Pledge is dead to the Tenant of the Land.

Maddox 318,  
319.

Of these Mortgages there are again two Sorts; 1<sup>st</sup>, Of the Freehold and Inheritance; and 2<sup>dly</sup>, Of Terms for Years.

1<sup>st</sup>, Of the Freehold and Inheritance, and here the ancient Way was to make a Charter of Feoffment, on Condition, that if the Feoffor, or his Heirs, paid the Sum to the Feoffee or his Heirs, he should re-enter and repossess; and sometimes the Condition was contained in the Charter of Feoffment, and sometimes it was defeazanced by another Charter, as may be seen in the old Forms.

Co. Lit. 226,  
227.

For as a Man might annex a Condition to his Feoffment, for *cujus est dare, ejus est deponere*, so he might annex a Condition by another Deed, bearing Date and executed at the same Time; for being executed at the same Time, it is really but one and the same Disposition, *que incontinenti sunt inesse videntur*; but a Defeazance or Condition annexed after the Feoffment executed comes too late; because the Livery *Coram Paribus* attesting the Infudation, in which there is no Condition, the Tenant must hold the Land according to the Tenure of the Investiture; but Rents, Annuities or Warranties, that are Things executory, may be defeated by Defeasances made at the Time of their Creation, or any Time after; because there is not any Necessity of the Notoriety of Livery to make an Investiture; and therefore being created by Deed only, they may be defeated or destroyed by Deed alone.

Co. Lit. 221,  
222.

These Sorts of Conveyances were subject to these Inconveniencies; that if the Money were not paid at the Day, so that the Estate became absolute, the Estate was thenceforth subject to the Dower of the Feoffee, and all other his real Charges and Incumbrances; for tho' if the Feoffor performed the Condition, then he might re-enter, and re-possess himself in his former Estate, and consequently was in above all the Charges and

Incum-

Incumbrances of the Feoffee; yet, if he did not literally perform the Condition, by Payment of the Money at the Day, then the Estate was legally subject to the Charges and Incumbrances of the Feoffee, tho' the Money were afterwards paid, and the Estate re-conveyed to the Feoffor.

But the Courts of Equity, as they grew in Power, have set this Matter right, and have maintained the Right of Redemption, not only against Tenant in Dower, and the Persons who come in under the Feoffee, but even against the Tenant by the Curtesy, and Lord by Escheat, that are in the *Post*; because the Payment of the Money doth, in the Consideration of Equity, put the Feoffor *in statu quo*, since the Lands were originally only a Pledge for the Money lent. Hard. 465.

As to Mortgages by Way of creating Terms, this was formerly by Way of Demise and Re-demise. As for Example; *A.* borrowed Money of *B.* thereupon *B.* would demise the Land to *A.* for a Term of 500, &c. Years absolutely, with common Covenants against Incumbrances, and for farther Assurance, and then *A.* would the Day after re-demise to *B.* for 499 Years, with Condition, to be void on Nonpayment of the Money at the Day to come; this Manner of Mortgaging came in after the 21 H. 8. for falsifying Recoveries, when there was a fixed Interest settled in Terms for Years; and was esteemed best for the Mortgagor, to avoid all Manner of Pretension from the Incumbrances and Dower of the Feoffee in Mortgage; and was reputed best for the Mortgagee, to avoid the Wardship and Feudal Duties of the Tenure, and was only inconvenient in this; that if the 2d Deed were lost, there appeared to be an absolute Term in the Mortgagee.

And this is now the common Method, *viz.* By a Demise of the Land for a Term, under a Condition to be void on the Payment of the Mortgage Money and Interest; and a Covenant is inserted at the End of such Deeds, that till the Default shall be made in the Payment of the Money, that the Mortgagor shall receive the Rents, Issues and Profits without Account.

This has been ruled to create a Tenancy at Will to the Mortgagor; but if the Mortgagor dies, the Tenancy at Will is determined, 'till there is a Receipt of Interest from the Heir, which seems to make him also Tenant at Will to the Mortgagee. Raym. 147.

But now the last and best Improvement of Mortgages seems to be, that in the Mortgage Deed of a Term for Years, or in the Assignment thereof the Mortgagor should covenant for himself and his Heirs, that if Default be made in the Payment of the Money at the Day, that then he and his Heirs will, at the Costs of the Mortgagee and his Heirs, convey the Freehold and Inheritance of the mortgaged Lands to the Mortgagee and his Heirs, or to such Person or Persons (to prevent Merger of the Term) as he or they shall direct and appoint; for the Reversion, after a Term of 50 or 100 Years, being little Worth, and yet the Mortgagee for Want thereof, continuing but a Termor and subject to Forfeiture, &c. and not capable of the Privileges of a Freeholder; therefore where the Mortgagor cannot redeem the Land, 'tis but reasonable the Mortgagee should have the whole Interest and Inheritance of it, to dispose of as absolute Owner.

## (B) What shall be deemed a Mortgage, or an Estate redeemable.

1 Vern. 183.  
268, 394.  
Preced. Chan.  
95.

HEREIN we may observe in general, that whatever Clauses or Covenants there are in a Conveyance, tho' they seem to import an absolute Disposition or conditional Purchase; yet, if upon the Whole, it appears to have been the Intention of the Parties, that such Conveyance should only be a Mortgage, or pass an Estate redeemable, a Court of Equity will always construe it so.

1 Vern. 33,  
190.  
2 Chan. Ca.  
147. S. C.  
Howard ver.  
Harris.

As where the Condition of a Mortgage is, that the Mortgagor should redeem during his Life, or that the Mortgagor and the Heirs of his Body should redeem, yet Equity will admit the general Heir of such Mortgagor to a Redemption; because this can be no Purchase, since there is a Clause of Redemption; and when the Land was originally only a Pledge for Money, if the Principal and Interest be offered, the Land is free; and it would be very hard, that it should be in the Power of the Scrivener, or griping Usurer, by such impertinent Restrictions, to elude the Justice of the Court.

1 Vern. 193.  
per North, L.  
K.

But if a Man borrows Money of his Brother, and agrees to make him a Mortgage, and that if he has no Issue male, his Brother should have the Land; such an Agreement made out by Proof, will be decreed in Equity.

1 Vern. 7,  
214, 232.  
Newcomb ver.  
Bonham.  
2 Vent. 364.  
S. C. where  
it is said, that  
Lord North's  
Decree was  
affirmed in  
the House of  
Lords.

*A.* in Consideration of 1000 *l.* made an absolute Conveyance to *B.* of the Reversion of certain Lands after two Lives, which, at that Time, were worth little more; and by another Deed of the same Date, the Lands are made redeemable any Time during the Life of the Grantor only, on Payment of 1000 *l.* and Interest; *A.* died, not having paid the Money; and it was held by my Lord Nottingham, that his Heir might redeem, notwithstanding this restrictive Clause, and that it was a Rule, *once a Mortgage and always a Mortgage*, and that *B.* might have compelled *A.* to redeem in his Life-time, or have foreclosed him; but on a Re-hearing, Lord K. North reversed the Decree on the Circumstances of this Case; for it appeared by Proof, that *A.* had a Kindness for *B.* and that he had married his Kinswoman, which made it in the Nature of a Marriage Settlement; he likewise held, that *B.* could not have compelled *A.* to redeem during his Life, which made it the more strong.

1 Vern. 488.  
Willett ver.  
Winnel.

If *A.* mortgage Lands to *B.* worth 15 *l.* per Annum, for securing 200 *l.* and at the same Time *B.* enters into a Bond conditioned, that if the 200 *l.* and Interest is not paid within a Year, then he to pay to *A.* his Executors or Administrators, the further Sum of 78 *l.* in full for the Purchase of the Premises, &c. and *A.* dies within the Year, and the Money is paid the next Day after, the Mortgage is forfeited to his Administrator; yet *A.*'s Heir may redeem, paying the 200 *l.* and likewise the 78 *l.* that was paid the Administrator.

2 Vern. 84.  
Manlove ver.  
Ball

So where *A.* for 550 *l.* made an absolute Assignment of a Church Lease for three Lives to *B.* and *B.* by writing under his Hand agreed, that if *A.* paid 600 *l.* at the End of the Year, *B.* would reconvey, *B.* died, leaving *C.* his Son and Heir; two of the Lives died, and the Lease was twice renewed by *C.* and his Father; and tho' it was near twenty Years since the Conveyance was made, yet the Master of the Rolls decreed a Redemption on Payment of the 550 *l.* and the two Fines.

2 Vern. 520.  
Fennings ver.  
Ward.

*A.* lends Money to *B.* to carry on certain Buildings, and takes a Mortgage from him to secure 1600 *l.* with Interest; and, by another Deed executed at the same Time, takes a Covenant from *B.* that he should convey to him, if he thought fit, Ground-Rents to the Value of 1600 *l.* at the Rate of 20 Years Purchase; and on a Bill brought to redeem, the

Master

Master of the Rolls decreed a Redemption on Payment of Principal, Interest and Costs, without Regard to that Agreement, but set aside the same as unconscionable; for a Man shall not have Interest for his Money and a collateral Advantage besides the Loan of it, or clog the Redemption with any Lye Agreement.

But tho' these and such like Restrictions are relieved against, to make them answer the primary Intention of the Parties; yet if *A.* on a Mortgage, lends Money at 5 *l. per Cent.* but agrees in the Deed, that if the Money were paid within 3 Months after it became due, that he would accept of 4 *l. per Cent.* and the Mortgagor neglects to pay the Interest within the Time, Equity will not relieve him, but he must pay 5 *l. per Cent.* for tho' the Court relieves against unreasonable Penalties, yet this is not so, for the Mortgagee might have refused to lend his Money under 5 *l. per Cent.*

So if the Mortgagee devises, that the Mortgagor should be remitted Part of his Mortgage Money, provided he pays the Principal and Interest within 3 Days after his Decease; if the Condition be not performed, the Remittance is lost; because this being a voluntary Bounty, and not *ex debito Justitiæ*, the Party must take it as it is limited, for *cujus est dare, ejus est disponere*; and the Court cannot relieve in this Case after the Day.

But where in a Mortgage there was a Proviso, that if the Interest was behind 6 Months, that then the Interest should be accounted Principal and carry Interest; this by my Lord Cowper was decreed to be a vain Clause, and of no Use; and he said, that no Precedent had ever carried the Advance of Interest so far, and that an Agreement made at the Time of the Mortgage, will not be sufficient to make future Interest Principal; but to make Interest Principal, it is requisite that Interest be first grown Due, and then an Agreement concerning it may make it Principal.

*Preced. Cas.*  
160.  
*Jery ver.*  
*Cox.*

1 *Chan. Rep.*  
52.

2 *Salk.* 449.  
Lord *Offul-*  
*ston ver. Lord*  
*Yarmouth.*

### (C) Of the Nature of a Mortgage, as to the distinct Interests of a Mortgagor and Mortgagee.

THE Mortgagor before Forfeiture, and whilst it remains uncertain, whether he will perform the Condition at the Time limited, or not, hath the legal Estate in him; also after Forfeiture he hath an Equity of Redemption; so that he is still considered as Owner and Proprietor of the Estate, until the Equity of Redemption be foreclosed, and therefore may make Leases or (a) any Settlement thereof, which will bind his Equity of Redemption.

(a) It is said,  
that a Te-  
nant in Tail  
of an Equity

of Redemption, may devise it for Payment of Debts. 1 *Vern.* 41 *Turner ver. Gwynn.*

Therefore, if a Man mortgages his Land, and, as is usual, still continues in Possession, and levies a Fine, and 5 Years pass, yet the Mortgagee is not barred; for tho' the Mortgagee be in Reality out of Possession, yet when that is done by the Consent of both Parties, and the nature of the Contract requires it should be so while the Interest is paid, it is against the original Design of the Contract, that any Act of the Mortgagor, except the Payment of the Money, should deprive the Mortgagee of his Security, and is no less than a Fraud, which the Law will not countenance.

And as the Mortgagor, being considered only as Tenant at Will to the Mortgagee, cannot, by his Act, defeat the Interest of the Mortgagee, otherwise than by Payment of the Mortgage Money; so neither can the Mortgagee

1 *Sid.* 460.  
1 *Vent.* 82.  
1 *Lov.* 274.  
*Carth.* 101,  
414.

*Paln.* 155.  
*Cro Jac.* 593.

Mortgagee defeat the Mortgagor of his Equity of Redemption; therefore if a Mortgagee in Fee suffers a Recovery, this, even at Law, shall not bind the Mortgagor's Right of Entry, upon Performance of the Condition; but if the Mortgagor had been a Party to the Recovery, then his Right had been bound, not only on Account of the Recompence in Value, but because he is estopped by the Recovery to claim the Land against the Recoverer or his Heirs, when he was called in before the Judgment given to defeat his Title, and could not do it.

*Plow. 513. a.*

So if a Mortgagee be disseised, and the Disseisor levies a Fine, and five Years pass after the Proclamations, tho' the Mortgagee is hereby barred, yet if the Mortgagor pays or tenders his Money, he has 5 Years to prosecute his Right, by the second Saving in the Statute 4 H. 7. cap. 24. because his Title did not accrue 'till Payment of the Money.

*Preced. Chan.  
1.*

And as the Mortgagor, 'till the Equity of Redemption be foreclosed, is considered as Owner of the Land, it was ruled, where a Bill for a Redemption was brought against a Mortgagee in Possession, and a Decree accordingly, that the Mortgagee, before the Account taken, having presented to a Church that became void, should revoke his Presentation, and present such a Person as the Mortgagor or his Vendee (he having contracted to sell) should appoint.

By the 7 W. & M. cap. 25. it is enacted, ' That no Person or Persons shall be allowed to have any Vote in Election of Members to serve in Parliament, for or by Reason of any Trust Estate or Mortgage; unless such Trustee or Mortgagee be in actual Possession, or Receipt of the Rents and Profits of the same Estate, but that the Mortgagor, or *Cestui que Trust* in Possession, shall and may vote for the same, notwithstanding such Mortgage or Trust.

And by the 9 Ann. cap. 5. which requires, that Knights of the Shire should have 600*l. per Annum*; and every other Member 300*l. per Annum*; it is enacted, ' That no Person shall be qualified to sit in the House of Commons, within the Meaning of the Act, by Virtue of any Mortgage, whereof the Equity of Redemption is in any other Person, unless the Mortgagee shall have been in Possession of the mortgaged Premises for seven Years before the Time of his Election.

## (D) Of the legal Performance of the Condition.

7 E. 4. 3.  
9 H. 6. 12.  
22 H. 6. 37.  
47 E. 3. 26.  
*Plow. 173.*  
5 Co. 114.  
*Co. Lit. 209.*

THE Condition must at Law be strictly performed, otherwise the Mortgagor loses all Benefit of Redemption; but if upon a Mortgage a Tender be made of the Money, at the Place, at any Time of the Day specified in the Condition, and the Mortgagee refuses, the Condition is saved for ever.

*Co. Lit. 209.*

And upon such Refusal the Land is discharged, because upon the Tender the Demise is void; and if it be upon a Feoffment, the Condition is performed, and the Feoffor may re-enter; but the Money lent doth yet remain a Debt or Duty, because it was a Debt by the original Lending of the Money, whether it had been so secured or not; and because the Security fails, according to the Words of the Agreement, yet there is the same natural Justice that the Money should continue: But if a Feoffment were made, on Condition of Payment of a Sum gratuitously, to re-enter, if it were refused, there is no Remedy.

The legal Tender, or Payment, must be made to the Parties mention'd in the Condition; because to make such a Tender as will be a legal

Performance, it must be made according to what the Parties have expressly agreed on in the Condition.

Therefore, if a Man bargains and sells Lands, with Proviso, that if the Vendor, before such a Day, pay so much Money to the Vendee, his Heirs or Assigns, that the Sale shall be void; the Vendee before the Day makes his Executors and dies, and the Vendor tenders the Money to the Executors, this is not good; because the Word *Assigns* must be understood to be Assigns of the Land, in its primary and original Signification; and where there is an express Provision to whom the Tender and Payment is to be made, the Executor is excluded; for *Expressum facit cessare Tacitum*.

But if a Man make a Feoffment in Fee, upon Condition, that the Feoffee shall pay 20*l.* to the Feoffor, his Heirs or Assigns; here the primary Signification of the Word *Assigns* fails; because there can be no Assignment of the Land of which he hath enfeoffed another; and since the original Sense of the Word fails, lest it should be wholly insignificant, the secondary Sense of the Word is to be taken, *viz.* the Assignees in Law, which the Executors are *quoad* the personal Estate; and therefore the Payment is good either to the Executor or the Heir.

If the Condition be to pay the Money to the Feoffee, in Mortgage, his Heirs or Assigns; and he makes a Feoffment over; it is in the Election of the Feoffor to pay the Money to the first or second Feoffee; because by the Words he may pay it either to him or the Assignee; so if the first Feoffee dies, in this Case he may pay it to his Heir or the Assignee, for the same Reason; nor is he obliged to take Notice of the Validity of the second Feoffment, to which he is a Stranger.

But if the Condition was, that the Feoffor should pay it to the Feoffee at such a Day, and the Feoffee die before the Day; it shall be paid to the Executor, and not to the Heir, tho' the Land descend to the Heir; for during the Suspension of the Condition, which is till the whole Time is elapsed, the Land is wholly taken to be a Pledge for the Money; and the Money to be a personal Duty to the Feoffee, and consequently is to be paid to such Person as represents him; but then this Payment must be to the Executor of the whole Sum; for a partial and fraudulent Payment, tho' accepted by the Executor, is really no Performance of the Condition, and therefore the Interest remains in the Heir at Law.

If the Condition were, that the Feoffor should pay so much Money to the Feoffee, without Limitation of Time, the Feoffor hath Time during Life to pay the Money to the Feoffee, during his Life; but if either die before the Time is elapsed, which is set by the Parties for the Performance of the Condition, the Feoffment is absolute; but if the Payment were to be made to the Feoffee, his Heirs or Executors, then the Feoffor hath Time during Life.

If a Man make a Feoffment in Fee, upon Condition, that the Feoffor, within a Year after the Death of the Feoffee, pay to his Heirs, Executors or Administrators, 100*l.* that then the Feoffor should re-enter; the Feoffee makes a Feoffment over and dies; the Feoffor paid the 100*l.* within the Year, and the Heir paid back 30*l.* this is a partial and fraudulent Payment, and no good Performance of the Condition, to defeat the Estate of the Feoffee; but if the whole Money had been paid, it had been good; because the Payment is to be made to the Persons mentioned in the Condition, and not to the Assignee of the Land, who is not named therein.



## (E) Of the Equity of Redemption and Foreclosure : And herein,

## 1. Who may redeem, and by whom the Mortgage-Money shall be paid.

Hard. 465.

**A**LTHO', after Breach of the Condition, an absolute Fee-simple is vested at Common Law in the Mortgagee; yet a Right of Redemption being still inherent in the Land, till the Equity of Redemption be foreclosed, the same Right shall descend to and is vested in such Persons as have a Right to the Land, in case there had been no Mortgage or Incumbrance whatsoever; and as an equitable Performance as effectually defeats the Interest of the Mortgagee, as the legal Performance doth at Common Law, the Condition still hanging over the Estate, till the Equity is totally foreclosed; on this Foundation it hath been held, that a (a) Person, who comes in under a voluntary Conveyance, may redeem a Mortgage; and tho' such Right of Redemption be inherent in the Land, (b) yet the Party claiming the Benefit of it, must not only set forth such Right, but also shew that he is the Person intitled to it.

(a) 1 Vern. 193.

(b) 1 Vern. 182.

1 Chan. Ca. 74.

2 Chan. Ca. 5.  
Vide Tit.  
Heir and Ancest.r.

As the Heir at Law is regularly intitled to the Benefit of Redemption, he is also intitled to the Assistance of the personal Estate of the Mortgagor for that Purpose; according to the Doctrine established in the Courts of Equity, that the personal Estate, in the Hands of the Executor, shall be employed in Ease of the Heir, by whatever Means the Heir becomes indebted as Heir; for the personal Estate having received the Benefit by contracting the Debt, and the Real considered only as a Pledge for it, it is but reasonable that Satisfaction should be made out of it; according to the Common Rule, *Qui sentit commodum sentire debet & onus*.

2 Salk. 449.

And on this Foundation it hath been frequently held, that if a Man mortgage Lands, and covenants to pay the Money, and dies, the personal Estate of the Mortgagor shall, in Favour of the Heir, be applied in Exoneration of the Mortgage

(c) 2 Chan. Ca. 84.

(d) 1 Vern. 36.

(e) 1 Chan. Ca. 271.

Also it is held by some Opinions, that this Benefit shall not only extend to the Heir at Law, or *Hæres natus*, but also to an (c) *Hæres factus* from a Presumption, that it is the Intention of the Testator, that he should have all the Privileges of the *Hæres natus*: And (d) some even held, that an ordinary Devisee shall have this Benefit; but as to this last Point it hath been (e) held otherwise; and that if a Man mortgages his Land, and then devises it to *J. S.* or to *A.* for Life, the Remainder in Fee to *B.* that there the Charge doth pass with the Estate, there appearing no Intention of the Testator, that he should have it discharged.

2 Salk. 450.

1 Vern. 37.

So if the Mortgagor conveys away the Equity of Redemption, the Purchaser shall not have the Benefit of the personal Estate, but must take it *cum onere*.

2 Salk. 449.

1 Vern. 436.

Preced. Chan. 61.

It has likewise been held by some Opinions, that the Heir of the Mortgagor shall have the Benefit of the personal Estate to pay off the Mortgage, tho' there be no Covenant in the Mortgage-Deed for the Payment thereof; because the Mortgage-Money is a Debt, whether there be any express Covenant for the Payment of it or not.

Preced. Chan.

425.

2 Vern. 701.

Hovel ver.

Price

But where a Mortgage in Fee was made, redeemable at *Mich.* 1702. or any other *Mich.* Day following, on six Months Notice; and there was no Covenant for Payment of the Mortgage-Money; it was held by my Lord Chancellor *Cowper*, that the Mortgagor having devised his personal Estate to his Wife and Daughter, and having during his Life

paid



paid the Interest of the Mortgage, the personal Estate should not be applied in Ease and Exoneration of the real Estate, for the Benefit of the Heir at Law; for, as he said, there being no Covenant for Payment of the Money, there was no Contract at all between them, neither express nor implied; nor would any Action lie against the Mortgagor to subject his Person, or compel him to pay this Money; but this was in Nature of a conditional Purchase, subject to be defeated on Payment by the Mortgagor, or his Heirs, of the Sum stipulated between them, at any *Mich. Day*, at the Election of the Mortgagor, or his Heirs; so that here was an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, which could not be forfeited at Law like other Mortgages; and therefore there could be no Equity of Redemption, or any Occasion for the Assistance of this Court; but the Plaintiffs might even at Law defeat the Conveyance, by performing the Terms and Conditions of it; which were not limited to any particular Time, but might be performed on any *Michaelmas-Day*, to the End of the World; and since here was no Covenant or Contract, either express or implied, to charge the personal Estate of the Mortgagor, he thought there was no Reason to lay the Load of this Debt upon that which was given to other Persons.

Also, if the Grandfather mortgages, and covenants to pay the Mortgage-Money, and the Lands descend to his Son, and his Son dies, having a personal Estate and a Son; the Son's personal Estate shall not go in Aid of this Mortgage. 2 Salk. 450.

So if an Heir has Land descended to him, incumbered with a Mortgage, and he, before any Application made by him to have Aid of the personal Estate, disposes of them, he cannot afterwards come upon the personal Estate; for the Equity, which an Heir has, is that the Lands may descend clear to the Family. Abr. Eq. 270.  
Wood ver.  
Fenwick.

If one devise Lands which are in Mortgage to *A.* for Life, Remainder to *B.* in Fee; *A.* shall contribute one Third towards the Discharge of the Mortgage, and *B.* the other two Thirds. 1 Chan. Ck.  
271.  
Pre ed. Chan.  
62.  
2 Vern. 117.

But if Lands in Mortgage are devised to *A.* for Life, Remainder to *B.* in Fee, and *A.* takes an Assignment of this Mortgage in a Trustee's Name; tho' *B.* might have compelled *A.* to contribute one Third towards Payment of the Mortgage, in respect of his Estate for Life; yet if *A.* be dead, and the Bill is brought against his Executor, he shall be obliged to contribute only in Proportion to the Time that *A.* his Testator enjoyed it. 1 Vern. 404.  
Clyat ver.  
Lattin.

*A.* mortgaged his Lands, upon Condition, that if he or his Heirs repaid 100*l.* at such a Day, he should re-enter; before the Day he dies, leaving Issue a Daughter, his Wife *enfeint* with a Son; the Daughter pays the Money at the Day, and then the Son is born; the Daughter shall keep the Lands, and the Son shall not recover against her; for the Daughter is in Nature of a Purchaser; where she hath regained the Land by her own Vigilance; which otherwise had lapsed at Law to the Mortgagee. Cro. Car. 37.  
1 Co. 99

If a Man enters into a Bond, in which he binds himself and his Heirs, and dies, leaving a real Estate to descend to his Heir, subject to a Mortgage for Years, and the Heir sells the Equity of Redemption; the Obligee cannot redeem the Mortgage, without first having a Judgment at Law against the Heir. Abr. Et. 515.  
Bateman ver.  
Bateman.

A Dowress may redeem a Mortgage, paying her Proportion of the Mortgage-Money; and as to the rest, she may hold over till she is satisfied. Abr. Eq. 219.  
Palmer ver.  
Danby.

So if a Jointure is made of Lands which are mortgaged; the Wife may redeem, and her Executor shall hold over till repaid with Interest; because such Tenant for Life ought to be reimbursed the Money she paid to set her Estate free, and in the Condition she ought to have been in. 1 Chan. Ck.  
271.  
2 Vent. 243.  
2 Chan. Ck.  
100, 151.

But

1 Chan. Ca.  
271.  
2 Chan. Ca.  
99, 100.

But if a Jointress after Marriage join with her Husband in a Fine, and mortgage the Land, and the Husband dies; there her Land is charged, and she shall pay her Part towards the Disburthening the Land; and her Executors shall not hold the Lands till satisfied thereof; because she herself concurred in laying on the Charge, and therefore must join in the Disburthening of it, according to the Value of her Interest.

1 Vern. 294.  
Dolin ver.  
Coltman.

If the Wife joins in a Mortgage, and levies a Fine, with an Intent to bar her Dower; and in Consideration thereof the Husband agrees, that she shall have the Equity of Redemption in lieu of her Dower, and he afterwards mortgages the same Estate twice more; tho' this Agreement be fraudulent against the subsequent Mortgagees, so as to intitle the Wife to the whole Equity of Redemption; yet she shall have her Dower, if she survives her Husband, and shall not be put to her Writ of Dower; because the Estate may be so conveyed away by some of the Mortgagees, that possibly she may not know against whom to bring her Writ of Dower.

1 Vern. 213.  
Brend ver.  
Brend.

If a Man marries a Jointress of Houses which are burnt down, and the Husband and Wife borrow 1500*l.* to build on the Ground, and levy a Fine *sur Concessit* for ninety-nine Years, if the Wife lived so long, and a Deed is made between the Conusee and the Husband, wherein the Husband covenants to repay the Mortgage-Money, with Interest; and the Equity of Redemption is limited to the Husband and his Heirs, and the Husband expends 3 or 4000*l.* in Building on this Ground, and dies; the Wife shall redeem, and not the Heir of the Husband; for the Wife was no Party to the Deed of Re-demise, by which the Redemption was limited to the Husband; and the Wife being a Jointress, and having granted a Term for Years only, out of her Estate for Life, there rests a Reversion in her, which naturally attracts the Redemption.

2 Vern. 480.  
Atton ver.  
Pierce.

*A.* on his Marriage agreed to leave his Wife 1000*l.* if she survived him; the Drawing of the Agreement was left to the Parson of the Parish, who made a Bond from *A.* to his intended Wife in 2000*l.* conditioned to leave her 1000*l.* if she survived him; the Marriage was had, and *A.* died leaving a Freehold and Copyhold Estate in Mortgage, and which were mortgaged together; and it was held, that the Wife should redeem as well the Freehold as Copyhold, and hold over till she was satisfied.

2 Vern. 457.  
The Earl ver.  
The Countess  
of Huntington.

*A.* joins with *B.* her Husband in making a Mortgage for Years of her Inheritance for 4500*l.* to supply the Husband's Occasions, and to pay for the Place of Captain of the Band of Pensioners, and subject to the Mortgage the Estate on *A.* for Life, Remainder to her Son in Tail; *B.* in the Mortgage-Deed covenants to pay the Money, and the Proviso was, that on Payment of the Mortgage-Money the Term was to cease; the Mortgage was several Times assigned, and particularly in 1683. and the Wife joined in it, and there the Proviso was, that on Payment of the Money to them, or either or them, the Mortgage-Term was to be assigned as they, or either of them, should direct or appoint; a few Days after the Mortgage was made, *B.* by Letter thanked his Wife for having sealed it, and added, that the Profits of the Office should be religiously applied to pay off the Incumbrance; but afterwards when Money came in, tho' he paid off the Mortgage, yet he took an Assignment thereof in Trust for himself; and by Will devised his personal Estate, and the Benefit of this Mortgage, to his second Wife; and on a Bill by the Son of the first Wife, to have this Mortgage assigned him, it was declared by my Lord Keeper, that he could not decree for him, but upon the usual Terms of Redemption, on Payment of Principal, Interest and Costs, discounting Profits; but upon an Appeal to the Lords, the Son obtained a Decree to have the Mortgage assigned to him.

So where *A.* and his Wife mortgaged the Wife's Estate, and *A.* covenanted to pay the Money, but the Equity of Redemption was reserved to them and their Heirs; the Husband dying, it was Decreed, that the Mortgage should be discharged out of the Husband's Estate.

2 Vent. 613.  
Prest. ver.  
Lett.

## 2. To whom the Mortgage Money shall be paid.

Mortgages being Part of the personal Estate belong to the Executors or Administrators, tho' it was formerly held, that if a Feoffment in Fee were made upon Condition, that if the Mortgagor paid the Sum to the Mortgagee, his Heirs, Executors or Administrators, that then the Mortgagor should re-enter, and the Day passed without Payment, and the Mortgagee died, whereby the Lands descended to his Heir; in such Case, the Heir being named in the Condition, and no Bond or Covenant given to make it appear a personal Matter, and no Deficiency of Assets to pay Creditors, that the Heir parting with the Benefit descended to him, should have the Money on the Mortgage.

1 Chan. Cz.  
88.  
Smith ver.  
Smout.

But afterwards it was truly settled by the Lord Chancellor *Finch*, that the Money should go to the Executors or Administrators, and not to the Heir; and the Reason was, because Equity follows the Law; and at Common Law, if Conditions or Defeazances of Mortgages are so penned, as no Mention is made either of their Heirs or Executors, in that Case, the Money ought to be paid to the Executors, because the Money came out of the personal Estate, and therefore ought to return thither again; but if the Defeazance appoints the Money to be paid the Heir or Executor disjunctively, there, as by the Common Law already mentioned, if the Mortgagor pay the Money precisely at the Day, he may elect to pay it either to the Heir, or to the Executor; but where the precise Day is past, and the Mortgage forfeited, all Election is gone in Law, for in Law there is no Redemption; and when the Case is reduced to an Equity of Redemption, it were perfectly against Equity to revive the Election of the Mortgagor; because that would only tend to the Delay of the Payment of the Money as long as he pleased, and end in Compositions to pay the Money into that Hand which would use him best; and to say that the Election should be in the Court, would be to place an arbitrary Power in it, which would tend to the Inconvenience of the Subject; since no Man could safely pay the Money in such Cases, without applying to the Court in a Suit in Equity; and therefore, since there ought to be a certain Rule, a better cannot be chose, than to come as near as can be to the Rule and Reason of the Common Law; now the Law always gives the Money to the Executor where no Person is named, and where the Election to pay either to the Heir or the Executor is gone and forfeited in Law, it is all one, as if neither Heir nor Executor were named in the Condition; and then in natural Justice and Equity, the principal Right of the Mortgagee is to his Money, and his Right to the Land is only as a Deposit or Pledge for his Money; and therefore the Money ought to be paid into the proper Hand, that the Mortgagee hath appointed Receiver of his Money, and that is his Executor; and then the Heir, that is only a Trustee to keep the Pledge, ought to deliver it back to the Mortgagor; and tho' the Heir has the Use and Benefit of the Land 'till redeemed, yet he has it only as a Pledge, and therefore is a Trustee to restore it when the Money is paid to the proper Hand; and the Heir himself, tho' he be proper to keep the Pledge, being Land, yet he is not proper to receive the Money, it being purely Personal; and it is not hard, that the Heir should part with the Land, without having the Money that comes in Lieu of it; because we are to consider, that the Money was originally parted with from the personal Estate, and had

1 Chan. Cz.  
285.  
2 Chan. Cz.  
50, 51, 220.  
2 Vent. 348,  
351.  
Hard. 467.  
1 Vern. 170,  
412.  
Prest. Chan.  
11.

immediately come into the Hands of the Executor, had it not been placed out on this real Security; and therefore decreed, whether the Executor has Affets or not, that the Mortgage Money should be paid to him; but the Mortgagee, by any Conveyance in his Life-time, or by his last Will and Testament, may dispose of it otherwise to whom he pleases.

2 Vern. 66.

If the Heir of the Mortgagee forecloses the Mortgagor, the Executor being no Party, upon a Bill by the Executor against the Heir of the Mortgagee and the Mortgagor, the Land will be decreed the Executor.

2 Vern. 67.

But if the Executor of the Mortgagee, after a Foreclosure by the Heir, brings a Bill to have the Benefit of the Mortgage, the Heir, if he thinks fit, may take the Benefit of the Foreclosure to himself, paying the Executor the Mortgage Money and Interest.

2 Vern. 367.

Tabor ver.  
Greaves.

If there be a Mortgage in Fee of a long standing, and there are two Descents cast since the Mortgage was made; and tho' the Mortgagor, by Answer says, he will not redeem, yet the Mortgage shall go to the Executor, and not to the Heir, the Equity of Redemption not being foreclosed or released.

1 Vern. 271.

Cotton ver.  
Hes.

But if a Mortgage in Fee enters for a Forfeiture, and after 7 Years Enjoyment absolutely sells the Land to J. S. and his Heirs, the Estate shall not be looked upon to be a Mortgage in the Hands of J. S. so as to make it Part of his personal Estate, but it shall be for the Benefit of his Heir.

Preced. Chan.

265.

Noys ver.

Mordant.

A. being in Possession of an Estate that was a Mortgage in Fee, by Will devises it to his Daughters B. and C. and their Heirs, and dies, B. marries, and dies; the Question was, whether the Share of B. should be decreed real or personal Estate, and consequently go to her Heir, or to her Husband as her Administrator; and it was decreed against the Husband; and my Lord Keeper put this Case: A Man seized of Lands in Fee, which were only mortgaged to him, devises them to his Son and Heir, and his Heirs; surely these Lands shall descend as an Inheritance, or tho' the Mortgage be paid off, shall not the Money be considered as Lands, and go to the Heir and his Heirs, as the Lands would have done, and this purely by the Intention of the Testator; and did not the Testator, who had a governing Power, intend in the present Case, that the mortgaged Lands should be considered as any other Lands of Inheritance, and be subject to, and be directed by the same Rules that other Estates are?

### 3. Of the Precedency and Right of Redemption, where there are several Mortgagees or Incumbrancers; and therein of their Remedies against each other, as well as against the Mortgagor.

4 Abr. Eq 320.

Herein we must observe, as a sure and established Rule, that he who hath the first Mortgage, having the legal Estate, shall prevail before all other subsequent Mortgagees and Incumbrancers; but if a Man mortgages Land by a defective Conveyance, and afterwards mortgages by an Assurance which is good and effectual, without Notice, the second shall prevail, because that carries the legal Title; and Equity will not interpose, when both are equally upon valuable Consideration; but if a Man mortgages by a defective Conveyance, and there be subsequent Debts that do not originally affect Lands, there the Defect of such a Conveyance shall be supplied against a subsequent Incumbrancer, that acquires a legal Title afterwards; for since the subsequent Incumbrancer did not originally take the Lands for his Security, nor had in his View an Intention to affect them, when afterwards the Lands are affected, and he comes in under the very Person that is obliged in Conscience to make the Security.

curity good, he stands in his Place, and shall be postponed to such defective Conveyance.

This Rule and Distinction being grounded on the following Case, we shall here insert it at Large.

*Henry Francis*, Father of the Defendant *Henry*, in Consideration of 400 *l.* Money lent by Feoffment, 17 July, 1665, mortgaged to the Plaintiff's Testator in Fee, a Piece of Ground called *Parkefield*, in the Parish of *Gibs*, but no Livery thereon, and covenants for him and his Heirs, that he was lawfully seized in Fee of the Premises, and for quiet Enjoyment, free from Incumbrances against him and his Heirs, and all Persons claiming under him, with Covenant for farther Assurance within seven Years; *Henry Francis*, the Father, 1 Mich. 1669. borrowed of the Testator 77 *l.* on Bond, and promised that the mortgaged Premises should be Security for it; *Henry Francis*, the Father, in 1670, made his Will, and thereof made *Henry Francis*, his Son, Executor. The Testator, *Robert Burgh*, died, and the Plaintiff *Eleanor* proved his Will; the Defendant, *Henry Francis*, confesses several Judgments, on Bonds entered into by his Father (to wit) 7 Judgments, as Heir, and one as Executor to his Father; one of these 7 Judgments was obtained by *Heyman*, a Defendant, on an Action brought the first or second Day of *Hillary* Term, 1670, for 400 *l.* and all the other Judgments were entered about the same Time; this Cause came to be heard by Sir *Heneage Finch*, Lord Keeper, assisted by Judge *Wild*, who declared, that the Court was fully satisfied, that the Plaintiff ought to be relieved, and that the said Judgments ought not to incumber the Premises, till the Mortgage Money was fully paid; wherein the Court did not ground it's Judgment upon the Manner of obtaining the Judgments all in a Term, and most of them together, nor on the special Way, whereby the Heir charged the Lands, by pleading *Riens per Descent*, nor on the Priority of the Teste of the *Subpœna's* before the Teste of the Original, on which the Judgments were grounded; but upon the true Nature of the Case the Court declared, that the Debt due by the Mortgage, did originally charge the Lands, which the Bonds did not, till they were reduced to Judgments; and it ought not to be in the Heir's Power, by confessing Judgments, to charge the Lands in Prejudice of that Equity, and the rather because of the Covenant for further Assurance; and tho' the Mortgage was defective in Law for want of Livery, yet Equity, which supplied that Defect, charged the Lands; and tho' the Creditors had no Notice, yet they shall be bound in this Case, because they are put in no worse Condition than they ought to be, viz. to be postponed to the Mortgage; therefore it was decreed, that the Defendant *Henry*, the Heir, should convey to the Plaintiff, or her Assigns, in Fee, in Manner as a Master should direct, but redeemable on the Payment of the said 400 *l.* due on the former defective Mortgage, and the Premises to be held quietly against the Plaintiff, and all claiming under them, since the Date of the Mortgage; and he who has the Equity of Redemption, may, in convenient Time, bring a Bill to redeem; and in Default thereof, the now Plaintiff may bring one to foreclose; and a perpetual Injunction was also awarded, to quiet the Plaintiff and their Assigns in Possession against all the Defendants and the aforesaid Incumbrances, and to stay all Proceedings at Law, but the Plaintiff to have no Costs of this Suit, unless some come to redeem; then the now Plaintiff to have all the Costs of this, and such Suits, as is usual in the Redemption of Mortgages.

From this Case, which hath been a governing Case in the Courts of Equity, they have stated the Difference beforementioned; for these Bond Creditors did not originally pitch upon the Land as a Pledge and Security for their Money; and when they came afterwards, and reduced their Securities into Judgments, to affect the Lands; yet since they affect it in the Hands of the Heir, who was subject to this Equity, and obliged

in Conscience to supply the Defect in the Execution of the Deed, they can only stand in his Place, and therefore must be subject to the defective Security; but otherwise it had been, if there had been a subsequent Mortgage duly executed, and without Notice of the former; because the Lands being then originally pledged for the Money, and he having the legal Title, the defective Securities that could not prevail at Law, should not overturn, in Equity, a Security that was equally upon valuable Consideration; but the Bonds in the former Case did not originally take hold on the Land at all; and when they were reduced to a Judgment, they only took hold of the Land, together with other Things; and therefore Equity doth not look on them, as such Charges on the Land as are to take hold so immediately on it, that a prior defective Security is not to be relieved and set up against them; especially, since such Incumbrancers did not take the Land as an original Security, but came in afterwards under the Person, who was obliged in Conscience to supply that Defect; for the Difference between the two Cases turns upon this, that in the Case of a 2d valid Mortgage, we must, in all Manner of Justice suppose, that the Mortgagee would not have lent, if the Land had not been offered to secure his Money; and therefore when he hath the Title at Law, it is no Equity to overturn it, or to postpone him to a defective Security; but in the Case of the Bonds, they lent their Money upon the personal Security, and not on the Credit of Lands; and therefore when they come to affect the Lands, they must stand in the Place of the Person, that had laid himself liable in a Court of Equity, to answer and make good the defective Security.

2 Vern. 564.  
2 Salk. 449.  
Taylor ver.  
Wheeler.

Thus it was also ruled by the Lord Cowper, where the Case was, *A.* surrenders his Copyhold by Way of Mortgage for Money lent, and the Surrender is not presented at the next Court, according to the Custom of the Manor; *A.* becomes a Bankrupt, and the Assignees, &c. are admitted, and bring their Ejectment, and the Surrendree of the Copyhold brings his Bill in Equity to be relieved; and in this Case, the Court decreed a perpetual Injunction in Behalf of the Surrendree; and tho' it was said, that the Creditors of the Bankrupt were equally valuable as the Surrendree, and having the Title at Law, they ought to be preferred; yet it was over-ruled, because the other Creditors of the Bankrupt did not lend on the Credit of the Land, as the Mortgagee did; and therefore when such Creditors come under the Bankrupt to charge the Land, they ought to stand in his Place, and come under the same Obligation of Conscience to make good the defective Security.

*Oxwick & al*  
ver *Plumer*  
& al', Pasch.  
3 May, 1708.

The Case of *Oxwick* and *Plumer* turns upon the Reverse of this Judgment, and was thus: *Richard Wiseman*, Esq; Son and Heir apparent of *Sir Richard Wiseman*, intermarried with *Winefred Barrington*, intitled to a Portion of 4000*l.* and brings his Bill against the Trustees of his Wife; whereupon a Decree was had, to pay unto him the Fortune of his Wife, upon making a competent Settlement; and upon Failure thereof, the Fortune to be invested in Lands by the Approbation of the Master; but upon the Master's Report, that no competent Settlement could be made by *Richard* the Son, it was, by Choice of Parties, invested in Lands of *Sir Richard* the Father, of equal Value, Part of which Lands happened to be 8 Acres of Copyhold, which in the Settlement were limited, and declared apart from the Freehold, to be to the Use of the Issue of the Marriage in common Form, and afterwards in Fee to the Son, with a Covenant from *Sir Richard* to surrender the Copyhold; accordingly the Wife dies without Issue, and the Son mortgages both Copyhold and Freehold together, for a valuable Consideration to *Oxwick* and others, Plaintiffs; but without any Surrender the Son dies, and the Lands descend to *Eliz.* his Sister and Heir at Law; the Mortgagees foreclose *Eliz.* by a Decree of the Court, and enter and take Possession; to whom being in Possession *Eliz.* releases, and confirms the Estate in Fee; *Sir Richard* the Father being

ing then out of Possession of the Premises from the Time of the Settlement, which was made thirteen Years past, surrenders the Copyhold Land to the Defendant *Plumer*, for a valuable Consideration; *Plumer* is admitted, and brings his Ejectment, and the Mortgagees bring their Bills to be relieved; and the Master of the Rolls, on solemn Argument, dismissed their Bill with Costs; and held, that this Court would not supply the Defect of a Surrender against a Person that came in by Title, upon Surrender of the same Premises; and this Case coming on to be re-heard before my Lord *Cotter*, he was of the same Opinion; and he took this Difference, that when there are two Persons that have equal Equity, there those that have the legal Title shall prevail; because there is no Equity to take from such Person the Title that he hath gained at Law; as where *A. B.* and *C.* are three Mortgagees, and *C.* purchases in the Mortgage of *A.* to secure his own Money *bona fide* lent; Equity will never take from him the legal Interest he hath gained; but if the contending Parties in Equity have not equal Equity, then those that have the greatest Equity shall prevail against the legal Title; as if a Creditor takes hold of the Land by a Feoffment in Mortgage, with Livery, Equity will supply the defective Conveyance against a subsequent Judgment Creditor; because the Judgment Creditor not relying on the Land for his Security, he hath not equal Equity to have that Land applied for the Payment of his Debt, as he that took it in Mortgage; but in this Case, where *Plumer* had equally lent Money, and taken hold of the Estate by a Mortgage made with a legal Surrender; so that the legal Interest was in him; the Covenant to surrender, tho' prior, cannot be set up against him who had no Notice of it; but *Oxwick* must pursue his Remedy at Law, for the Breach of the Covenant.

A precedent Mortgagee discounts his Mortgage-Money by Purchase of Parcel of the Land, and the subsequent Mortgagee, having also a Judgment, comes to be relieved; the precedent Mortgagee pleads this Purchase; and without Notice it is good; for having a legal Title by the first Mortgage, kept on Foot precedent to the second, this Court will not destroy it; and the Judgment on Record is no Notice, without express Notice from the Party in Interest. 1 Chan. Rep. 36.

If a Man makes a voluntary Deed, and mortgages the same Lands; this Deed, tho' fraudulent as to the Mortgagee is good to pass the Equity of Redemption, because the voluntary Conveyance binds the Party and his Heirs. 1 Chan. Rep. 59.

Tenant in Tail demise the Lands for ninety-nine Years, by Way of Mortgage, under a Condition of Redemption; and on his Marriage suffers a Recovery, and in Consideration of the Portion settles a Jointure; then the Husband borrows more Money of the Mortgagee, and appoints the Term as a Security; the Recovery enures to make good the Term; and if the Mortgagee had no Notice of the Jointure, he shall be allowed his whole Money, for the Entail is destroyed by the Recovery; because every Recovery places the Fee in the Recoverer; and neither the Husband nor Wife, that comes in by Title under him, can vacate this Act precedent; so that the subsequent Recovery of Tenant in Tail makes good all precedent Incumbrances. 1 Chan. Rep. 119, 120.

A Man makes a Mortgage, and afterwards makes a Marriage-Settlement of the Equity of Redemption, wherein he limits it on the Wife; and then on the Issue of his Body, with Remainder in Tail to his Brother; the Mortgagee exhibits his Bill against the Mortgagor, to have his Money, or that he may stand foreclosed, without making the Brother a Party; and has a Decree accordingly; and afterwards the Mortgagor dies without Issue, and the Lands remain to the Brother by the Marriage-Settlement, who prefers his Bill to redeem; and it was dismissed; for having made those Parties to the Bill of Foreclosure, that were Parties to the Mortgage, the Mortgagee did as much as was possible; and 1 Chan. Rep. 217, &c.



since at Law a Fine or other Conveyance extinguishes an Equity of Redemption, which is but a Chose in Action, tho' the modern Course hath allowed it to be transferred; yet it ought not to be so allowed, that the Mortgagee should not know from whom to seek a Foreclosure, in order to keep him an eternal Bailiff to the Mortgagor; therefore after Length of Time, and in Behalf of a meer Volunteer, they would not open the Account, after such Decree to foreclose had against the Person that was Party to the Mortgage; for possibly the Mortgagee, since the Foreclosure, hath kept no Account, since he was not bound to do it.

1 Chan. Rep.  
170.

If a Man mortgages Lands, and then confesses several Judgments, and some of the Persons, who have Judgments, give the Mortgagee Notice, and after he obtained, against the Mortgagor, a Decree to foreclose; such Persons, that gave Notice of their Interest shall notwithstanding redeem; because they are Creditors for a valuable Consideration, and the Mortgagee had Notice of them, that he might have made them Parties to his Bill; but the Persons, who gave no previous Notice of their Judgments, are totally barred of all Redemption, by the former Decree.

1 Chan. Rep.  
123. Brent  
ver. English.

*A.* mortgages to *B.* and *C.* obtains a Judgment in Debt against *A.* and then *A.* mortgages to *D.* then *B.* *D.* and *A.* account together for what was due to *B.* and *D.* pays the Money, and *B.* assigns the Mortgage to *D.* *C.* sues for his Debt, and to have an Account of what was really due to *B.* and *D.* on both Securities; *D.* pleads the Account thus made up in Bar to *C.* but it was disallowed; because their Account being voluntary shall never conclude a third Person, so that he shall not come into the Redemption; for it were unjust, that their Accounts should shut him out of his Security, where he had no Opportunity to litigate or examine the Account.

1 Chan. Ca.  
299. Needler  
ver. Deeble.

But it hath been held, that if a first Mortgagee brings a Bill to foreclose the Mortgagor, and an Account is directed and taken between them, such Account shall bind the second Mortgagee, tho' he was no Party to the Bill, if there was no Fraud or Collusion in the taking of it.

2 Chan. Rep.  
57, 58.

If a Man mortgages his Estate to two, who each of them lend several Sums upon the Estate, as appears by Notes under their Hands, and one of them dies, there shall be no Survivorship; for it is considered as a Sum of Money still subsisting apart, for which the Lands are only a Pledge and Security; so that the Money being distinct Sums, and the Interest in it being distinct and separate, there can be no Survivorship between them.

Abr. Eq. 320.  
Bentham and  
Haincourt.

The Mortgagor, being Son-in-Law to the Mortgagee, having entered, and afterwards suffered the Mortgagor to take the Profits for several Years, without requiring Interest, it was held by the Court, that the Interest of the first Mortgagee should not affect the Lands, so as to keep out the second Mortgagee longer than he would have been, had the Interest been duly paid; it was likewise held, that if a Mortgagee, after Notice of a subsequent Mortgage, joins with the Mortgagor in a Sale of the Lands to a Stranger, the Money received by either for the Purchase, shall sink so much of the Mortgage-Money.

2 Vern. 370,  
554.

If *A.* being about to lend Money to *B.* on a Mortgage, sends *C.* to inquire of *D.* who had a prior Mortgage, whether he had any Incumbrance on *B.*'s Estate, and it is proved that *C.* went to him, and spoke to him accordingly; *D.*'s Mortgage shall be postponed.

Abr. Eq. 321,  
322. Peter  
ver. Russel.

One *Goff* being possessed of the *Thatched House* at *St. James's*, on a Building-Lease for sixty Years, mortgages it to *Dr. Lancaster* and one *Habberfield*, for securing 600*l.* which the Defendant afterwards paid off, and advanced to *Goff* 600*l.* more, and took an Assignment of this Mortgage, but had not the original Lease delivered to him till some Days after the Assignment; *Goff* afterwards, being in a declining Way, proposed to borrow of the Plaintiff 350*l.* on a Mortgage of a Vault and two Rooms, Part of the mortgaged Premises; and on a Treaty for that

Purpose,



Purpose, one *Remington*, who acted for the Plaintiff, desired to see the original Lease; *Goff* told him, that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it safe to trust them in his own House, where all Sorts of Company resorted; upon which *Goff* goes to the Defendant, who was an Attorney in the City, tells him he was about agreeing with a Person for the rebuilding Part of the Premises, at so much a Foot-square, which would better his Security, and desired him to let him have the original Lease, that he might see the Dimensions of the House; the Defendant would not trust him with the Lease in his own Power, but goes along with him to the *Thatched House*; and after he had been there some Time, *Goff* sends for the Plaintiff and *Remington*, told them he had now the original Lease, which they might see; and upon their coming to his House, *Goff* goes into the Room where the Defendant was, and desires him to let him have the Lease, to shew the Person he had mentioned, for that he was now in the House; and accordingly the Defendant lets him have the Lease, which he carries to the Plaintiff and *Remington*; and they being satisfied therewith lend him the Money, and took a Mortgage of the Vault and two Rooms, insisting at the same Time to have the original Lease delivered to them; but *Goff* urging, that it concerned much more than the Plaintiff had in Mortgage, and that he could not part with it, the Plaintiff permitted him to keep it; and he thereupon, in about an Hour's Time, delivered it again to the Defendant, without acquainting him with what he had done; and the Defendant swore expressly in his Answer, that he had no Notice of this Transaction, or of the Plaintiff's Mortgage; afterwards the Plaintiff lent *Goff* a further Sum of Money, and he prevailed on the Defendant to let him have the original Lease a second Time; but there was no Proof that the Defendant knew the Occasion of it, and he, by his Answer, expressly denied his having Notice of it; afterwards *Goff* fail'd, and thereupon the Defendant brought his Ejectment and recovered; and this Bill was brought to have the Defendant's Mortgage postponed, upon Pretence, that here was a manifest Fraud on the Plaintiff, and that the Defendant was privy to it; and at the Rolls the Plaintiff had a Decree accordingly; but on Appeal the Decree was reversed; but my Lord Chancellor said, that if a Man makes a Mortgage, and afterwards mortgages the same Estate to another, and the first Mortgagee is in Combination to induce the second Mortgagee to lend his Money, this Fraud will, without Doubt, in Equity postpone his own Mortgage; so if such Mortgagee stands by and sees another lending Money on the same Estate, without giving him Notice of his first Mortgage, this is such a Misprision as shall forfeit his Priority; but here is no Manner of Proof that the Defendant knew any Thing of the Plaintiff's lending his Money; nay, if there had, yet the Plaintiff appears guilty of so much a grosser Neglect, that he ought not to prevail; for the Defendant intrusted *Goff* with his original Lease but for a very little while; the Plaintiff takes his Word, that he could not part with it, and leaves it wholly in his Power to go on in defrauding whom else he had a Mind to; besides, it appears the Defendant was imposed on by *Goff*, for he parted with the Lease only to better his own Security, and had the most specious Pretence that could be for it; and therefore it cannot be, without manifest Proof, objected to him; that he let *Goff* have the Lease to shew the Plaintiff, or with a Design to draw in the Plaintiff to lend his Money; and dismissed the Bill with Costs, unless the Plaintiff should, within such a Time, redeem the Defendant.

By the 4 & 5 W. 3. cap. 16. reciting, that great Frauds and Deceits are often practised by necessitous and evil disposed Persons, in borrowing of Money, and giving Judgments, Statutes and Recognizances privately, for securing the Repayment of the said Money; and the same Persons do afterwards borrow Money, upon Security of their Lands, of other Persons, and do not acquaint the later Lender thereof with the same;

whereby

whereby such late Lender is very often in Danger to lose his whole Money, or forced to pay off the Debts secured by the said Judgments, Statutes and Recognizances, before they can have any Benefit of the said Mortgages; and that divers Persons do many Times mortgage their Lands more than once, without giving Notice of their first Mortgage; whereby Lenders of Money upon second or after Mortgages do often lose their Money, and are put to great Charges in Suit and otherwise; for Remedy whereof it is enacted, ‘ That if any Person shall borrow ‘ any Money, or for any other valuable Consideration for the Payment ‘ thereof voluntarily give, acknowledge, permit or suffer to be entered ‘ against him, or them, one or more Judgment or Judgments, Statute or ‘ Statutes, Recognizance or Recognizances, to any Person or Persons, ‘ Creditor or Creditors; and if the said Borrower or Borrowers, Debtor ‘ or Debtors, shall afterwards take up or borrow any other Sum or Sums ‘ of Money of any other Person or Persons, or for other valuable Consi- ‘ deration become indebted to such Person or Persons, and for securing the ‘ Repayment and Discharge thereof shall mortgage his, her or their Lands ‘ or Tenements, or any Part thereof, to the said second or other Lender ‘ or Lenders of the said Money, Creditor or Creditors, or to any other ‘ Person or Persons, in Trust for or to the Use of such second or other ‘ Lender or Lenders, Creditor or Creditors, and shall not give Notice ‘ to the said Mortgagee or Mortgagees of the said Judgment or Judg- ‘ ments, Statute or Statutes, Recognizance or Recognizances, in Wri- ‘ ting under his her or their Hand or Hands, before the Execution of the ‘ said Mortgage or Mortgages; unless such Mortgagor or Mortgagors, ‘ his, her or their Heirs, upon Notice to him, her or them given by ‘ the Mortgagee or Mortgagees of the said Lands and Tenements, his, ‘ her or their Heirs, Executors, Administrators or Assigns, in Writing, ‘ under his, her or their Hands and Seals, attested by two or more suf- ‘ ficient Witnesses, of any such former Judgment or Judgments, Statute ‘ or Statutes, Recognizance or Recognizances, shall within six Months ‘ pay off and Discharge the said Judgment or Judgments, Statute or ‘ Statutes, Recognizance or Recognizances, and all Interest and Charges ‘ due thereupon, and cause or procure the same to be vacated, or dis- ‘ charged by Record; that then the Mortgagor or Mortgagors of the ‘ said Lands and Tenements, his, her or their Heirs, Executors, Admi- ‘ nistrators or Assigns, shall have no Benefit or Remedy against the said ‘ Mortgagee or Mortgagees, his, her or their Heirs, Executors, Admi- ‘ nistrators or Assigns, or any of them, in Equity or elsewhere, for Re- ‘ demption of the said Lands and Tenements, or any Part thereof; but ‘ the said Mortgagee and Mortgagees, his, her or their Heirs, Execu- ‘ tors, Administrators and Assigns, shall and may hold and enjoy the said ‘ Lands and Tenements for such Estate and Term therein, as were or ‘ was granted and settled to the said Mortgagee or Mortgagees against ‘ the said Mortgagor or Mortgagors, and all Person and Persons lawfully claiming from, by or under him, her or them; freed from Equity ‘ of Redemption, and as fully, to all Intents and Purposes whatsoever, ‘ as if the same had been purchased absolutely, and without any Power ‘ or Liberty of Redemption.

And it is further enacted, ‘ That if any Person shall mortgage any Lands ‘ or Tenements to any Person or Persons, for Security of Money lent, ‘ or otherwise accrued or become due, or for other valuable Considerations; ‘ and if the said Mortgagor or Mortgagors shall again mortgage the same ‘ Lands or Tenements, or any Part thereof, to any other Person or Per- ‘ sons for valuable Considerations, (the said former Mortgage being in Force ‘ and not discharged,) and shall not discover to the said second or other ‘ Mortgagee or Mortgagees, or some or one of them, the former Mort- ‘ gage or Mortgages, in Writing under his or their Hands, that then, ‘ and in these Cases also, the said Mortgagor or Mortgagors, his, her ‘ or

or their Heirs, Executors, Administrators or Assigns, shall have no Relief, or Equity of Redemption, against the said second or after Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, upon the said after Mortgage or Mortgages; but that such Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators and Assigns, shall and may hold and enjoy such more than once mortgaged Lands and Tenements, for such Estate and Term therein, as were or was granted and conveyed by the said Mortgagor or Mortgagors, against him, her or them, his, her or their Heirs, Executors or Administrators respectively, freed from Equity of Redemption, and as fully, to all Intents and Purposes, as if the same had been an absolute Purchase, and without any Power or Liberty of Redemption.

Provided always, and be it further enacted by the Authority aforesaid, That, nevertheless, if it so happen there be more than one Mortgage at the same Time made, by any Person or Persons, to any Person or Persons of the same Lands and Tenements, the several late or under Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns, shall have Power to redeem any former Mortgage or Mortgages, upon Payment of the principal Debt, Interest, and Costs of Suit to the prior Mortgagee or Mortgagees, his, her or their Heirs, Executors, Administrators or Assigns.

Provided always, That nothing in this Act contained shall be construed, deemed or extended to bar any Widow of any Mortgagor of Lands or Tenements from her Dower and Right in or to the said Lands, who did not legally join with her Husband in such Mortgage, or otherwise lawfully bar or exclude herself from such her Dower or Right.

It hath been held, that if a Man mortgages certain Lands to one Man, and mortgages those Lands with some others to another; tho' this seems to be a Case omitted out of the above Statute against clandestine Mortgages; yet if it appears to be a Contrivance to evade it, as if an Acre or two of Land were only added, this will not exempt it: Also a Person, who will take Advantage of the Statute, must be an honest Mortgagee; and therefore, if a Man has used any Fraud or Practice in obtaining a second Mortgage, he shall not have the Benefit of the Statute. 2 Vern. 587,  
590.

#### 4. How far the Purchasing in a precedent Mortgage of Incumbrance will protect such Purchaser, and intitle him to a Precedency of Redemption.

It hath been established as a Rule in the Courts of Equity, that if a Man mortgages Lands to A. and afterwards makes a subsequent Mortgage to B. without Notice at the Time of his making the Mortgage, and B. purchases in a precedent Mortgage, which stands out at Law, tho' nothing on it be due in Equity, or a Statute whereon Money is due, which he extends, he shall hold the Land till he is satisfied what is due upon both Securities, tho' he had Notice of A.'s Mortgage before his second Purchase of the prior Security; because, having at first innocently lent the Money, he may do what he can to secure that Money from being lost; and when he hath purchased in the prior Incumbrance, it is but just, that Equity should leave it in the same Manner that it stood at Law; for there is no Room for Equity to interpose, to take away the Security the Law had given, where the Person that has the Security comes into the Title without any Corruption at all; and it were Partialty, and not Equity, to interpose, where the Security gives the fair Lender a good and legal Title; and it is all one whether such thrd Lender or Purchaser takes in a Mortgage that is an Interest vested, or a Statute, that is only a Charge; for both are real Liens, and sufficient to overthrow the

Title of the mesne Incumbrance; or whether Money be due on the first Security or not, since that does not alter the legal Title.

1 Chan. Ca.  
201.

3 Chan. Rep.  
67. S. C. Sir  
Ralph Bovey  
ver. Skipwith.

A Man mortgages the Manor and Rectory of *D.* to *A.* and afterwards mortgages the Rectory to *B.* without Notice of the Mortgage to *A.* and then *B.* purchases in a precedent Incumbrance on both the Manor and Rectory; and the Question was, when *B.* had received all the Money due on the first Security, whether he should receive any more Profits of the Manor, or only keep the Incumbrance on Foot to protect the Rectory; this was argued before Sir *Heneage Finch* Lord Keeper, in the Presence of *Wild* and *Twisden*; and the two Judges held, that *B.* should not receive the Profits of the Manor after the first Incumbrance was satisfied; because he had taken the Rectory only for his Security of that Sum; and it would be unreasonable, to give him a Security beyond what he had in his original Intention; but the Lord Keeper over-ruled it; for that when he had purchased the precedent Incumbrances, that comprehended both the Manor and the Rectory, and were forfeited at Law, it was but reasonable that the Estate should not be taken away by the mesne Incumbrancer here in a Court of Equity, which by no Methods could be evicted at Law; unless such Person that seeks Relief would do Equity, and pay the whole Money due on both Securities.

1 Chan. Ca.  
166.

But if *B.* the second Mortgagee, had Notice of the Mortgage of *A.* at the Time of his first Lending the Money, then he could not purchase in a prior Incumbrance, so as to crowd out *A.* because he lent it on the Prospect that *A.* was first to be paid, and under that immediate Expectation; and tho' the Estate would bear more Money at the Time of the Loan, yet if by prior Debts appearing, or any Accident, it is likely to fall short, it seems he cannot crowd out *A.* of whose Interest he had Notice, since he took the Estate with his Eyes open, under Notice of *A.*'s Interest; and therefore, on his original taking the Security, ran all the Hazards of that Nature; for it is Corruption in *B.* to purchase after such Notice, with an ill Intention of destroying *A.*'s prior Security.

2 Chan. Ca.  
20.

A Man mortgages Lands subject to an Annuity to *A.* and then mortgages the same Lands to *B.* the Mortgagor and Annuitant borrow more Money of *A.* for which the Annuity is assigned, and the Lands farther charged; *A.* shall be allowed the whole Money, if he had no Notice of *B.*'s Mortgage; if he had, then only what was paid to the Annuitant.

Breerton ver.  
Jones, June  
8. 1709. Per  
Master of  
the Rolls.

*A.* mortgaged his Estate to *B.* and then assigned the Equity of Redemption to *C.* afterwards *D.* obtained a Judgment against *A.* and *B.* the Mortgagee assigns to *D.* his Mortgage; and then *C.* tenders the Money due on the first Mortgage to *D.* who had Notice of the Assignment of the Equity of Redemption, upon his purchasing in of his first Mortgage; and it was here objected, that *D.* having the legal Estate in him by the Assignment of the forfeited Mortgage, and *C.* having only an equitable Interest, not supported by the legal Estate, that if *C.* would have Equity, he ought to do Equity, by paying off both Monies to *C.* But it was answered and resolved by the Court, that *C.* should redeem, paying only the Money due on the Mortgage, and not what was due on the Judgment; because the Equity of Redemption was never bound by the Judgment; for the Judgment was not confessed, so as to become a real Lien upon the Estate, at the Time when the Equity of Redemption was conveyed away; but it only subsisted upon Bond, which was a Security *in personam*, not *in rem*, at the Time when this Equity was assigned; and therefore the Judgment could never charge or affect it; and consequently *C.* purchased an Estate not bound by the Judgment; and by Consequence the Judgment Creditor, by purchasing in the prior Mortgage, could never defeat the Interest of *C.* It was also declared, that if a Person who had a first Mortgage, without the Consent of the Mortgagor, should purchase in a subsequent Judgment, without the Consent

sent of the Mortgagor, that a mesne Mortgagee, or Assignee of the Equity of Redemption, should not be obliged to pay the Money due on both Securities, in order to redeem, because such Transaction of the Mortgagee, was only to load the Estate without the Consent of the Owner, and had no Prospect of bettering his own Security; as in the Case where a Mortgagee at a third Hand purchases in the first Incumbrance.

*Beeching* made a Mortgage of his Estate, and became indebted to *Hayward* in 60 *l.* and then convey'd to *Streater*, another Defendant, in Trust to pay the Debt of *Streater*, and then all his other Debts in Average; then *Streater* tendered the Money to the Mortgagee, which he refused, and afterwards assigned the Mortgage to *Hayward*; and then *Hayward* obtained Judgment against *Beeching*, on his Bond of 60 *l.* and then *Streater* sold to the Plaintiffs, who not having paid their Purchase Money, preferred their Bill against the Mortgagees and *Hayward* to redeem; the Lord Keeper ordered, that the Plaintiffs should redeem *Hayward's* Mortgage, and deduct their Costs out of the Mortgage Money, and that the Judgment should be paid but in Proportion; for tho' *Hayward* had a Title at Law, and it was insisted, that his Judgment would affect the resulting Equity in *Beeching*, if there was more than sufficient to pay his Debts; and none of the Creditors of *Beeching* were made Parties to the Suit; yet the Lord Keeper thought, that the Conveyance made for the Payment of all *Beeching's* Debts was a good Consideration, and that being prior to the Judgment, the subsequent Judgment could not affect the Estate; and tho' no Creditors of *Beeching's* were made Parties, yet they might be brought in before the Master.

*Streater* ver. *Hayward*, Feb. 9, 1710, per Lord Keeper Harcourt.

If a Man lends 600 *l.* on a Mortgage, and afterwards discovering that the Estate is pre-mortgaged to *J. S.* he gets in an old satisfied Incumbrance, and brings his Bill against *J. S.* to redeem or be foreclosed, he need not prove the actual Payment of any Money for such precedent Incumbrance, the having the Deed or Acquittance being sufficient.

2 Vern. 279.

If a prior Mortgage or Statute be bought in, pending a Bill brought by *A.* against the Mortgagor, and *B.* who buys in such precedent Statute or Mortgage to foreclose; tho' this Purchase be *Pendente lite*, yet it will protect *B.* he being at Liberty to do what he can for his own Security.

2 Vern. 29. *Taylor* ver. *Leigh*.

But where *A.* made a Mortgage to *B.* and afterwards a Commission of Bankruptcy was taken out against him, and the Commissioners made an Assignment of his Estate, and then *C.* lent the Bankrupt 2000 *l.* on a second Mortgage, having no Notice of the Bankruptcy, tho' he afterwards got in the first Mortgage; yet it was held by 2 Lords Commissioners against one, that this prior Mortgage should not protect the Mortgage subsequent to the Bankruptcy; for every one is bound to take Notice of a Commission of Bankruptcy.

2 Vern. 157, 160.

And tho' a Purchaser or Mortgagee may buy in an Incumbrance, or lay hold on any Plank to protect himself, yet he shall not protect himself by the taking a Conveyance from a Trustee, after he had Notice of the Trust; for by taking such Conveyance, he becomes the Trustee himself.

2 Vern. 271.

##### 5. Of the Equity which must be done by him, who would redeem, to the Person against whom a Redemption is prayed.

It is a Rule in Equity, that he, that will have Equity to help where the Law cannot, shall do Equity to the Party against whom he seeks to be relieved; and that therefore where there is an Estate subsisting in Law, as there is in the Mortgagee after Forfeiture, Equity will not destroy it, unless

unless

unless the Party redeeming will satisfy all equitable Demands out of the Estate.

2 Chan. Ca.  
164.  
2 Chan. Rep.  
247.  
1 Vern. 245.  
2 Chan. Ca.  
194.

And on this Foundation it hath been frequently adjudged, that if a Mortgagor borrows more Money of the Mortgagee upon Bond, where the Heir is bound, and dies, the Heir of the Mortgagor shall not redeem without paying the Bond-Debt, as well as that secured by the Mortgage; because, when the Condition is broken, so that the Term or Interest becomes absolute in the Mortgagee, if the Heir of the Mortgagor will have Equity, he must do Equity by the Payment of the whole Money due to the Mortgagee; and this is called a Rebutter; but if the Bill was exhibited by the Mortgagee to foreclose, there if the Heir of the Mortgagor tender Principal and Costs, it sufficeth, without Tender of the Money due on the Bond; because such Bond was not originally any Lien on the Land itself; and if that be tendered, for which the Land was originally pledged, there is no Reason to debar the Heir of his Right of Redemption.

3 Vern. 41.  
Reason ver.  
Saubeverel.

So where a Husband and Wife levy a Fine of the Wife's Land, to enable them to take up the Sum of 400 *l.* and they make a Mortgage for it, and after the Mortgage is forfeited, the Husband pays in Part of the Mortgage Money, but afterwards borrows again the same Sum of the Mortgagee; and it was decreed, that the Mortgagee having the Estate in Law in him, by the Forfeiture of the Mortgage, he should hold the Land against the Heir of the Wife until the whole Money was paid; and if the Heir would not pay in the whole Principal, Interest and Costs, he should be foreclosed.

2 Vern. 177.  
Preced. Chan.  
18. S. C.

So if a Lessee for Years mortgages his Term, and afterwards borrows Money of the Mortgagee on Bond, and dies, his Executor shall not redeem without paying the Bond as well as the Mortgage.

Pre ed. Chan.  
419.  
2 Vern. 691.  
Demandry  
ver. Metcalf.

So where a Man borrowed 200 *l.* on the Pawn of some Jewels, which were worth about 600 *l.* and took a Note from the Pawnee, acknowledging the Jewels to be in his Hands for securing of the 200 *l.* and afterwards the Pawner borrows at several Times 3 several other Sums of Money of the Pawnee, and gives his Note for each Sum, without taking any Manner of Notice of the Jewels, and dies; and his Executors having brought their Bill to redeem the Jewels, on Payment of the 200 *l.* first lent thereon and Interest; it was held, that to intitle them to such Redemption, they must pay all the Money due on the several Notes, on this Foundation, that he who will have Equity must do Equity; and that therefore since the Plaintiffs could not have back these Jewels without the Assistance of this Court, it is reasonable and just he should pay the Defendant all Monies due to him, it being natural to suppose, the Pawnee would not have lent him those Sums, but on the Credit of the Pledge he had in his Hands before.

1 Chan. Ca.  
97. St. John  
ver. Halford.

If *A.* is bound in several Bonds with *B.* as his Surety for 4000 *l.* and *A.* conveys the Manor of *C.* to *B.* by Way of Mortgage, to counter-secure him against the Bonds for 4000 *l.* and *A.* dies, and after *D.* the Son and Heir of *A.* becomes bound with *B.* for 2000 *l.* more; but there is no Agreement that the Mortgage should be a Security to *D.* against the Bonds for 2000 *l.* and after *B.* dies, his Heir shall not be permitted to redeem upon Payment of the 4000 *l.* only, but must save *D.* harmless, as well touching the 2000 *l.* as the 4000 *l.* for he, that would have Equity to help where the Law cannot, must do Equity to the Party against whom he seeks to be relieved.

Hard. 318.  
Sir John Hed-  
worth and  
Primate.

If *A.* acknowledge a Statute to *B.* for Payment of 800 *l.* with Interest, which being forfeited, and the Lands extended upon it, *A.* for a valuable Consideration settles the same Lands in Tail, and after borrows Money of *B.* and by Articles it is agreed, the Statute and Extent shall stand a Security for the last Money, and after *A.* dies, and the 800 *l.* with In-

terest

terest is satisfied by Reception of the Profits; yet the Issue in Tail shall not be relieved against the Penalty of the Statute; for tho' the Heir has an Equity, by Reason of the Tail made upon a Consideration, yet the Money lent raises an Equity for *B.* so that *B.* hath both Law and Equity, whereas the Issue in Tail hath Equity only till the Penalty is satisfied.

The Plaintiff, as Assignee of a Statute of Bankruptcy, brought his Bill to redeem a Mortgage of the Manor of *Newington* in *Kent*, made by the Bankrupt to the Defendant; the Defendant by Answer insisted, that he first lent the Bankrupt 200 *l.* on a Mortgage of a particular Tenement, and afterwards lent him 300 *l.* on a Mortgage of the Manor of *Newington*, which was of greater Value than the Money due, but the first Mortgage was deficient in Point of Value; and it was held, that if the Plaintiff will redeem one he must redeem both.

So if a Man make two several Mortgages of several Lands, and dies, and one of the Mortgages is of an entailed Estate, or is deficient in Value, the Heir of the Mortgagor shall not be admitted to redeem one without the other; neither shall the Mortgagor himself redeem the one, and leave the defective Mortgage, but he must take both together.

If a Man has a Debt owing to him by Mortgage, and another on Bond from the same Person, he cannot tack them together against the (a) Mortgagor, but he shall be let into a Redemption without Payment of both; because the Land in his Hands is chargeable with the Bond even at Law; and (b) since the Statute against fraudulent Devises, the Devisee of the Equity of Redemption is in the same Case with the Heir, and cannot redeem without Payment of both; because the Statute makes such Devise void, as against Creditors, and then the Devisee stands in the Place as the Heir must have done if no Devise had been made; but before that Statute, such Devisee would not be liable to the Bond-Debt.

*Cham. 419.* it is said by my Lord Chancellor, that if a Sum be secured by a Mortgage of Lands, the Mortgagor shall not be admitted to redeem after the Day of Payment is lapsed without paying likewise all that is due to the Mortgagee on Notes or simple Contract; but that it is otherwise, if such subsequent Debts had been secured by Bond. (b) But before the Statute, the Devisee of the Equity of Redemption was not obliged to pay both. *Abr. Eq. 325. Preced. Chan. 89.*

Also it hath been held, that if the Heir of the Mortgagor alien the Lands, the Purchaser, on a Bill brought by him for a Redemption after Forfeiture, shall not be obliged to pay both the Mortgage Money, and also a Bond-Debt due from the Mortgagor; for tho' the Heir must have paid both in such a Case; yet the Reason of that is, because the Heir is expressly bound, and his Person is become Debtor, and not the Lands, and consequently the Lands in the Hands of the Alienee can be charged with nothing but what is an immediate *Lien* thereon, which the Bond is not.

So if a Man, possessed of a Term for Years, mortgages it, and dies indebted to the Mortgagee in a Bond-Debt, if the Executor brings a Bill to redeem, he must pay both; because the Equity of Redemption of the Term is Affets in his Hands; but if he alien the Equity of Redemption of his Term, tho' he shall be answerable for the Value, as it is so far a *Devastavit*, yet the Purchaser shall be charged with no more than was immediately borrowed upon it.

If a Bill is brought by an Heir at Law, or any other Person, against a Mortgagee, whereby the Party would avoid the Mortgage, under Pretence his Ancestor was only Tenant for Life, and he seeks for a Discovery of Deeds and Writings to avoid the Title of the Mortgagee, he shall never have such a Discovery, unless he, by his Bill, submits to confirm the Title, and then he shall.

Father Tenant for Life, Remainder to the Son in Tail; the Father mortgages the Land, and dies; the Mortgagee, by a third Hand, procures the Son to borrow Money of him, as Tenant in Fee, on a Mortgage of

2 Vern. 27.  
Pare ver.  
Orlow.

1 Vern. 29,  
248.  
2 Vern. 207.

*Abr. Ep. 325.*  
*Challis ver.*  
*Cathon.*

(a) In 1 Vern.  
244, it is  
held, that  
the Mortga-  
gor himself  
must pay  
both Bond  
and Mort-  
gage. — And  
in *Preced.*

*Preced. Chan.*  
511. *Coleman*  
*ver. Wines.*

*Preced. Chan.*  
512. *per curiam.*

2 *Chan. Ca.*  
23. *Bromley*  
*ver. Ham-*  
*mond.*



the Premises; this shall not inure to make good the Money lent the Father; for tho' the Mortgagee hath got the legal Estate, yet 'tis only pledged for Money lent to the Son, and the Money lent to the Father was on another Estate, to which the Son is an absolute Stranger; and therefore the Court will not compel the Son to pay the Debt of the Father, from whom he did not claim. But if the Tenant in Tail had mortgaged without Notice of the Entail, and the Mortgagee had got the Deed into his Possession, Equity will not compel him to discover such Deed to overthrow his own Possession, since his Estate arises upon a valuable Consideration, and the Heir in Tail claims under the Ancestor who made the Mortgage, especially if the Mortgage had worked a Discontinuance.

<sup>1</sup> *Vern.* 262.  
*Foster ver.*  
*Merchant.*

So where a Lunatick, before he became such, made a Mortgage of a good Part of his Estate for 50*l.* and the Committee transferred this Mortgage, and took up 3 or 400*l.* more upon it; and my Lord Chancellor declared, the Mortgage should stand a Security for the 50*l.* only.

### 6. At what Time the Redemption must be.

<sup>1</sup> *Chan. Ca.*  
20.

When a Man made a Feoffment in Fee upon Condition, that if the Feoffor paid a Sum of Money at a Day he should re-enter at Law; if the Money was not paid at the Day, the Estate was gone for ever; this made Pledging, according to the Rules of the Common Law, very insecure, and also made it necessary for the Court of Equity to interpose; because the Words of the Condition bound down the Construction at Common Law to the Payment at the precise Day; yet a Trust is supposed between the Mortgagor and Mortgagee, that in Case the Payment was afterwards made, the Mortgagor might have up the Lands; and this the rather, because the Land was esteemed only a Pledge for Money, and that it would be a very unconscionable Thing, that the Mortgagee should take Advantage of the Non-payment at the precise Day, when Lands were generally pledged but for half Value; and in this the Chancellors, who were Ecclesiasticks, were more generally confirmed from the Reasonings of the Civil Law herein beforementioned.

<sup>1</sup> *Chan. Ca.*  
102.  
<sup>1</sup> *Chan. Rep.*  
97, 184, 206.  
*Abr. Eq.* 313,  
314.  
<sup>2</sup> *Vern.* 377.

But tho' a Redemption has been allowed, yet no Time has been limited when the same may be; but when a Man comes in at an old Hand, it hath been sometimes decreed, that the Possessor should account no farther, than for the Profits made in his own Time, to discourage the stirring in such dormant Titles; but 'tis the common Doctrine in the Courts of Equity, that there is no Time limited; for 'tis not within the Statute of Limitations, and the Courts of Equity are tender of settling any set Time; because a Man can never be injured, if he receives Principal, Interest and Costs; and the Proprietor is injured, if he parts with his Possession under the true Value; but sometimes the Court hath allowed Length of Time to be pleaded in Bar, where the mortgaged Estate hath descended, as a Fee, without Entry or Claim from the Mortgagor, and where the Possessor would be entangled in a long Account.

<sup>2</sup> *Vent.* 340.  
*Ewre ver.*  
*White.*

And therefore, at a Rehearing before my Lord Keeper, assisted with Justice *Vaughan* and *Turner*, concerning the Redemption of a Mortgage, which had been made above 40 Years, my Lord Keeper declared, that he would not relieve Mortgages after 20 Years; for that the Statute of Limitations did adjudge it reasonable to limit the Time of one's Entry to that Number of Years, unless there are some particular Circumstances that may vary the ordinary Case, as Infants, Femes Covert, &c. who are provided for by the very Statute; tho' these Matters in Equity are to be governed by the Course of the Court, and that it is best to square the Rules of Equity as near the Rules of Reason and Law as may be.



A Bill was exhibited to redeem a Mortgage; to which the Defendant demurred; because, by the Plaintiff's own shewing it appeared the Mortgage was sixty Years old; but upon Argument the Demurrer was over-ruled; because it was charged in the Bill, that the Mortgagor agreed the Mortgagee should enter and hold till he was satisfied, which is in the Nature of a (a) *Welsh* Mortgage.

1 Vern. 43.  
Orde. vii.  
*Mortgage.*

(a) In a Conveyance by

Lease and Release there was a Proviso, that if A. his Heirs or Assigns, should on *Mich.* Day then next ensuing, or any other *Mich.* Day following, pay to B. his Heirs or Assigns, the Sum of 300*l.* (the Mortgage-Money) and all Arrears of Rent or Interest which should be then due, then the said Conveyance was to cease, without any other Covenant for Payment of the Money; this was held to be a *Welsh* Mortgage, being in Nature of a conditional Purchase, subject to be defeated on Payment, by the Mortgagor, or his Heirs, of the Sum stipulated between them at any *Mich.* Day, at the Election of the Mortgagor or his Heirs; and that here being an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, the same could not be forfeited at Law, like other Mortgages; and this was said to be a common Practice in *Wales*, (proceeding from their Pride,) being done with a Design to keep the Estate for ever in their Family. *Preced. Chanc.* 423-4.

A Mortgage was made to A. in the Year 1639. to indemnify him against Debts for which he was engaged for the Mortgagor; and in the Year 1649. he entered into the mortgaged Premises, and had Possession, and afterwards conveyed away several Parts of the mortgaged Premises to several Persons; and several Sales and Marriage Settlements had been made of them; in the Year 1663. a Bill was brought to redeem; but all the Assignees were not Parties; and a Decree to Account, and a Report made, and Exceptions taken to that Report; and so it rested for about eighteen Years; and then another Bill was brought; and another Decree to redeem; but no Prosecution upon it from the Year 1676. till 1697. and then the Plaintiff, having purchased the Equity of Redemption of those Lands (*inter alia*) from the Heirs of the Mortgagor, brought his Bill to redeem. The Objections against it were the Length of Time, the many derivative Titles that had been made, and when no Suit was depending, and the Difficulty of taking the Account. To which it was answered, that there had been fresh Pursuits, and that the Difficulty of the Account had been occasioned by the Mortgagees themselves, and that there were Infants in the Case. My Lord Keeper held there ought to be no Redemption; and that Length of Time excuses the Mortgagee for taking the Estate as his own, and using it accordingly; and none that have come under him have done amiss; and tho' there were Infants in the Case, yet the Time having begun on the Ancestor, it shall run even upon Infants, as it is at Law in the case of a Fine; and there is one great Objection to a Redemption in this Case, that it does not appear that the Plaintiff paid any Thing for this Equity of Redemption, only had it thrown into his Bargain.

2 Vern. 418.  
*Abr. Eq.* 314.  
*Saint-John*  
ver. *Turner*.

The Plaintiff's Grandfather in the Year 1686. had made a Mortgage of the Estate in Question, which was proved to be about nine or ten Pounds *per Annum*, for securing about 100*l.* in the Year 1696. this Mortgage was assigned over to the Defendant; who by Agreement was then let into Possession, and had continued so ever since, and was now about ninety Years of Age; the Mortgagor died several Years since, leaving the Plaintiff's Father his eldest Son and Heir of full Age, who likewise died in the Year 1714. leaving the Plaintiff his eldest Son and Heir, then about twelve Years of Age; who brought this Bill for an Account, and to be let into a Redemption of the Estate in Question; but which the Defendant had been in Possession of thirty-three Years, and so was greatly over-paid his Principal and Interest. But my Lord Chancellor dismissed his Bill; and ordered it to be entered down as one of the Reasons for dismissing the Bill, that the Plaintiff had no Remedy by Ejectment at Law, to recover the Possession, being barred by the Statute of Limitations; and he thought that a reasonable Guide for this Court to follow, as to the Redemption in Equity; and tho' the Plaintiff was an Infant at his

*Abr. Eq.* 315.  
*Knowles* ver.  
*Spence*.

his Father's Death, yet the Computation of Time began long before, when there was no Infancy in the Case, and therefore will run on against Infants after.

### 7. Of the Manner of redeeming and foreclosing.

7 Geo. 2. cap.  
20. For the  
more easy  
Redemption  
and Foreclo-  
sure of Mort-  
gages.

The Methods of Redemption and Foreclosing being dilatory and expensive, and inconvenient, not only to the Mortgagee but also to the Mortgagor, the same seem now remedied by the 7 Geo. 2. cap. 20. which reciting, that whereas Mortgagees frequently bring Actions of Ejectment for the Recovery of Lands and Estates to them mortgaged, and bring Actions on Bonds given by Mortgagors to pay Money secured by such Mortgages, and for performing the Covenants therein contained; and likewise commence Suits in his Majesty's Courts of Equity to foreclose their Mortgagors from redeeming their Estates; and the Courts of Law, where such Ejectments are brought, have not Power to compel such Mortgagees to accept the principal Money, and Interests due on such Mortgages, and Costs, or to stay such Mortgagees from proceeding to Judgment and Execution in such Actions, but such Mortgagors must have Recourse to a Court of Equity for that Purpose; in which Case the Courts of Equity do not give Relief until the Hearing of the Cause; for Remedy thereof, and to obviate all Objections relating to the same, it is enacted, ' That from and after the first Day of *Easter Term* 1734. ' where any Action shall be brought on any Bond for the Payment of ' the Money secured by such Mortgage, or Performance of the Cove- ' nants therein contained; or where any Action of Ejectment shall be ' brought in any of his Majesty's Courts of Record at *Westminster*, or in ' the Court of Sessions in *Wales*, or in any of the Superior Courts in ' the Counties Palatine of *Chester*, *Lancaster* or *Durham*, by any Mortga- ' gee or Mortgagees, his, her or their Heirs, Executors, Administrators ' or Assigns, for the Recovery of the Possession of any mortgaged ' Lands, Tenements or Hereditaments, and no Suit shall be then de- ' pending in any of his Majesty's Courts of Equity, in that Part of ' *Great Britain* called *England*, for or touching the foreclosing or re- ' deemming such mortgaged Lands, Tenements or Hereditaments; if the ' Person or Persons having Right to redeem such mortgaged Lands, Te- ' nements or Hereditaments, and who shall appear and become Defendant ' or Defendants in such Action, shall, at any Time pending such Action, ' pay unto such Mortgagee or Mortgagees, or in case of his, her or ' their Refusal, shall bring into Court, where such Action shall be de- ' pending, all the principal Money and Interest due on such Mortgage, ' and also all such Costs as have been expended in any Suit or Suits at ' Law or in Equity upon such Mortgage, (such Money for Principal, ' Interest and Costs, to be ascertained and computed by the Court ' where such Action is or shall be depending, or by the proper Officer, by ' such Court to be appointed for that Purpose,) the Monies so paid to ' such Mortgagee or Mortgagees, or brought into such Court, shall be ' deemed and taken to be in full Satisfaction and Discharge of such ' Mortgage; and the Court shall and may discharge every such Mortga- ' gor or Defendant of and from the same accordingly; and shall and ' may, by Rule or Rules of the same Court, compel such Mort- ' gagee or Mortgagees, at the Costs and Charges of such Mortgagor ' or Mortgagors, to assign, surrender or re-convey such mortgaged Lands, ' Tenements and Hereditaments, and such Estate and Interest, as such ' Mortgagee or Mortgagees have or hath therein, and deliver up all Deeds, ' Evidences and Writings in his, her or their Custody, relating to the ' Title of such mortgaged Lands, Tenements and Hereditaments; and ' such

such Mortgagor or Mortgagors, who shall have paid or brought such Monies into the Court, his, her or their Heirs, Executors or Administrators, or to such other Person or Persons as he, she or they shall for that Purpose nominate or appoint.

*Sec. 2.* And it is further enacted by the Authority aforesaid, ' That from and after the said *Easter Term 1734.* where any Bill or Bills, Suit or Suits shall be filed, commenced or brought, in any of his Majesty's Courts of Equity in that Part of *Great Britain* called *England*, by any Person or Persons having or claiming any Estate, Right or Interest in any Lands, Tenements or Hereditaments, under or by Virtue of any Mortgage or Mortgages thereof, to compel the Defendant or Defendants in such Suit or Suits, (having or claiming a Right to redeem the same,) to pay the Plaintiff or Plaintiffs in such Suit or Suits the principal Money and Interest due on any such Mortgage, or the principal Money and Interest due on such Mortgage, together with any Sum or Sums of Money due on any Incumbrance or Specialty, charged or chargeable on the Equity of Redemption thereof; and in Default of Payment thereof, to foreclose such Defendant or Defendants of his, her or their Right or Equity of Redeeming such mortgaged Lands, Tenements or Hereditaments; and upon his or their admitting the Right and Title of the Plaintiff or Plaintiffs in such Suit, may and shall, at any Time or Times before such Suit or Cause shall be brought to Hearing, make such Order or Decree therein, as such Court or Courts might or could have made therein, in case such Suit or Cause had then been regularly brought to Hearing before such Court or Courts; and all Parties to such Suit or Suits shall be bound by such Order or Decree so made to all Intents and Purposes, as if such Order or Decree had been made by such Court at or subsequent to the Hearing of such Cause or Suit; any Usage to the contrary thereof in any wise notwithstanding.

*Sec. 3.* Provided always, ' That this Act, or any Thing herein contained, shall not extend to any Case, where the Person or Persons, against whom the Redemption is or shall be prayed, shall (by Writing under his, her or their Hands, or the Hand of his, her or their Attorney, Agent or Solicitor, to be delivered before the Money shall be brought into such Court at Law to the Attorney or Solicitor for the other Side) insist either that the Party praying a Redemption has not a Right to redeem, or that the Premises are chargeable with other or different principal Sums than what appear on the Face of the Mortgage, or shall be admitted on the other Side; nor to any Case where the Right of Redemption to the mortgaged Lands and Premises in Question, in any Cause or Suit, shall be controverted or questioned, by or between different Defendants in the same Cause or Suit; nor shall be any Prejudice to any subsequent Mortgagee or Mortgagees, or subsequent Incumbrancer; any Thing in this Act to the contrary thereof in any wise notwithstanding.

## (F) Mortgagees and their Assignees how to account, and what Allowances to have.

THE Mortgagee is answerable in Equity, when he comes into the Possession of Lands, for the Profits that he made of the Lands, and not for the Profits which he might have made, unless there were Fraud; for it is the Fault and Laches of the Mortgagor, that he would let the Lands lapse into the Hands of the Mortgagee, by the Non-payment of

<sup>1</sup> *Chan. Ca.*

258.

<sup>1</sup> *Vern. 476.*

the Money, and when it doth, he is only a Bailiff for what he doth receive, but is not bound to the Trouble and Pains of making the best of what is another's.

1 Vern. 45.

And therefore a Mortgagee shall not be bound by any Proof, that the Land was worth so much, unless it can likewise be proved, that he did actually make so much of it, or might have done so, had it not been for his wilful Default, as if he turned out a sufficient Tenant that held it at so much Rent, or refused to accept a sufficient Tenant that would have given so much for it.

3 Chan. Ca. 3.

If a Mortgagee in Possession assigns over his Mortgage without Assent of the Mortgagor, the Mortgagee is bound to answer the Profits both before and after the Assignment, tho' assigned only for his own Debt; for he is under a Trust to answer the Profits of the Pledge, and it is a Breach of Trust to assign such Pledge to a Person insolvent; but *Quære*, if the Mortgagor hides, so that he cannot be served with a *Subpoena* to foreclose, whether the Mortgagee may not assign, and not be answerable for the Profits after Assignment.

1 Chan. Ca.

67, 258.

1 Vern. 169.

2 Vern. 135.

If the Mortgagee assigns his Mortgage, and the Mortgagor comes to redeem against the Assignee, all Monies really paid by the Assignee, either as principal or Interest, shall be Principal to the Assignee, and shall bear Interest; otherwise it is, if the Assignee had not paid the Money, and the Assignment was only colourable, in order to load the Mortgagor with compound Interest.

1 Vern. 336.

If a Stranger get an Assignment of a Mortgage for less than is due, the Mortgagor, or his Heir, shall not redeem without paying all the Money due; but if a Man purchases the mortgaged Lands, without Notice of this Incumbrance, whether he has not an Equity to redeem them for what was really paid by the Stranger is made a *Quære*.

1 Vern. 476.

But if there are subsequent Incumbrancers, or Creditors in the Case, a Man who buys in a prior Incumbrance, shall against them be allowed only what he really paid, tho' there was in Truth a greater Sum due.

2 Vern. 536.

Ramsden ver. Langley.

If an Infant, by his Guardian, endeavours to overthrow the Mortgage by a supposed Intail, and after a special Verdict, and great Agitation at Law, the Mortgagee prevails, and the Infant brings his Bill to redeem, the Mortgagee having sworn he paid and expended above 120*l.* in defending his Mortgage at Law, altho' he had but 60*l.* Costs allowed him there, shall not be held down to the Taxation at Law, but shall on the Account be allowed all he laid out or expended; and if the Mortgagee in this Case, fearing that his Mortgage would be defeated at Law, gets Administration, as principal Creditor, in the spiritual Court, he shall be allowed the Costs expended there also.

1 Vern. 270.

The Mortgagee obtained Judgment in Ejectment, and entered on the mortgaged Premises, and thereby prevented other Creditors that had subsequent Incumbrances from entering, and yet permitted the Mortgagor to take the Profits, and the other Incumbrancers coming to redeem him, the Court ordered the Mortgagee should be charged with all the Profits he had, or might have received since his Entry.

1 Vern. 258,

267.

So where a Bankrupt, before he became such, having made a Mortgage of his Estate, and the Assignees of the Statute brought an Ejectment for Recovery of the Lands comprized in the Mortgage, and the Mortgagee refused to enter, but suffered the Bankrupt to take the Profits, and to fence against the Assignees with the Mortgage; and it was held, that the Mortgagee should be charged with the Profits from the Time of the Ejectment delivered.

2 Vern. 401.

Amhurst ver. Daxeling.

*A.* mortgaged the Manor of *T.* to *B.* to which an Advowson was appendant; *B.* brought a Bill to foreclose, the Church became void, and he likewise brought a *Quære Impedit* at Law; and on a Motion to stay the Proceedings on the *Quære Impedit*, the Court held, that tho' *A.* had no Bill, yet being ready, and offering to pay the Principal, Interest and

Costs;

Costs; if *B.* will not accept his Money, Interest shall cease, and an Injunction to stay Proceedings on the *Quare Impedit* granted; for the Mortgagee can make no Benefit by presenting to the Church, nor can account for any Value in Respect thereof to sink or lessen his Debt; and the Mortgagee therefore, in that Case, is but in the Nature of a Trustee for the Mortgagor.

It was decreed, that a Mortgagee having received 8 *l. per Cent.* since the Year 1660, should account for the 2 *l. per Cent.* over Value, to sink the principal Mortgage Money; but if the Principal and Interest were over paid, the Parties must shake Hands, for there shall be no Refunding.

*A.* makes a Jointure of an Equity of Redemption, and afterwards becomes a Bankrupt, the Commissioners assign this Equity of Redemption, and the Assignees state an Account. The Jointress brings her Bill to be relieved, alledging Combination between the Assignees and the Mortgagee, and that they had allowed more Money than was due on the Mortgage. Lord Keeper, the Assignees stand in the Place of the Husband, and the Account stated by them ought to be as conclusive as if stated by the Husband, and the Charge is not right in the Bill, being too general; however the Plaintiff had Leave to amend her Bill.

Mortgagor and Mortgagee settle an Account before a Master, and now a subsequent Mortgagee sues for a new Account, supposing the former Account to be false, and made by Consent, but did not insist upon any Particulars; and the Lord Chancellor declared, that the Account should bind the second Mortgagee, if the Fraud and Collusion were answered.

*J. S.* mortgaged his Estate to the Plaintiff, and died, leaving the Defendant his Daughter and Heir, who was an Infant, and had nothing to subsist on but the Rents of the mortgaged Estate; and the Interest being suffered to run in Arrear 3 Years and a Half, the Plaintiff grew uneasy at it, and threatened to enter on the Estate, unless his Interest might be made Principal; upon which the Defendant's Mother, with the Privity of her nearest Relations, stated the Account, and the Defendant herself, who was then near of Age, signed it; and the Account being admitted to be fair, it was held by my Lord Chancellor, that tho' regularly Interest shall not carry Interest, yet that in some Cases, and upon some Circumstances, it would be Injustice if Interest should not be made Principal; and the rather in this Case, because it was for the Infant's Benefit, who, without this Agreement, would have been destitute of Subsistence.

If *A.* mortgages for 450 *l.* payable at the End of 5 Years with Interest, at 5 *l. per Cent.* in the mean Time, and about two Months before the End of the 5 Years, the Mortgagee assigns over the Mortgage for 560 *l.* being the Principal and Interest then due, the 560 *l.* shall carry Interest, tho' the 5 Years were not elapsed, the Mortgage being forfeited by the Non-payment of Interest.

If the Mortgagor tenders the Money, and the Mortgagee refuses, he loses the Interest from the Time of the Tender; because it is but a Pledge for the Money, and if the Money be tendered, he ought not to keep the Pledge; and no Man ought to pay for the Forbearance, when he hath the Money ready.

The Plaintiff had made a Mortgage in Fee of his Estate, which by several mesne Assignments was come to Sir William Dodwell, and there being likewise two several Terms for Years standing out, they were assigned to Trustees, in Trust for Sir William Dodwell, to protect the Inheritance, and subject to the same Equity of Redemption; the Plaintiff and Sir William settled an Account of what was due; and there appearing to be due thereon 4400 *l.* principal Money, the Interest was then paid off, and at the same Time Sir William Dodwell gave a Note, whereby he promised, that on Payment of the Sum of 4479 *l.* or thereabouts, on the 23 October then next, being the Interest computed to that Time, he would convey the Inheritance to the Plaintiff and his Heirs, and would procure

*Preced Chan.*  
50. Walker  
ver Penrin.  
Ex Vid.  
2 Vern. 78.  
145.

1 Vern 179.  
Knight ver.  
Barnfield.

1 Cha. Ca.  
299.  
Needler ver.  
Deeble.

*Abt Eq.* 287.  
Earl of Chesh-  
terfield, ver.  
Lady Crom-  
well.

2 Vern. 135.  
Gladman ver.  
Henchman.

1 Chan. Ca.  
29.  
2 Chan. Ca.  
206.

*Abt Eq.*  
218-9. Sir  
John Aupen  
ver. Execu-  
tors of Sir  
William Dod-  
well.

his

his Trustees to assign the two Terms for Years, as the Plaintiff should direct. In *August* following Sir *William Dodwell* died, and the Defendants were his Executors; and he likewise left the Defendant *Mary*, his only Child and Heir at Law, an Infant of about 8 Years of Age; the Plaintiff provided the Money, and on the 23 *October* tendered a Bank-Bill of 4500 *l.* to one of the Executors (there being 4 in all) for him to take thereout what was then due for Principal and Interest; but the Executors, having none of them proved the Will, he refused to accept the Tender; upon which the Plaintiff asked him, if he objected to the Legality of the Tender, being in a Bank-Bill and not in Money, and that if he did, he would immediately turn it into Money; to which the other answered, he had no Objection to the Tender, but not having proved the Will, he would not accept of the Money. Afterwards the Plaintiff made the like Tender to another of the Executors, who likewise refused to accept of it, not having proved the Will; but he objected to the Legality of the Tender, not being in Money. Afterwards all the 4 Executors proved the Will; and the Bill was brought to redeem, on Payment of 4400 *l.* and Interest, to the 23 *October*, being the Time mentioned in the Note, and that the Plaintiff might not be obliged to pay Interest beyond that Time, as the Executors insisted he ought; and 'twas held by my Lord Chancellor, that this Tender in a Bank-Note was not, strictly speaking, a legal Tender; but since it was proved the Plaintiff offered to turn it into Money, that made it a good Tender. 2dly, It was clearly agreed, that any, or either of the Executors, before Probate, might have received, and given a good Discharge for the Money, especially when, as appeared in this Case, they afterwards proved the Will, and so were Executors *ab initio*. 3dly, That tho' they were Executors only in Trust for the Daughter, who was an Infant, yet none of them could be in a better Case than Sir *William Dodwell* himself would have been, if he had been living; and such Tender, under these Circumstances, would have bound him; so it will his Executors and Devisee; and therefore decreed a Redemption on Payment of the 4400 *l.* and Interest to the 23 *October*, the Time mentioned in the Note, and no longer, and no Costs on either Side; and the Infant, Heir at Law, on Payment of the Money to the Executors, was to convey the Inheritance descended to her, according to the Act 7 *Ann.* for obliging Infant Trustees to assign and convey.

# Murder and Homicide.

**T**H E taking away the Life of another, whether it amount to Felony or not, is called by the general Name of Homicide, and is thus branched out and distinguished by our Law.

1. Into *Murder*, which is usually defined the wilful Killing of a Person thro' Malice prepense; and it is said, that anciently it signified only the private Killing of a Man, for which, by Force of Law, introduced by King *Canutus*, for the Preservation of his *Danes*, the Town or Hundred, where the Fact was done, was (a) amerced, unless it could be (b) proved, that the Person slain was an *Englishman*, or unless they could produce the Offender; and this Law was provided to avoid the secret Murder of the *Danes*, who were hated by the *English*, and oftentimes privily murdered by them.

*Bract.* 134.  
*Stamf.* 17.  
*Keeling* 121.  
*& vid. For-*  
*rescue's Pref.*  
to Absolute  
and Limited  
Monarchy,  
59.  
(a) The A-  
mercement  
was 46

Marks. *Wilk. Sax. Law* 280. (b) This Proof was called *Englesbire*, and was various according to the Custom of several Places, but most ordinarily it was by the Testimony of two Males, of the Part of the Father of him that was slain, and by two Females of the Part of the Mother. 1 *Hal. Hist. P. C.* 447.

But this Law having been abolished by 14 *E. 3.* the Killing of any *Englishman* or Foreigner through Malice prepense, whether committed openly or secretly, was by Degrees called Murder, and punished with Death; but by the Common Law, as also by the Statute of 25 *E. 3. cap. 4.* Clergy was promiscuously allowed, as well in Case of Murder, as of Homicide or Manslaughter, before the Statutes of 23 *H. 8. cap. 1. 25 H. 8. cap. 3. 1 E. 6. cap. 12. 5 & 6 Ed. 3. cap. 10.* by which Clergy is taken away from Murder *ex Malitia Præcogitata*.

1 *Hal. Hist.*  
*P. C.* 450.  
1 *Hawk.* 78.

2. *Manslaughter*, by which is understood such Killing, as happens either on a sudden Quarrel, or in the Commission of an unlawful Act, without any deliberate Intention of doing any Mischief at all, and in which the Offender is allowed his Clergy; tho' it be Felony, and differs from Murder only in Degree and Quality. Hence it is, that upon an Indictment of Murder, the Party offending may be acquitted of Murder, and yet found guilty of Manslaughter, as is every Day's Practice; and as it is done without Premeditation, it is held, that there can be no Accessaries to it before the Fact.

3 *Inst.* 55.  
*Dalt. cap.* 94.  
1 *Hal. Hist.*  
*P. C.* 450.  
1 *Hawk.* 76.

3. Homicide *per Infortunium* or *Chance-Medley*, is, where a Man in doing a lawful Act, without any Intent of Hurt, unfortunately chances to kill another; and tho' this be not Felony, yet as the King hath lost a Subject, and in order to make Men the more careful of their Actions, the Law punishes the Offender with the Loss of his Goods.

1 *Hal. Hist.*  
*P. C.* 477.  
1 *Hawk. P.*  
*C.* 73.

4. Homicide *se defendendo* is, where one who has no other possible Means of preserving his Life from one who combats with him, on a sudden Quarrel, kills the Person, by whom he is reduced to such an inevitable Necessity; and in this Case as in the former, the Party forfeits his Goods, tho' it be not Felony.

1 *Hal. Hist.*  
*P. C.* 478.  
1 *Hawk.* 73.

*Justifiable Homicide* is, 1<sup>st</sup>, Where in Defence of a Man's House, he kills one who attempts to burn it, or to commit in it Murder, Robbery, or other Felony. 2<sup>dly</sup>, Where in Defence of a Man's Person, he kills one who assaults him in the Highway, with an Intent to murder or rob him. 3<sup>dly</sup>, Where the Killing happens in the Advancement and due Execution of publick Justice, as where a Felon flies from those who en-

1 *Hal. Hist.*  
*P. C.* 424.  
1 *Hawk. P.*  
*C.* 70.



deavour to apprehend him, &c. and this is so far from being Felony, that it causes no Forfeiture whatsoever.

But for the better understanding these several Species of Homicide, it will be necessary to consider.

(A) **In what Cases a Man may be said to kill another.**

(B) **Who are such Persons, by killing of whom a Person may be said to commit Murder.**

(C) **What shall be deemed Murder: And herein,**

1. Where it shall be said to be express Murder, and of Malice prepense.

2. Where the Malice shall be said to be implied, or by Presumption of Law: And herein,

1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.

2. When done on an Officer or Minister of Justice.

3. When done by Persons in the Execution of some other unlawful Act.

(D) **Of Manslaughter, and therein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1.**

(E) **Of Justifiable Homicide: And herein,**

1. As it happens in the due Execution and Advancement of publick Justice.

2. As it happens in the Defence of a Man's Person, House or Goods.

(F) **Of Excusable Homicide: And herein,**

1. Of Homicide *per Infortunium*, or Chance-Medley.

2. Of Homicide *se Defendendo*.

(A) **In what Cases a Man may be said to kill another.**

3 Inst. 48.

Palm. 548.

1 Hal. Hist.

P. C. 431 2.

1 Hawk. P.

C. 78.

AS there are as many Ways of Killing, as there are Modes by which one may die, *Moriendi mille Figure*, it is laid down in general, that not only he, who by a Wound or Blow, or by Poisoning, Strangling or Famishing, &c. directly causes another's Death; but also in many Cases, he, who by wilfully and deliberately doing a Thing, which apparently endangers another's Life, thereby occasions his Death, shall be adjudged to kill him.

Crompt. 24. b.

Dalt. cap. 93.

1 Hal. Hist.

432.

1 Hawk. 78.

Hence in the Case of that unnatural Mother, who left her Child in an Orchard covered only with Leaves, in which Condition it was struck by a Kite, and died thereof, it was adjudged Murder.

So



So in the Case of that unnatural Son, who carried his sick Father, against his Consent, in cold frosty Weather from one Town to another, by Reason whereof he died.

*Cromp.* 24. b.  
*Pult.* 122.  
*Dalt. cap.* 93.  
*1 Hale's Hist.* 432. *1 Hawk.* 78.

So if by Durefs of Imprisonment a Prisoner die, it is Murder in the Gaoler; and this Durefs is said to be inflicted on every one, that by the Usage of his Keeper is brought nearer to Death and further from Life; and therefore it is said, not to be material whether it proceeds from the Neglect and Carelessness of the Gaoler, or from any actual Violence; and may be effected by confining the Prisoner too closely in a noisome Place, loading him with Fetters, &c.

*Britt. cap.* 11.  
*Jeff.* 38.  
*Fitz. Indict.*  
*ment* 3.  
*Lamb.* 240.  
*Stamf.* 36.  
*3 Inst.* 52.  
*Palm.* 548.  
*1 Hale's Hist.*

466. — And that therefore where any Person dies in Gaol, the Coroner ought to be sent for to inquire of the Manner of his Death. *1 Hale's Hist.* 432.

So where one, by Durefs of Imprisonment, compels a Man to accuse an innocent Person, who on his Evidence is condemned and executed; this is Murder. *Nil refert an quis mortem inferat, aut causam mortis prebeat.*

*Stamf.* 36.  
*3 Inst.* 91.

So in Judgment of Law, a Man may be said to kill one, who in Truth is killed by another, or by himself; as where a Man incites a Madman to kill himself, or another; or where A. by Force takes the Arm of B. and the Weapon in his Hand, and therewith stabs C. whereof he dies, this is Murder in A.

*Plow.* 19. a.  
*Dalt. cap.* 93.  
*1 Hale's Hist.* 434.

So if a Man lays Poison with an Intent to kill one Man, which is accidentally taken by another, who dies thereof, this is Murder.

*9 Co.* 81.  
*Plow.* 474.

So if a Woman be with Child, and a Person gives her a Potion to destroy the Child within her, and she takes it, and it works so strongly that it kills her, this is Murder.

*1 Hale's Hist.* 429.

Also a Person, who wilfully neglects to prevent a Mischief, which he may and ought to provide against, is answerable for any ill Consequences that may ensue his Neglect: And on this Foundation it is held by some Opinions, that if a Man have an Ox, Horse, &c. which he knows to be mischievous, by being used to gore or strike those who come near them, and he neglects to tie them up, by which they kill a Person, that the Owner may be indicted, as having himself feloniously killed him; which seems agreeable to the (a) Jewish Law; but herein my Lord Hale lays down the following Particulars, which he says seem to him to be agreeable to Law.

*Fitz. Coron*  
311.  
*Stamf.* 17.  
*Cromp.* 24.  
*1 Hawk. P.C.*  
495.

1. If the Owner have Notice of the Quality of his Beast, and it doth any Body Hurt, he is chargeable with an Action for it.

*1 Hale's Hist.* 430

2. Tho' he have no particular Notice that he did any such Thing before, yet if it be a Beast that is *Feræ Nature*, as a Lion, a Bear, a Wolf, yea an Ape or Monkey, if he get loose and do Harm to any Person, the Owner is liable to an Action for the Damage; as was adjudged in *Andrew Baker's Case*, whose Child was bit by a Monkey that broke his Chain and got loose.

*1 Hale's Hist.* 430.

3. And therefore, in case of such a Wild Beast, or in case of a Bull or Cow that doth Damage, where the Owner knows of it, he must, at his Peril, keep him up safe from doing Hurt; for tho' he use his Diligence to keep him up, if he escape and do Harm, the Owner is liable to answer Damages.

*1 Hale's Hist.* 430.

4. But as to the Point of Felony, if the Owner have Notice of the Quality of the Ox, &c. and use all due Diligence to keep him up, yet the Ox breaks loose and kills a Man; this is no Felony in the Owner, but the Ox is a Deodand.

*1 Hale's Hist.* 431.

5. But if he did not use that due Diligence, but thro' Negligence the Beast goes abroad, after Warning or Notice of his Condition, and kills a Man, it is Manslaughter in the Owner.

*1 Hale's Hist.* 431.

6. But if he did purposely let him loose, or wander abroad, with Design to do Mischief, nay, tho' it were with Design only to fright People, and make Sport, and it kill a Man, it is Murder in the Owner; and this, he says, he had heard had been so ruled at the Assizes held at *St. Albans*; but he adds, this is only a Hearsay.

1 *Hale's Hist.*  
429.

If a Physician gives a Person a Potion, without any Intent of doing him any bodily Hurt, but with an Intent to cure or prevent a Disease, and, contrary to the Expectation of the Physician, it kills him, this is no Homicide; and the like of a Chirurgeon.

*Stamf.* 16. b.  
*Pult.* 22. b.  
*Crom.* 27.  
43 E. 3. 33. b.  
*Fitz. Coron.*  
163.

But some hold, that if a Person, not duly authorized to be a Physician or Surgeon, undertake a Cure, and the Patient die under his Hand, he is guilty of Felony; but this Opinion, says my Lord *Hale*, is erroneous; for Physick and Salves were before licensed Physicians and Surgeons; and therefore, if they be not licensed according to the Statutes of 3 H. 8. cap.

1 *Hale's Hist.*  
429.  
1 *Hawk. P.C.*  
87.

11. or 14 H. 8. cap. —. they are liable to the Penalties in the Statutes, but are not guilty of Murder or Manslaughter; and herewith agreeth *Hawkins*, who says, that the charitable Endeavours of those Gentlemen, who study to qualify themselves to give Advice of this Kind, in order to assist their poor Neighbours, can by no Means deserve so severe a Construction from their happening to fall into some Mistakes in their Prescriptions, from which the most learned and experienced cannot always be secure. But as it is highly rash and presumptuous for unskilful Persons to undertake Matters of this Nature, the Law cannot well be too severe in this Case; in order to deter ignorant People from endeavouring to get a Livelihood by such Practice; which cannot be followed, without the manifest Hazard of the Lives of those that have to do with them.

1 *Hale's Hist.*  
432.

If a Person, who is infected with the Plague, having a Plague-sore running upon him, goes abroad to the Intent to infect another, and another is thereby infected, and dies; this it seems is Murder by the Common Law; but if no such Intention evidently appear, tho' *de facto* by his Conversation another be infected, it is no Felony by the Common Law, tho' it be a great Misdemeanor.

1 *Hale's Hist.*  
429.

If a Man, either by Working upon the Fancy of another, or possibly by harsh or unkind Usage, put another into such Passion of Grief or Fear, that the Party either die suddenly, or contract some Disease, whereof he dies; tho', as the Circumstances of the Case may be, this may be Murder or Manslaughter in the Sight of God, yet *in foro humano* it cannot come under the Judgment of Felony; because no external Act of Violence was offered, whereof the Common Law can take Notice; and secret Things belong to God.

*Stamf.* 21.  
*Dalt. cap.* 93.  
1 *Hawk. P.C.*  
79.

But in all these Cases it is agreed, that no Person shall be adjudged, by any Act whatever, to kill another, who doth not (a) die thereof within a Year and a Day after; in the Computation whereof the whole Day on which the Hurt was done shall be reckoned the first.

(a) Antient-

ly a barbarous Assault with an Intent to murder, so that the Party was left for dead, but yet recovered again, was adjudged Murder and Petit Treason; but that holds not now; for the Stroke without the Death of the Party stricken, nor the Death without the Stroke, or other Violence, makes not the Homicide or Murder. 1 *Hale's Hist. P. C.* 425 6.

3 *Inst.* 53.  
*Kely.* 26.  
1 *Keb.* 17.

If a Person hurt by another, die thereof within a Year and a Day, it is no Excuse for the other, that he might have recovered, if he had not neglected to take Care of himself.

1 *Hale's Hist.*  
P. C. 428.

But if the Wound or Hurt be not mortal, but with ill Applications by the Party, or those about him, of unwholesome Salves or Medicines, the Party dies; if it can clearly appear that this Medicine, and not the Wound, was the Cause of his Death; it seems it is not Homicide; but then that must appear clearly and certainly to be so.

(B) Who are such Persons, by Killing of Whom a Person may be said to commit Murder.

IT is agreed, that the malicious Killing of any Person, whatsoever (a) Nation or Religion he be of, or of whatsoever (b) Crime attainted, is Murder. 1 Hawk. P. C. So.

Enemy within this Kingdom, yet it is Felony; unless it be in the Heat of War, and in the actual Exercise thereof. 1 Hale's Hist. P. C. 433. (b) Tho' outlawed of Felony, or attainted in a *Præmunire*, for the Execution of the Sentence must be by a lawful Officer lawfully appointed; and therefore, if a Person be condemned to be hanged, and the Sheriff behead him, this is Murder, and the Wife may have an Appeal. 1 Hale's Hist. P. C. 433.

If a Woman be quick or great with Child, if she take or another give her any Potion, to make an Abortion, or if a Man strike her, whereby the Child within her is killed; it is not Murder nor Manslaughter by the Law of *England*; because it is not *in rerum natura*; tho' it be a great Crime, and, by the Judicial Law of *Moses*, was punishable with Death; nor can it be legally known whether it were killed or not: So it is (c) if after such Child were born alive and baptized, and after die of the Stroke given the Mother, this is not Homicide. 1 Hale's Hist. P. C. 433.

Murder, notwithstanding some Opinions to the contrary. 1 Hawk. P. C. So.

But if a Man procure a Woman with Child to destroy her Infant when born, and the Child is born, and the Woman, in Pursuance of that Procurement, kill the Infant; this is Murder in the Mother, and the Procurer is Accessory to Murder; and this, whether the Child were baptized or not. 7 Co. 9. Dyer 186. 1 Hale's Hist. 433. 1 Hawk. P. C. So.

(C) What shall be deemed Murder: And herein,

1. What shall be said to be express Murder, and of Malice prepense.

HEREIN it seems to be agreed, that any (d) formed Design of doing Mischief may be called Malice; and therefore that not such Killing only, as proceeds from premeditated Hatred or Revenge against the Person killed, but also in many other Cases, such as is accompanied with those Circumstances that shew the Heart to be perversly wicked, is adjudged to be of Malice prepense. 1 Hawk. P. C. So.

doing any bodily Harm to another, whereunto by Law he is not authorized; and the doing of such a Malice, says he, must arise from external Circumstances discovering that inward Intention; as Lying in wait, Menacings, antecedent former Grudges, deliberate Compassings, and the like, which are various, according to Variety of Circumstances. 1 Hale's Hist. P. C. 451.

If two Persons in cool Blood meet and fight on a precedent Quarrel, and one of them is killed, the other is guilty of Murder; and this the Law adjudges to be of Malice, and that the Party cannot help himself by alledging, that he was first struck by the Deceased, or that he had often declined to meet him, and was prevailed upon to do it by his Importunity; or that it was his only Intent to vindicate his Reputation; or that he meant not to kill, but only to disarm his Adversary; for since

he deliberately engaged in an Act highly unlawful, in Defiance of the Laws, he must at his Peril abide the Consequences thereof; and not only he who kills, but also his Seconds are guilty of Murder; and some hold, (a) that the Seconds of the Deceased are also equally guilty.

(a) By Reason of the

Countenance they give, and it being done by Compact and Agreement; but this Construction is said to be too rigid; and that it would be hard to make a Man, by such Reasoning, the Murderer of his Friend, to whom he was so far from intending any Mischief, that he was ready to hazard his own Life in his Quarrel. 1 Hawk. P. C. 82. 1 Hale's Hist. 453.

Keil. 56.

1 Sid. 177.

1 Lev. 150.

A Man is esteemed to fight in cool Blood, when he meets in the Morning on an Appointment over Night; or in the Afternoon on an Appointment in the Morning; or as some say, if he fell into other Discourse after the Quarrel, and talked calmly upon it; or if he have so much Consideration, as to observe that it is not proper or safe to fight at present for such and such Reasons, which shew him to be Master of his Temper.

1 Hawk. P. C. 81.

If *A.* on a Quarrel with *B.* tell him he will not strike him, but that he will give *B.* a Pot of Ale to strike him, and thereupon *B.* strike, and *A.* kill him, he is guilty of Murder; for he shall not elude the Justice of the Law by such a Pretence to cover his Malice.

1 Hawk. P. C. 81.

1 Hale's Hist. 453.

In like Manner, if *B.* challenge *A.* and *A.* refuse to meet him, but in order to evade the Law tells *B.* that he shall go the next Day to such a Town about his Business; and accordingly *B.* meets him the next Day in the Road to the same Town, and assaults him, whereupon they fight, and *A.* kills *B.* he seems guilty of Murder; unless it appear by the whole Circumstances that he gave *B.* such Information accidentally, and not with a Design to give him an Opportunity of fighting.

Crompt. 22. b.

Dalt. cap. 93.

Keil. 58, 129.

And at this Day it seems to be settled, that if a Man assault another with Malice prepense, and after be driven by him to the Wall, and kill him there in his own Defence, he is guilty of Murder, in respect of his first Intent.

Keilyng, The Queen ver.

Marygridge.

1 Hawk. P. C. 81.

And it hath been adjudged, that even upon a sudden Quarrel, if a Man be so far provoked by any Words or Gestures of another, so as to make a Push at him with a Sword, or to strike at him with any such Weapon, as manifestly indangers his Life, before the other's Sword is drawn, and thereupon a Fight ensue, and he who made such Assault kills the other, he is guilty of Murder; because that by assaulting the other in such an outrageous Manner, without giving him an Opportunity to defend himself, he shewed that he intended not to fight with him, but to kill him; which violent Revenge is no more excused by such a slight Provocation, than if there had been none at all.

Keil. 55, 61,

151.

1 Hawk. P. C. 81.

But it is said, that if he, who draws upon another in a sudden Quarrel, make no Pass at him till his Sword is drawn, and then fight with him and kill him, he is guilty of Manslaughter only; because that by neglecting the Opportunity of Killing the other, before he was on his Guard, and in a Condition to defend himself, with like Hazard to both, he shewed that his Intent was not so much to kill as to combat with the other, in Compliance with those common Notions of Honour; which prevailing over Reason, during the Time that a Man is under the Transports of a sudden Passion, so far mitigate his Offence in Fighting, that it shall not be adjudged to be of Malice prepense.

1 Hawk. P. C. 82.

And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a Weapon, and go into the Field, and there one kill the other, he is guilty of Manslaughter only; because he did it in the Heat of Blood.

1 Hawk. P. C. 82.

And such an Indulgence is shewn to the Frailties of Human Nature, that where two Persons, who have formerly fought on Malice, are afterwards to all Appearance reconciled, and fight again on a fresh Quarrel,

it shall not be presumed that they were moved by the old Grudge; unless it appear by the whole (a) Circumstances of the Fact.

appears, that the Reconciliation was but pretended, or counterfeit, and that the Hurt done was upon the Score of the old Malice, then it is Murder. 1 Hale's Hist. 452.

If a Man be so far provoked by a Breach of Promise, or by a Trespass on his Lands or Goods, or by any Words or Gestures whatsoever, as thereupon immediately to push at another with a Sword, or strike him with a dangerous Weapon before his Sword is drawn, and thereupon a Fight ensue, and the Person assaulted be slain, the Assailant is guilty of Murder, tho' he was driven to the Wall when he gave the mortal Wound; for by assaulting the other in such abusive Manner, he shews that his Intent was not to fight with him, but to kill him; but if he had made no Pass till the other's Sword had been drawn, or had only beaten him in such Manner, as made it appear that he meant only to chastize him, he would have been guilty of Manslaughter only.

So if a Person, seeing two others fighting together on a private Quarrel, whether sudden or malicious, takes Part with one of them, and kills the other, it is but Manslaughter.

So if two strive for the Wall, and one happen to kill the other, or a Man happen to kill another, who, claiming a Title to his House, attempts forcibly to enter it, &c. or to kill one who endeavours unlawfully to arrest him; or to force him from his Possession of a Room in a Publick House; or if a Man immediately kills one whom he finds in Bed with his Wife; or that pulls him by the Nose; or fillips him in the Forehead, or actually strikes him; in all these Cases the Party is at most only guilty of Manslaughter.

So where A. the Son of B. and C. the Son of D. fall out in the Field and fight, A. is beaten, and runs home to his Father all bloody, B. presently takes a Staff, runs into the Field, being three Quarters of a Mile distant, and strikes C. that he dies; this is not Murder in B. because done in a sudden Heat and Passion.

If a Person in cool Blood, by Way of Revenge, deliberately beat another in such a Manner that he dies of it; or if a Man, upon a sudden Provocation, execute his Revenge in such a Manner as shews a cruel and deliberate Intent of doing a personal Hurt, he is guilty of Murder; as (b) where the Keeper of a Park, finding a Boy stealing Wood, tied him to a Horse's Tail, and beat him, whereupon the Horse ran away and killed him.

Cafe. Keil. 127. S. C. cited. 1 Hale's Hist. 454. S. C. cited and agreed; because the Correction was excessive, and it was an Act of deliberate Cruelty.

## 2. Where the Malice shall be said to be implied, or by Presumption of Law: And herein,

### 1. Where the Homicide being voluntarily committed, and without Provocation, the Law implies Malice.

Herein it is laid down, that when one voluntarily kills another, without any Provocation, it is Murder; for the Law presumes it to be malicious, and that he is *Hostis Humani Generis*; and therefore it is necessary for him, who happens to kill another, to shew such a Provocation as will take off the Presumption of Malice.

He that wilfully gives Poison to another, whether he had provoked him or not, is guilty of wilful Murder; because it is an Act of Deliberation, odious in Law, and presumes Malice.

If

- <sup>1</sup> Hale's Hist. P. C. 455. If *A.* comes to *B.* and demands a Debt of him, or comes to serve him with a *Subpoena ad respondendum*, or *ad testificandum*, and *B.* thereupon kills *A.* this is Murder; for herein there is no Provocation.
- <sup>Cro. Eliz.</sup> 78. <sup>Brains's Case.</sup> <sup>1</sup> Hale's Hist. P. C. 455. cited. *Watts* came along by the Shop of *Brains* and distorted his Mouth, and smiled at him, *Brains* kills him, it is Murder; for it was no such Provocation as would abate the Presumption of Malice in the Party killing.
- <sup>1</sup> Hale's Hist. P. C. 455-6. If *A.* be passing the Street, and *B.* meeting him, there being a convenient Distance between *A.* and the Wall, takes the Wall of *A.* and thereupon *A.* kills him, this is Murder; but if *B.* had jostled *A.* this Jostling had been a Provocation, and would have made it Manslaughter; and so it would be, if *A.* riding on the Road, *B.* had whipped the Horse of *A.* out of the Track, and then *A.* had alighted and kill'd *B.* it had been Manslaughter.
- <sup>1</sup> Hawk. P. C. 82. It seems agreed, that no Affront by bare Words or Gestures, however slighting, or however false and malicious they may be, and aggravated by the most provoking Circumstances, will excuse him from being guilty of Murder, who is so far transported thereby, as immediately to attack the Person who offends him, in such a Manner as manifestly indangers his Life; but if *A.* gives indecent Language to *B.* and *B.* thereupon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* this is but Manslaughter; for the second Stroke made a new Provocation; and so it was but a sudden Falling-out; and tho' *B.* gave the first Stroke, and after a Blow received from *A.* *B.* gives him a mortal Stroke; this is but Manslaughter, according to the Proverb, *The second Blow makes the Affray.*
- <sup>1</sup> Hale's Hist. P. C. 457. *A.* and *B.* are at some Difference, *A.* bids *B.* take a Pin out of the Sleeve of *A.* intending thereby to take Occasion to strike or wound *B.* which *B.* doth accordingly, and then *A.* strikes *B.* whereof he died; this was ruled Murder; 1. Because it was no Provocation, when he did it by the Consent of *A.* 2. Because it appeared to be a malicious and deliberate Artifice, thereby to take Occasion to kill *B.*
- <sup>1</sup> Hale's Hist. P. C. 457. If there be chiding between Husband and Wife, and the Husband strikes his Wife thereupon with a Pestle, that she dies presently, it is Murder; and the Chiding will not be a Provocation to extenuate it to Manslaughter.
- <sup>1</sup> Hawk. P. C. 86-7. If a Person happen to occasion the Death of another unadvisedly, doing an idle wanton Action, which cannot but be attended with the manifest Danger of some other, as by riding with a Horse, known to be used to kick, among a Multitude of People, by which he means no more than to divert himself by putting them into a Fright, he is guilty of Murder.

## 2. When done on an Officer or Minister of Justice.

- <sup>9 Co.</sup> 68. <sup>4 Co.</sup> 40. <sup>Cromp.</sup> 25. <sup>2 Inst.</sup> 52. <sup>Savil</sup> 67. <sup>Keil.</sup> 66. <sup>1 Hawk</sup> P. C. 84. <sup>1 Hale's Hist.</sup> P. C. 457. It hath been adjudged, and hath frequently been agreed, that if a Justice of Peace, Constable, Watchman, &c. be killed in the Execution of their Offices, he, by whom any such Person is killed, is guilty of Murder; for herein the Law implies Malice; and the Indictment need not be special but general, *Ex malitia sua præcogitata interfecit & murderavit*; because the Malice in Law maintains the Indictment.

<sup>Keil.</sup> 66. <sup>1 Hawk</sup> P. C. 84. So if (*a*) a private Person be killed in endeavouring to part those whom he sees fighting, the Person by whom he is killed is guilty of Murder; (*a*) Killing the Assistant of the Constable is as well Murder, as the Killing of the Constable himself; so those who came to the Constable's Assistance, tho' not specially called thereunto, are under the same Protection, as they that are called to his Assistance by Name. <sup>1 Hale's Hist.</sup> P. C. 463

and he cannot excuse himself by alledging, that what he did was in a sudden Affray, in the Heat of Blood, and through the Violence of Passion; but if such Person do not give Notice for what Purpose he comes, by commanding the Parties in the King's Name to keep the Peace, or otherwise manifestly shewing his Intention to be not to take Part in the Quarrel, but to appease it; he who kills him, is guilty of Manslaughter only.

Whoever kills a Sheriff, or any of his Officers, in the lawful Execution of a Civil Process, as on arresting a Person, a *Capias*, &c. is guilty of Murder. <sup>1 Hawk. P. C. 86.</sup>

Nor is it any Excuse to such Person, that the Process was erroneous, (for it is not void by being so) or that the Arrest was in the Night, or that the Officer did not tell him for what Cause he arrested him, and out of what Court, (which is not necessary when prevented by the Party's Resistance) or that the Officer did not shew his Warrant, which he is not bound to do at all, if he be a Bailiff commonly known, nor without a Demand if he be a special one. <sup>1 Hawk. P. C. 86.</sup>

But where the Warrant, by which he acts, gives him no Authority to arrest the Party, as (a) where a Bailiff arrests *J. S.* Baronet, who never was Knighted, by Force of a Warrant to arrest *J. S.* Knight, it is but Manslaughter. <sup>1 Hawk. P. C. 86.</sup>

Defendant be interlined, or inserted after the Sealing thereof by the Bailiff himself, or any other; if such Bailiff be killed it is but Manslaughter. <sup>1 Hal. Hist. P. C. 457.</sup> — So if the Process be executed out of the Jurisdiction of the Court, the Killing of the Officer is only Manslaughter. <sup>1 Hal. Hist. P. C. 458.</sup> — The Constable of the Vill of *A.* comes into the Vill of *B.* to suppress some Disorder, and in the Tumult the Constable is killed in the Vill of *B.* this is only Manslaughter, because he had no Authority in *B.* as Constable. <sup>1 Hal. Hist. P. C. 459.</sup> — But it seems, that if the Constable of the Vill of *A.* had a particular Precept from a Justice of Peace directed to him by Name, or by the Name of the Constable of *A.* to suppress a Riot in the Vill of *B.* or to apprehend a Person in the Vill of *B.* for some Misdemeanor, and within the Jurisdiction and Conuizance of the Justice of Peace, and in Pursuance of that Warrant, he go to arrest the Party in *B.* and in Execution of his Warrant is killed in *B.* this is Murder; for tho', in such Case, the Constable was not bound to execute the Warrant out of his Jurisdiction; neither could he do it singly, *Virtute Officii*, as Constable of *A.* yet he may do it as Bailiff or Minister, by Virtue of the Warrant, and the Killing of him is Murder, as well as if he had been Constable of the Hundred wherein *A.* and *B.* lie; or Sheriff of the County; for a Justice of the Peace may, for a Matter within his Jurisdiction, issue his Warrant to a private Person as Servant, but then such Person must shew his Warrant, or signify the Contents of it. <sup>1 Hal. Hist. P. C. 459.</sup>

And as to the Point of Notice, it is herein further laid down by my Lord Hale, that if he be a Bailiff, Constable or Watchman *Jurus & Conus*, the Killing of him is Murder, tho' the Party does not know him to be such; also it is not necessary for him to notify himself to be such by express Words; but it shall be presumed that the Offender knew him. <sup>1 Hal. Hist. P. C. 460.</sup>

But if it be a private Bailiff, either the Party must know that he is so, or there must be some such Notification thereof, whereby the Party may know it; as by saying *I arrest you*, which is of itself sufficient Notice; and it is at the Peril of the Party, if he kill him after these Words, or Words to that Effect pronounced; for it is Murder, if *de facto* it fall out that he were a Bailiff and had a Warrant. <sup>1 Hal. Hist. P. C. 461.</sup>

A Constable coming to appease a sudden Affray in the Day-time, in the Village whereof he is Constable, it seems every Man, *ex Officio*, is bound to take Notice that he is the Constable; because he is to be chosen and sworn in the Leet, where all Resiants are to attend; but it is not so in the Night-time, unless there be some Notification that he is the Constable. <sup>1 Hal. Hist. P. C. 461.</sup>

But whether it be in the Day or Night, it is sufficient Notice, if he declare himself to be the Constable, or command the Peace in the King's Name; and the like for any who come in his Assistance, or for a Watchman, &c. and therefore, if any of them are killed after such Notification, it is Murder in them that kill him. <sup>1 Hal. Hist. P. C. 461.</sup>



1 *Hal. Hist.*  
P. C. 465.

A Press-Master seized *B.* for a Soldier, and with the Assistance of *C.* laid hold on him; *D.* finding Fault with the Rudeness of *C.* there grew a Quarrel between them, and *D.* killed *C.* By the Advice of all the Judges, except very few, it was ruled, that this was but Manslaughter.

1 *Hawk. P.*  
C. 86.  
(a) This had  
been Mur-  
der before  
the Statute. 1  
*Hal. Hist.* 457.

If a legal Warrant be executed in an unlawful Manner, as if a Bailiff be killed in breaking open a Door or Window to arrest a Man; or perhaps if he arrest one on a Sunday (*b*) since the Statute 29 *Car. 2. cap. 7.* by which all such Arrests are made unlawful, and he is killed, this is but Manslaughter.

### 3. When done by Persons in the Execution of some other unlawful Act.

*Keling* 117.  
*Dalt. cap.* 93.  
*Moor* 87.  
*Plocw* 101.

It seems agreed, that wherever a Man happens to kill another in the Execution of a deliberate Purpose to commit any Felony, he is guilty of Murder; as where a Person, shooting at tame Fowl with an Intent to steal them, accidentally kills a Man, this is Murder.

3 *Inst.* 52.  
1 *Hal. Hist.*  
P. C. 465.

So if *A.* come to rob *B.* in his House, or upon the Highway, or otherwise, without any precedent Intention of killing him; yet if in the Attempt, either without, or upon the Resistance of *B.* *A.* kills *B.* this is Murder.

1 *Hal. Hist.*  
P. C. 465.

So if Men come to steal Deer in a Park or Forest, or to rob a Warren of Conies, and the Parker, Forester or Warrener resists, and is killed, this is Murder.

*Plocw.* 473.  
9 *Co.* 81.  
1 *Hawk. P.*  
C. 84.

And not only in such Cases, where the very Act of a Person having such a felonious Intent, is the immediate Cause of a third Person's Death; but also, where it any Way occasionally causes such a Misfortune, it makes him guilty of Murder; and such was the Case of the Husband, who gave a poisoned Apple to his Wife, who eat not enough to kill her, but innocently, and against the Husband's Will and Persuasion, gave Part of it to a Child, who died thereof. Such also was the Case of the Wife, who mixed Ratsbane in a Potion sent by an Apothecary to her Husband, which did not kill him, but afterwards killed the Apothecary, who to vindicate his Reputation tasted it himself, having first stirred it about; neither is it material in this Case, that the Stirring of the Potion might make the Operation of the Poison more forcible than otherwise it would have been; for in as much as a murderous Intention, which of itself perhaps, in Strictness, might justly be punished with Death, proves now in the Event, the Cause of the King's losing a Subject, it shall be as severely punished, as if it had had the intended Effect, the Missing whereof is not owing to any Want of Malice, but of Power.

1 *Hal. Hist.*  
P. C. 466.

So if *A.* by Malice fore-thought, strikes at *B.* and missing him strikes *C.* whereof he dies; tho' he never bore any Malice to *C.* yet it is Murder, and the Law transfers the Malice to the Party slain.

*Savil* 67.  
*Moor* 86.  
*Palm.* 35.  
*Crom.* 24.  
*Dyer* 128.  
5 *Moi.* 289.  
1 *Hawk. P.*  
C. 84.

If divers Persons resolve generally to resist all Opposers in the Commission of any Breach of the Peace, and to execute it in such a Manner, as naturally tends to raise Tumults and Affrays, as by committing a violent Disseisin with great Numbers of People, hunting in a Park, &c. and in so doing happen to kill a Man, they are all guilty of Murder; for they must, at their Peril, abide the Event of their Actions, who wilfully engage in such bold Disturbances of the Publick Peace, in open Opposition to, and Defiance of the Justice of the Nation.

*Crom.* 28.  
1 *Hawk. P.*  
C. 85.

Yet where divers Rioters, having forcibly Possession of a House, afterwards killed the Person whom they had ejected, as he was endeavouring in the Night forcibly to regain the Possession, and to fire the House, they were adjudged guilty of Manslaughter only, notwithstanding they did the

Fact,



Fact in Maintenance of a deliberate Injury ; perhaps for this Reason (says *Hawkins*) because the Person slain was so much in Fault himself.

But if in such Case, or any other Quarrel, whether it were sudden or <sup>1 Hawk. P. C. 84-5.</sup> premeditated, a Justice of Peace, Constable or Watchman, or even a private Person be slain in endeavouring to keep the Peace and suppress the Affray, he who kills him is guilty of Murder ; for tho' it was not his primary Intention to commit a Felony, yet in as much as he persists in a less Offence with so much Obstinacy, as to go on in it to the Hazard of the Lives of those, who no otherwise offend him, but by doing their Duty in Maintenance of the Law, which therefore affords them its more immediate Protection, he seems to be in this Respect equally criminal, as if his Intention had been to commit a Felony.

If *A.* throws a Stone with an Intent to kill the Poultry or Cattle of <sup>1 Hal. Hist. P. C. 475.</sup> *B.* and the Stone hit and kill a By-stander, it is Manslaughter, because the Act was unlawful ; but not Murder, because he did it not maliciously, or with an Intent to hurt the By-stander.

And tho' by the Statute 33 *H. 8. cap. 6.* no Person not having Lands, <sup>1 Hal. Hist. P. C. 475.</sup> &c. of the Yearly Value of 100*l. per Ann.* may keep, or shoot in a Gun, upon Pain of forfeiting 10*l.* yet, if a Person not qualified shoots with a Gun at a Bird or at Crows, and by Mischance it kills a By-stander, by the Breaking of the Gun, or some other Accident, that, in another Case, would have amounted only to Chance-Medley ; this will be no more than Chance-Medley in him ; for tho' the Statute prohibit him to keep or use a Gun, yet the same was but *malum Prohibitum*, and that only under a Penalty, and will not enhance the Effect beyond its Nature.

If a Man, knowing that People are passing along the Street, throws a <sup>1 Hal. Hist. P. C. 475.</sup> Stone, or shoots an Arrow over the House or Wall, with an Intent to do Hurt to People, and one is thereby slain, this is Murder ; and if it were without such Intent, yet it is Manslaughter, and not barely *per Infortunium*, because the Act itself was unlawful ; but if the Man were tiling an House, and let fall a Tile knowingly, and gave Warning, and yet a Person is killed, this is *per Infortunium* ; but if he gave not convenient Warning, it is Manslaughter, *quia non adhibuit debitam Diligentiam*.

So if a Person happen to occasion the Death of another inadvertently, <sup>1 Hawk. P. C. 86.</sup> doing any idle wanton Action, which cannot but be attended with the manifest Danger of some other ; as by riding with a Horse, known to be used to kick, among a Multitude of People, by which he means no more than to divert himself by putting them into a Fright ; he is guilty of Murder.

## (D) Of Manslaughter, and therein of Manslaughter exempt from Clergy by the Statute of 1 Jac. 1.

**M**anslaughter, or simple Homicide (*a*), is the voluntary killing of <sup>1 Hal. Hist. P. C. 466.</sup> another without Malice express or implied, and differs not, in Substance of the Fact, from Murder, but only differs in these ensuing Circumstances. <sup>(a) By Manslaughter is understood such Killing</sup>

as happens either on a sudden Quarrel, or in the Commission of an unlawful Act, without any deliberate Intention of doing Mischief. <sup>1 Hawk. P. C. 76.</sup>

1. In the Degree of the Offence, Murder being aggravated with Malice presumed or implied, but Manslaughter not ; and therefore in Manslaughter there can be no Accessaries before. <sup>1 Hal. Hist. P. C. 466-7.</sup> 2. In the Form of the Indictment,

dictment, the former being always *Felonice ex malitia præcogitata interfecit & Murtheravit*, the latter only *Felonice interfecit*. 3. In the Point of Clergy, Murder being by the Statute of 23 H. 8. cap. 1. exempt from the Benefit of the Clergy, but not Manslaughter. 4. In the Form of the Pardon of Murder; for tho' at Common Law a Pardon of all Felonies had pardoned Murder, yet, by the Statute of 13 Rich. 2. cap. 1. the Pardon of Murder must either be by the express Word of *Murder*, or else it must be a Pardon of *Felonica interfecio*, with a special *Non Obstante* of the Statute of 13 Rich. 2.

(a) It is generally holden, that this Statute is but declarative of the Common Law. 1 Bull. 87. Keling 55. 1 Hawk. P. C. 77.

But there is a particular Kind of Manslaughter, from which the Benefit of the Clergy is taken away by the (a) 1 Jac. 1. cap. 8. 'Where any Person shall stab or thrust any Person or Persons, that hath not then any Weapon drawn, or that hath not then first stricken the Party that shall so stab or thrust, so as the Person or Persons, so stabbed or thrust, shall thereof die within the Space of six Months then next following; altho' it cannot be proved, that the same was done of Malice forethought; the Offender is ousted of Clergy, provided it shall not extend to him that kills *se Defendendo*, or by Misfortune, or in preserving the Peace, or chastizing his Child or Servant.

In the Construction of this Statute, the following Opinions have been holden.

1 Jon. 240.  
3 Lev. 266.  
1 Hawk. P. C. 77.

That wherever a Person, who happens to kill another, was struck by him in the Quarrel before he gave the mortal Wound, he is out of the Statute, tho' he himself gave the first Blow.

Allen 44.  
1 Salk. 542.  
1 Hawk. P. C. 77.  
1 Hal. Hist. P. C. 468.

That he only who actually gives the Stroke, and not any of those who may be said to do it by Construction of Law, as being present and aiding and abetting the Fact, are within the Statute; from whence it follows, that if it cannot be proved by whom the Stroke was given, none can be found guilty within the Statute, but the Indictment, tho' formed specially upon the Statute, and concluding *contra formam Stat.* is yet a good Indictment of Manslaughter against them that were present aiding and abetting; and upon such a special Indictment of Manslaughter upon the Statute, the Prisoner may be convicted of simple Manslaughter, and acquitted of Manslaughter upon the Statute, and the Indictment serves for a common Manslaughter, as well as a Man upon an Indictment of Murder may be acquitted of Murder, and convicted of Manslaughter.

1 Jon. 432.  
3 Lev. 266.  
1 Hawk. P. C. 77.

That the Killing of a Man with a (b) Hammer, or such like Instrument, which cannot come properly under the Words *thrust* or *stab*, is not a Killing within the Statute; but it seems that the discharging a (c) Pistol, or throwing a Pot, or other dangerous Weapon at the Party, is within the Equity of the Words *having a Weapon drawn*; for penal Statutes are construed strictly against the Subject, and favourably and equitably for him.

(b) If the stabbing or thrusting

were with a Sword, or with a Pikestaff, it is within the Statute; but if by a Shot of a Pistol, Blow with a Sword or Staff, *Quare*. 1 Hal. Hist. P. C. 470. (c) So if the Party slain had a Cudgel in his Hand, it is a Weapon drawn within this Statute; but this must be intended of such a Cudgel as might probably do Hurt, not a small riding Rod or Cane. 1 Hal. Hist. P. C. 470.

1 Hal. Hist. P. C. 465.

The Indictment to oust the Prisoner of his Clergy, must be specially formed pursuant to the Statute, *viz.* that he did with a Sword, &c. stab the Party dead, he having no Weapon drawn, nor having struck first; otherwise it will be but a common Manslaughter, and the Party will have his Clergy.

Stil. 86.  
1 Hal. Hist. P. C. 468.

The Indictment need not conclude *contra Formam Statuti*, no more than in Burglary or Robbery; for the Statute doth not make the Offence to be Felony, but ousts the Prisoner of his Clergy, where the Crime is so circumstantiated as the Statute expresseth.

Cro. Jac. 283.  
1 Hal. Hist. P. C. 468.

But yet it doth not vitiate the Indictment, tho' it do conclude & *fit interfecit contra Formam Statuti*, and accordingly, for the most part, to this

this Day the Indictments upon this Statute do conclude *contra formam statuti*; so it is good with or without such Conclusion; but it is best to follow the common Usage, because every Man doth not readily observe the Reason of the Omission of that Conclusion.

Also the Use hath been, in Cases of this Nature, to prefer two Indictments against Offenders in this Kind, *viz.* one of Murder, another upon this Statute, and put the Prisoner to plead to both; and to charge the Jury first with the Indictment of Murder, and if they find it not to be Murder, then to charge them to inquire upon the other Bill; because, if convict upon either, the Offender is ousted of Clergy.

In the Year 1657. at *Newgate*, before *Glyn*, who then sat as Chief Justice, a Man was indicted upon this Statute, and a special Verdict found, that a Bailiff, having a Warrant to arrest a Man, pressed early into his Chamber with Violence, but not mentioning his Business, nor the Man knowing him to be a Bailiff, nor that he came to make an Arrest, snatched down a Sword that hanged in his Chamber and stabbed the Bailiff, whereof he presently died; there was some Diversity of Opinion among the Judges, whether this were within the Statute; but at Length the Prisoner was admitted to his Clergy; for tho' this Case was within the Words of the Statute, and not within the particular Exceptions, yet it was held, that this Case was never intended in the Statute; for the Prisoner did not know but that the Party came in to rob or kill him, when he thus violently broke into his Chamber, without declaring his Business.

## (E) Of justifiable Homicide: And herein,

### 1. As it happens in the due Execution and Advancement of Publick Justice.

SUCH Killing as happens in the due Execution and Advancement of Publick Justice, is deemed justifiable Homicide; the Ministers of Justice being under the special Protection of the Law; and therefore if a Person, having actually committed a Felony, will not suffer himself to be arrested, but stand on his own (*a*) Defence, or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private Persons or publick Officers, with or without a Warrant from a Magistrate, he may be lawfully slain by them.

*P. C.* 489. *1 Hawk.* 70. (*a*) But if the Prisoner makes no Resistance, but flies, yet the Officer, either for fear that he, or some other of his Party, will rescue the Prisoner, strikes the Prisoner whereof he dies; this is Murder. *1 Hale's Hist. P. C.* 481.

So if an innocent Person be indicted of Felony, where in Truth no Felony was committed, and will not suffer himself to be arrested by the Officer who has a Warrant for that Purpose; he may lawfully be killed by him, if he cannot otherwise be taken; for there is a Charge against him on Record, to which at his Peril he is bound to answer.

So if a Prisoner, endeavouring to break the Gaol, assault his Gaoler, he may lawfully be killed by him in the Affray.

So if those who are engaged in a Riot, or forcible Entry or Detainer, stand in their Defence, and continue the Force, in Opposition to the Command of a Justice of Peace, &c. or resist such Justice endeavouring to arrest them, the Killing of them may be justified; and so perhaps may the Killing of dangerous Rioters by any private Person, who cannot

not otherwise suppress them, or defend himself from them; in as much as every private Person seems to be authorized by the Law to arm himself for the Purposes aforesaid.

*Crompt.* 50.  
*Dyer* 326.  
*1 Hawk. P. C.*  
71.

So if Trespassers in a Forest, Chase, Park or Warren, or any inclosed Ground wherein Deer are kept, will not render themselves to the Keepers, upon an Hue and Cry made to stand to the King's Peace, but fly from, or defend themselves against them; they may be slain by Force of the Statute *De malefactoribus in parcis*, and 3 & 4 *H. & M. cap.* —.

*Plow.* 9 *b.*  
*Dalt. cap.* 98.  
*3 Inst.* 221.  
*37 H. 6. 21. a.*

If either of the Parties fighting in a Combat, allowed by Law for the Trial of some special Cases, be slain, he who kills him is justified; and the Death of the other is imputed to the just Judgment of God, who is presumed to give the Victory to him who fights in the Maintenance of Truth.

*1 Rol. Rep.*  
189.  
*3 Inst.* 56.  
*Crompt.* 24.  
*Dalt. cap.* 98.  
*1 Hawk. P. C.*  
71.

If a Sheriff, being resisted by one whom he attempts lawfully to arrest in a Civil Action, or to retake after he has arrested him, unavoidably kill him in the Affray, he may justify it; tho' he never gave back, but stood his Ground and attacked the Party; but if a Person barely fly from the Execution of (a) Civil Process, the Sheriff cannot justify killing him.

(a) Herein, says my Lord *Hale*, the Difference is between Civil Actions and Felonies; that if a Man be in Danger of Arrest by a *Capias* in Debt or Trespass, and he flies, and the Bailiff kills him, it is Murder; but if a Felon fly, and he cannot be otherwise taken, if he be killed, it is no Felony; and in that Case the Officer so killing forfeits nothing, but the Person so assaulted and killed forfeits his Goods. *1 Hale's Hist. P. C.* 481.

Homicide may be justified in the due Execution of Publick Justice; but herein these Rules must observed.

*10 Co.* 76.  
*Dalt. cap.* 98.  
*22 E. 4. 33. a.*  
*1 Hawk. P. C.*  
70.

1. That the Judgment, by Virtue whereof the Party was put to Death, be given by one who had Jurisdiction in the Cause; for otherwise both Judge and Officer may be guilty of Felony; as if the Court of Common Pleas give Judgment on an Appeal of Death; or Justices of Peace on an Indictment of High Treason, and award Execution, which is executed; but if Justices of Peace condemn a Man to Death, on an Indictment of Trespass, and he be executed, they only, and not the Officers, are guilty of Felony; because they had a Jurisdiction over the Offence; and therefore their Proceedings are erroneous only, and not void.

*1 Hale's Hist.*  
*P. C.* 454.

A Man hath the Liberty of *Infangthief*, the Steward of the Court gives Judgment of Death against a Prisoner against Law; this was a Cause of Seizure of the Liberty, but was not Murder in the Judge, *quia factum judicialiter licet ignoranter.* 2 *R.* 3. 10. *a.* The Case of the Steward of the Liberty of the Abbot of *Crowland*.

*1 Hawk. P. C.*  
70.  
*1 Hale's Hist.*  
455.

The Judgment must be executed by the lawful Officer; for those ancient Opinions, that any one may kill a Person attainted of Felony, and that a Man condemned in an Appeal of Death, is to be executed by the Relations of the Deceased, are now obsolete; and at this Day, even the Judge, who condemns a Man, cannot execute his own Sentence; neither can the proper Officer do it, but by a lawful Command, without being guilty of Felony.

*1 Hawk.* 70.  
*1 Hale's Hist.*  
433. *S. P.*  
Because an  
*A& of deliberate Cruelty.*

The Execution must pursue the Judgment; therefore if the Sheriff behead a Man, where Beheading is no Part of the Sentence, it is the general Opinion, that he is guilty of Felony.

2. As it happens in the Defence of a Man's Person,  
House or Goods.

It is clear, that the Killing of a Person in the Defence of a Man's Person, House or Goods, is justifiable in the following Instances; as where a Man kills one who assaults him in the Highway to rob or murder him; or the Owner of a House, or any of his Servants or Lodgers, &c. kills one who attempts to burn it, or to commit in it Murder, Robbery or other Felony; or a Woman kills one who attempts to ravish her; or a (a) Servant coming suddenly and finding his Master robbed and slain, falls upon the Murderer immediately and kills him; for he does it in the Height of his Surprise, and under just Apprehensions of the like Attempt upon himself; but in other Circumstances he could not have justified the Killing of such a one, but ought to have apprehended him.

Assistants shall have the same Construction, in such Cases, as the Act of the Party assisted should have had, if it had been done by himself. 1 Hale's Hist. P. C. 484.

But a Man cannot justify the Killing another in Defence of his House or Goods, or even of his Person, for a bare private Trespass; and therefore he who kills another, who, claiming Title to his House, attempts to enter it by Force, and shoots at it, or that breaks open his Windows in order to arrest him, or that persists in breaking his Hedges, after he is forbidden, is guilty of Manslaughter; and he, who in his own Defence kills another that assaults him in his House in the Day-time, and plainly appears to intend to beat him only, is guilty of Homicide *se defendendo*, for which he forfeits his Goods, but is pardoned of Course; yet it seems, that a private Person, and *a fortiori* an Officer of Justice, who happens unavoidably to kill another in endeavouring to defend himself from, or suppress dangerous Rioters, may justify the Fact, in as much as he only does his Duty, in Aid of the Publick Justice.

If a Man be dangerously assaulted by another, as with a drawn Sword, &c. without any previous Affray, tho' in a Town or other Place where Help may be expected, and use the same Caution to avoid fighting, as would make the Killing the Assailant Homicide *se defendendo* only, if there had been a previous Affray, and then unavoidably kill the Assailant, it seems reasonable that he may justify it.

It seems also, that in some special Cases, a Man may justify even killing an innocent Person; as where in a Ship-wreck two Persons get upon the same Plank, which will not support them both, and one thrusts the other off.

So if a Man be awakened in the Night with an Alarm that Thieves are in his House, and searching for them in the Dark, with his Sword drawn, happen to kill a Person lying hid in Part of the House, who in Truth had no ill Design, and was brought thither by a Servant in order to assist in cleaning the House; it seems he may justify the Fact, in as much as it hath not the Appearance of a Fault.

But a Man shall never justify himself under a Necessity which he brought upon himself by his own Fault; and therefore, if Rioters, wrongfully detaining a House by Force, kill the Party ejected, or any of his Assistants who attack it from without, and endeavour to burn it, they are guilty of Manslaughter.

It seems a reasonable Opinion, and countenanced by the old Books, that a Fact amounting to justifiable Homicide, being specially

(a) pleaded,

1 Hawk. P.C. 71. and several Authorities there cited.

1 Hale's Hist. P. C. 484.

(a) So of a Husband in Defence of his Wife, a Child of his Parent, &c. *converso*; for the Act of the

1 Hawk. P. C.

72.  
1 Hale's Hist. 485

1 Hawk. P. C. 72.

Dalt. cap. 98.

Cro. Car. 538.  
March 5.

1 Hawk. P. C. 73.

1 Hawk. P. C. 69.

(a) But here- (a) pleaded, and proved to the Court on an Indictment or Appeal of Murder, the Party shall be dismissed without being arraigned, &c. But Hale says, it is certain, that a Fact amounting to excusable Homicide cannot be so pleaded; but the Party must plead Not guilty, and give the special Matter in Evidence: Also it is certain, that where a Fact amounting to justifiable Homicide is found by a Jury, the Party is to be dismissed, without being obliged to purchase a Pardon, &c.

or Charge of Felony, the Prisoner cannot plead any Thing by Way of Justification, as that he did it in his own Defence, or *per infortunium*, but must plead Not guilty; and upon his Trial the special Matter is to be found by the Jury, and thereupon the Court gives Judgment. 1 Hale's Hist. P. C. 478.

## (F) Of excusable Homicide: And herein,

### I. Of Homicide *per infortunium* or Chance-Medley.

- 1 Hale's Hist. P. C. 471. **E**Xcusable or involuntary Homicide is of two Kinds. 1<sup>st</sup>, When it is purely involuntary and casual; as the Killing of a Man *per infortunium*. 2<sup>dly</sup>, When it is partly involuntary and partly voluntary, but occasioned by a Necessity which the Law allows, which is commonly called Homicide *ex necessitate*, as killing a Man in his own Defence.
- 1 Hale's Hist. P. C. 472. Homicide *per infortunium* is where a Man is doing a lawful Act, and without Intention of bodily Harm to any Person, and by that Act Death of another ensues; as if a Man be shooting at Butts or Pricks, and by Casualty his Hand shakes, and the Arrow kills a By-stander.
- 1 Hale's Hist. P. C. 477. And tho' the Killing of another *per infortunium*, be not in Truth Felony, nor subjects the Party to a Capital Punishment; and therefore, in such Cases the Verdict usually concludes *quod interfecit per infortunium & non per feloniam*; yet the Party forfeits his Goods; and tho' he ought to have, *Quasi de jure*, a Pardon of Course, upon the Certificate of the Conviction, yet he is not to be discharged out of Prison, but bailed to the next Term, or Sessions, to sue out his Pardon of Course; for tho' it was not his Crime, but his Misfortune, yet because the King hath lost his Subject, and that Men may be the more careful, he forfeits his Goods; and is not presently absolutely discharged of his Imprisonment, but bailed.
- 1 Hawk. P.C. 76. Also it is agreed, that no one can excuse the Killing of another, by setting forth in a special Plea, that he did it by Misadventure, or *se defendendo*, but that he must plead Not guilty, and give the special Matter in Evidence.
- 1 Hale's Hist. P. C. 472. As where, without any Intent of doing Hurt, a Person chances to kill another by the Head of a Hatchet flying off at Work; this being proved in Evidence, the Party is guilty of Homicide *per infortunium* only.
- 1 Hale's Hist. P. C. 473. So where a Person happens to kill another by a Piece of Timber flung down from a House standing out of any Road, after loud Warning to all Persons to stand clear; or by a Gun discharged at Wild Fowl; or by an unlucky Fall or Kick at Wrestling or Football, or other such like Sports; or in fighting at Barriers; or tilting by the King's Command; or by moderate Correction of a Child, Scholar or Servant; but if the Correction be immoderate, the Offence will be Manslaughter at least; and if the Instrument be such as apparently endangers Life, as an Iron-Bar, &c. it will be Murder.
- 1 Hawk. P.C. 74. So if a Man whip a Horse on which another is riding, whereupon he springs out and runs over a Child and kills him, the Rider is guilty of Homicide *per Infortunium*, the other of Manslaughter.

But regularly, if the Act, which occasions the Death of a Man, be a Trespass, or cannot but be attended with the manifest Danger of Hurt to the Person of some Man, or be of such a Nature, that it cannot be used without manifest Hazard of Life, and there were no deliberate Intent of Mischief, the killing is esteemed Manslaughter; as if a Man kill another by shooting at Deer in a third Person's Park; or by flinging down a Piece of Timber into a common Street or Highway, tho' in Work, and after Warning to stand clear; or by throwing Stones at another wantonly at Play; or by tilting without the King's Command; or by parrying with naked Swords covered with Buttons at the Points, or with Swords in the Scabbards.

But if a Man happen to kill another, in the Execution of a deliberate Purpose to commit a Felony, or to do a personal Hurt to another, or to do any unlawful Act, which cannot but manifestly be attended with Danger of great personal Hurt to some other, tho' it be not intended against any one in particular, he is guilty of Murder; as where a Man kills another by maliciously Beating or Wounding him; or by Shooting at tame Fowl, with an Intent to steal them; or by knowingly and deliberately Discharging a Gun; or throwing a great Stone or Piece of Timber; or riding with a Horse, used to strike, among a Multitude, tho' he do it only with an Intent to divert himself by frightening them; or by engaging in a Riot; or robbing in a Park, &c.

## 2. Of Homicide *se defendendo*.

Homicide (*a se defendendo*) is where one is forced to fight, on a sudden Affray, retreats as far as he can without endangering his own Life, and then, and not before, in order to save his Life, or to defend his Person from a Battery, (especially if the Assault were in his own House,) gives the other a mortal Wound; and it is said by some, not to be material who struck first; but if a Man attack another upon Malice, in such a Manner as endangers his Life, and then fly to the Wall, and kill him, he is guilty of Murder.

for if he be merely passive, this will make it only a Killing *per infortunium*; and tho' it be not Felony, not being accompanied with a felonious Intent, yet it subjects the Party to a Forfeiture of his Goods and Chattels. 1 Hale's Hist. P. C. 478, &c.

Regularly, it is necessary that the Person, who kills another in his own Defence, fly as far as he may to avoid the Violence of the Assault, before he turn upon his Assailant; for tho' in Cases of Hostility between two Nations, it is a Reproach and Piece of Cowardice to fly from an Enemy; yet in Cases of Assaults and Affrays between Subjects under the same Law, the Law owns not any such Point of Honour; because the King and his Laws are to be the *Vindices injuriarum*; and private Persons are not trusted to take capital Revenge one of another.

There is Malice between *A.* and *B.* they appoint a Time and Place to fight, and meet accordingly, *A.* gives the first Onset, *B.* retreats as far as he can with Safety, and then kills *A.* who had otherwise killed him, this is Murder; for they met by Compact and Design, and therefore neither shall have the Advantage of what they themselves each of them created.

There is Malice between *A.* and *B.* they meet casually, *A.* assaults *B.* and drives him to the Wall, *B.* in his own Defence kills *A.* this is *se defendendo*, and shall not be heightened by the former Malice into Murder; for it was not a Killing upon the Account of the former Malice, but upon a Necessity imposed upon him by the Assault of *A.*

<sup>1</sup> Hale's Hist.  
P. C. 483.

In *Fleet-street* *A.* and *B.* were walking together, *B.* gave some provoking Language to *A.* *A.* thereupon gave *B.* a Box on the Ear, they closed, *B.* was thrown down and his Arm broken, he runs to his Brother's House presently, which was hard-by, *C.* his Brother, taking the Alarm, came out with his Sword drawn and made towards *A.* who retreated ten or twelve Yards, *C.* pursued him, *A.* drew his Sword and made a Pass at *C.* and kill'd him; *A.* being indicted at *Newgate* Sessions for Murder, the Court directed the Jury upon the Trial to find this Manlaughter; not Murder, because upon a sudden Falling-out; not *se defendendo*, partly because *A.* made the first Breach of the Peace, by striking *B.* and partly because, unless he had fled as far as might be, it could not, by Way of Interpretation, be said to be in his own Defence; and it appeared plainly upon the Evidence, that he might have retreated out of Danger; and his stepping back was rather to have an Opportunity to draw his Sword, and with more Advantage to come upon *C.* than to avoid him; and accordingly at last it was found Manlaughter, 1671. at *Newgate*.

## Nonsuit.

- (A) Of the Nature thereof, and how it differs from a Retraxit.
- (B) Who may be nonsuit.
- (C) In what Actions there may be a Nonsuit.
- (D) At what Time a Nonsuit may be.
- (E) How far the Nonsuit of one shall be the Nonsuit of another.
- (F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.
- (G) Of the Effect of a Nonsuit; and therein of its being a peremptory Bar.

### (A) Of the Nature thereof, and how it differs from a Retraxit.

<sup>Co Lit.</sup> 139. a.  
<sup>2</sup> *Lil. Reg.*  
230.

**W**HERE a Plaintiff is demanded and doth not appear, he is said to be nonsuit; and this usually happens, where upon the Trial, and when the Jury are ready to give their Verdict, the Plaintiff discovers some Error or Defect in the Proceedings, or is unable to prove a material Point, for Want of a necessary Witness, &c. and thereupon the Plaintiff being demanded, (as he must



must be) his Default is recorded by the Secondary, and the (a) Entry is (a) For the *in Misericordia quia non Prosecutus est breve suum*; upon which the Defendant recovers his Costs against him; but this arising from some supposed Neglect or Oversight, the Plaintiff, except in some particular Cases, is not (b) barred from commencing a new Action.

(b) That where a Plaintiff is nonsuit, if he will again proceed in the same Cause, he must put in a new Declaration; for by his being nonsuit, it shall be intended that he had no such Cause of Suit as he declared in, and so that Declaration is void, and he hath no Day in Court. 2 *Lit. Reg.* 231. — But a Nonsuit by Mistake may be set aside, and a *Disfringas de novo* awarded, for which *vid. Cro. Car.* 203. *Cro. Jac.* 669. *Gedds* 328. *Rayn* 38, 73. 2 *Salk.* 455. — A Motion to set aside a Nonsuit occasioned by the Judge's mistaking the Law. *Ca. Law and Eq.* 315. — Nonsuit discharged, being entered on *Nisi Prius* without *Habeas Corpus*. 1 *Sid.* 164.

A *Retraxit* is when he is present in Court (as regularly he is ever by *Co. Lit.* 135. Intendment of Law, 'till a Day be given over, unless it be when a Verdict is given, and then he is but demandable); and this is either privative, when the Entry is *quod solemniter exactus non venit, sed a secula sua in Contemptum Curiae se retraxit, &c.* or positive, when the Entry is *quod factum se, seu cognoscit se ulterius nolle Prosecui, &c.* It is called a *Retraxit*, because that is the effectual Word used in the Entry, and is (c) a Bar to all Actions of the like or inferior Nature.

A *Retraxit* is always of the Part of the Plaintiff or Demandant, and cannot be, unless the Plaintiff or Demandant be in Court in proper Person.

It is held, that a *Retraxit* cannot be entered (d) before the Plaintiff hath declared, and if entered before, it hath but the Effect of a Nonsuit.

may be entered after a general Verdict. *Cro. Eliz.* 465. *dubitatur.*

Debt was brought upon a Bond against *A.* wherein *A.* and *B.* were jointly and severally bound, and after Plea pleaded, the Plaintiff entered a *Retraxit*, and in an Action after brought against *B.* upon the same Bond, whether this should be a Bar, between (e) *Dennis and Paine*, *Cro. Jac.* 551. *dubitatur, & adjournatur.* It was said, that a *Retraxit* was in Nature of a Release, and a Release to one joint Obligor discharged the other; but on the other Side it was said to be a Bar only by Way of Estoppel between the Parties, whereof no other should take Advantage.

Defect in the Plea. *March* 95. *S. C. dubitatur*, but varies in the stating it; for by this Report, Debt was brought both against *A.* and *B.* and the Plaintiff entered a *Retraxit* against *A.* and whether this was a Discharge of *B.* is made the Question. *Vid. Cro. Eliz.* 762.

## (B) Who may be nonsuit.

IT is every where agreed, that the King being in Supposition of Law always present in Court, cannot be nonsuit in any Information or Action wherein he himself is the sole Plaintiff; but it is held, that any Informer *qui tam*, or Plaintiff in a popular Action, may be nonsuit, and thereby wholly determine the Suit, as well in Respect of the King as of himself.

If an Infant bring an Assize by Guardian, altho' that the Infant disavow the Suit in proper Person, yet no Nonsuit shall be awarded.

Where

- 6 *Mod.* 181. Where an Executor need not name himself Executor, he shall pay Coſts upon a Nonfuit, and the naming himſelf Executor ſhall not exempt him from it.
- 20 *H.* 6. 44. *b.* If an Attorney of the *Common Pleas* ſues an Action there, he ſhall not  
1 *Rol. Abr.* be demanded, becauſe he is ſuppoſed always preſent aiding the Court.  
531. *S. C.*

### (C) In what Actions there may be a Nonfuit.

- 2 *Rol. Ab.* 130. **A** Perſon may be nonfuit in a Writ of Error.  
1 *Sid.* 255. *S. P.*
- 20 *H.* 6. 18. *b.* A Perſon may be nonfuit in a Writ of falſe Judgment.  
2 *Rol. Abr.*  
130. *S. C.*
- 22 *E.* 4. 10. One cannot be nonfuit in any Action in which he is not an Actor or Demandant; and tho' he afterwards becomes an Actor, yet not being originally ſo, he cannot be nonfuit as an Avowant; ſo of Garniſhees who become Actors, but were not ſo originally.
- 2 *Rol. Abr.* So if a Perſon outlawed hath a Charter of Pardon, and ſues a *Scire*  
130. *facias* againſt the Party, tho' hereby he is an Actor, yet he cannot be nonfuit.
- 2 *Rol. Abr.* So if a Man traverse an Office he cannot be nonfuit, altho' he is an  
130. Actor, for he hath no Original pending againſt the King.  
*Dyer* 141. *pl.* 47. this is made a *Quare*.
- 11 *H.* 4. 52. But in a Petition of Right againſt the King the Plaintiff may be  
2 *Rol. Ab.* 130. nonfuit.
- 47 *E.* 3. 5. *b.* So in an *Audita Querela*, to avoid a Statute, the Plaintiff may be nonfuit, for he is Plaintiff in this Action.
- 45 *E.* 3. 16. If to 2 *Nibils* returned on a *Scire facias* on a Charter of Pardon, the Plaintiff does not appear, he ſhall be nonfuit; for the Statute ordains, that upon his appearing he ought to count againſt the Defendant.

### (D) At what Time a Nonfuit may be.

- Co. Lit.* 139. **A**T the Common Law, upon every Continuance, or Day given over  
*b.* that if at before Judgment, the Plaintiff was demandable, and upon his Non-  
Common appearance might have been nonfuit.  
Law he did  
not like the Damages given by the Jury, he might be nonfuit. 5 *Mod.* 208.

But now by the 2 *H.* 4. *cap.* 7. it is enacted in the Words following:  
'Whereas, upon Verdict found before any Juſtice in Aſſiſe of *Novel*  
'*Diſſeiſin*, *Mordanceſtor*, or any other Action whatſoever, the Parties  
'before this Time have been adjourned upon Difficulty in Law, upon  
'the Matter ſo found; it is ordained and eſtabliſhed, that if the Verdict  
'paſs againſt the Plaintiff, that the ſame Plaintiff ſhall not be nonſuited.'

- Co. Lit.* 139. But notwithſtanding this Statute it hath been held, that the Plaintiff  
2 *Fon.* 1. may be nonſuited after a ſpecial Verdict, or after a Demurrer and (a)  
2 *Rol. Abr.* Argument thereupon.  
131-2.  
3 *Leon* 28. & *vid.* 2 *Hawk. P. C.* 184. (a) In Debt upon an Obligation, upon Demurrer, the Caſe being argued, the Opinion of the Court was againſt the Plaintiff, and Rule given, that Judgment ſhould be entered for the Defendant; and the Plaintiff prayed that he might be nonſuited, and becauſe he had the ſame Term appeared, and argued by his Counſel, and had prayed Judgment, he could not be nonſuited the ſame Term. *Cre. Jac.* 35.

If there be Judgment to account, and Auditors assigned, and there-  
upon a *Capias ad Computandum*, the Plaintiff cannot be nonsuited on the  
Original, because the Original is determined by the Judgment to ac-  
count.

If the Defendant wages his Law, and a Day is given him over to ano-  
ther Term to make his Law, if the Plaintiff does not appear that Day  
he will be nonsuited; otherwise, if he wages his Law immediately, or,  
as some hold, on a Day in the same Term.

2 Rol. Abr.  
131. Vid. Co.  
Lit. 159. b.

3 H. 6. 13.  
2 Rol. Abr.  
131

## (E) How far the Nonfuit of one shall be the Nonfuit of another.

IN real or mixt Actions, the Nonfuit of one Demandant is not the  
Nonfuit of both; but he that makes Default shall be summoned and  
severed; but regularly in personal Actions, the Nonfuit of the one is the  
Nonfuit of both.

But in personal Actions, brought by Executors, there shall be Sum-  
mons and Severance, because the best shall be taken for the Benefit of the  
Dead; and so it is in Action of Trespafs, as Executor for Goods taken  
out of their own Possession. Like Law in Account, as Executors by the  
Receipt of their own Hands.

In an (a) *Audita Querela* concerning the Personalty, the Nonfuit of the  
one is not the Nonfuit of the other; because it goeth by Way of Dis-  
charge, and freeing themselves, and therefore the Default of the one  
shall not hurt the other.

Co. Lit. 139  
2 Inst. 563.  
2 Rol. Ab. 132  
Several Cases  
to this Pur-  
pose.

Co. Lit. 139;  
a. Vid. Head  
of Execu-  
tors.

Co. Lit. 139.  
(a) In an  
*Audita Que-  
rela*, *Scire fa-  
cias*, Attaint,  
the Nonfuit

of one shall not prejudice the other. 6 Co. 26.

In a *Quid Juris clamat*, the Nonfuit of the one is the Nonfuit of both,  
because the Tenant cannot attorn according to the Grant.

Some Actions follow the Nature of those Actions, whereupon they are  
grounded; as the Writs of Error, Attaint, *Scire facias*, and the like. If a  
real Action be brought by several *Præcipe's* against two or more, if the  
Demandant be nonsuit against one, he is nonsuit against (b) all; for as to  
the Demandant, it is but one Writ under one *Teste*.

Co. Lit. 139.  
a.

Co. Lit. 139  
a. b  
2 Rol. Abr.  
133

(b) But  
where a  
Plaintiff

may enter a *Nolle Prosequi* against one, and have Judgment against the rest, *vid.* 2 Rol. Abr. 101. Cro.  
Car. 259, 245. Hob. 70, 180. Carth. 19. 3 Med. 101.

In an Appeal against divers, whether they plead the same or several  
Issues, it hath been adjudged, that a Nonfuit against one, at the Trial  
of any one of the Issues, is a Nonfuit as to all, because such a Nonfuit  
operates in Nature as a Release of the Whole.

A *Latitat* was sued out against 4 Defendants in Trespafs, the Plaintiff  
was nonsuit for (c) Want of a Declaration, and the Defendants Attor-  
ney entered 4 Nonsuits against him; and it was held to be irregular, be-  
cause the Trespafs is joint; and tho' the Plaintiff may count severally  
against the Defendants, yet it remains joint 'till it is severed by the  
Court.

Cro. Eliz.  
460. pl. 6.  
Dyer 120.  
2 Rol. Ab. 133.  
1 Sid. 378.

2 Salk. 455.  
(c) There is  
a Nonfuit  
before Ap-  
pearance at  
the Return  
of the Writ,

or after Appearance at some Day of Continuance. Co. Lit. 138. r

## (F) How far a Nonsuit for Part of the Thing in Demand shall be a Nonsuit for the Whole.

2 Leon. 177  
Hob. 180.

IT is laid down as a general Rule, that a Nonsuit for Part is a Nonsuit for the Whole; but it hath been held, that if a Defendant plead to one Part, and thereupon Issue is joined, and demur to the other, the Plaintiff may be nonsuit as to one Part, and proceed for the other.

2 Rol. Abr.  
154.

If in Debt the Defendant acknowledges the Action as to Part, and joins Issue as to the Residue, and the Plaintiff hath Judgment for that which is so confessed; but there is a *Cessat Executio*, by Reason of the Damages to be assessed by the Jury; if the Plaintiff be nonsuited in this Issue, this shall not be a Nonsuit for the Damages to be given, because that he had Judgment.

2 Leon. 177  
Sir John  
Sands ver.  
Packful Bio  
cas

If in Trover for divers Goods the Defendant pleads, that as to some of the Goods they were fixed to his Freehold, as to others that he had them of the Gift of the Plaintiff, and as to the rest Not guilty; and as to the first, the Plaintiff enters *non vult ulterius Prosequi*, this amounts only to a *Retraxit*, and is no Nonsuit, so as to bar the Plaintiff from proceeding on the other Parts of the Plea, on the Rule, that a Nonsuit for Part is a Nonsuit for the Whole.

## (G) Of the Effect of a Nonsuit; and therein of its being a peremptory Bar.

A Nonsuit, as hath been observed, is regularly no peremptory Bar; but the Plaintiff may, notwithstanding, commence any new Action of the same or like Nature; but this general Rule hath the following Exceptions.

Co. Lit. 159.  
a.

1. It is peremptory in a *Quare Impedit*; and in that Action a Discontinuance is also peremptory; and the Reason is, for that the Defendant had, by Judgment of the Court, a Writ to the Bishop; and the Incumbent, that cometh in by that Writ, shall never be removed; which is a flat Bar to that Presentation.

Co. Lit. 159.  
a.

(a) But the bare taking out of a Writ of Appeal, and causing it to be deli-

2. Nonsuit in an Appeal of Murder, Rape, Robbery, &c. after (a) Appearance, is peremptory, and this *in favorem Vitæ*; (b) but the Nonsuit of the Plaintiff in an Appeal is not such an Acquittal, on which the Defendant shall recover Damages against the Abettors, by *West. 2. cap. 12.* unless, after the Nonsuit, he were arraigned at the King's Suit upon the Appeal, and acquitted.

delivered of Record to the Sheriff, and a Nonsuit upon it, is no Bar of a second Appeal; because it doth not appear of Record, but that it might be done by a Stranger; and therefore the Nonsuit must be after an Appearance in proper Person of Record. 2 Hawk. P. C. 193-4. (b) 2 Inst. 385.

Co. Lit. 159.  
a.

3. So if the Plaintiff, in an Appeal of Mayhem, be nonsuit after Appearance, it is peremptory; for the Words therein are *Felonice Mayhemavit*.

Co. Lit. 159 a.  
Cro. Eliz. 881.

4. A Nonsuit after Appearance is also peremptory in a *Nativo Habendo*, and the Nonsuit of one Plaintiff in that Action nonsuits both *in Favo-*

*rem Libertatis*; for in a *Libertate Probanda* such Nonfuit is not peremptory, neither is the Nonfuit of one Plaintiff the Nonfuit of both.

5. Such Nonfuit is also peremptory in an Attaint, but a Discontinu- *Co. Lit. 139.*  
ance in an Attaint is not; because there is a Judgment given upon the *a.*  
Nonfuit, but not upon the Discontinuance.

## Nuisances.

**A** Common Nuisance is an Offence against the Publick, either *2 Rol. Abr.*  
by doing a Thing which tends to the Annoyance of all *85.*  
the King's Subjects, or by neglecting to do a Thing which the *1 Hawk. F.*  
common Good requires. *C. 197*

Under which Description we shall consider.

- (A) What shall be said a Nuisance.
- (B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.
- (C) How a Nuisance is to be removed or abated.
- (D) How the Offence is punishable.

For Nuisances relating to the Highways, *vide* Title Highways

For those relating to Bridges, Tit. Bridges.

For those relating to publick Houses, Tit. Inns and Inn-keepers.

### (A) What shall be said a Nuisance.

**I**T is clearly agreed, that keeping a Bawdy-House is a common Nuisance, as it endangers the publick Peace, by drawing together dissolute and debauched Persons; and also has an apparent Tendency to corrupt the Manners of both Sexes, by such an open Profession of Lewdness. *3 Inst. 205. Kitchen 11. 1 Hawk. P. C. 196.*

Also it hath been adjudged, that this is such an Offence, of which a *Salk 384. The Queen ver. Williams.*  
Feme Covert may be guilty as well as if she were sole; and that she, together with her Husband, may be indicted and condemned to the Pillory for keeping a Bawdy-House; for the keeping the House does not necessarily import Property, but may signify that Share of Government which the Wife has in a Family as well as the Husband; and in this she is presumed to have a considerable Part, as those Matters are usually managed by the Intrigues of her Sex.

It is clearly agreed, that all common Gaming Houses are Nuisances in *1 Hawk. P. C. 198*  
the Eye of the Law, being detrimental to the Publick, as they promote  
Cheat-

(a) *Trin.* 2  
*Georg. 1. The*  
*King ver.*  
*Dixon.*

*Mod.* 76.  
*Keb.* 846.  
*Keb.* 464.  
*Ver.* 169.  
*Mod.* 142.  
*Harek* 1.  
*C.* 198.

*Rushworth's*  
*Col.* Part 1.  
*Vol.* 1. fol.  
 220, 247.  
*1 Rol. Rep.*  
 109.  
*5 Mod.* 142.  
*Stim.* 625.

Cheating and other corrupt Practices, and incite, to Idleness and avaricious Ways of gaining Property, great Numbers, whose Time might otherwise be employed for the general Good of the Community; also it hath been (a) adjudged, that this is such an Offence, for which a Feme Covert may be indicted; for as in the preceding Case, the Wife may be concerned in Acts of Bawdry; so here she may be active in promoting Gaming, and furnishing the Guests with all Conveniencies for that Purpose.

It seems to be the better Opinion, that all common Stages for Rope-Dancers, &c. are Nuisances, not only because they are great Temptations to Idleness, but also because they are apt to draw together Numbers of disorderly Persons, which cannot but be very inconvenient to the Neighbourhood.

But it seems the better Opinion, that Playhouses having been originally instituted with a laudable Design of recommending Virtue to the Imitation of the People, and exposing Vice and Folly, are not Nuisances in their own Nature, but may only become such by Accident; as where they draw together such Numbers of Coaches or People, &c. as prove generally inconvenient to the Places adjacent; or when they pervert their original Institution, by recommending vicious and loose Characters under beautiful Colours to the Imitation of the People, and make a Jest of Things commendable, serious and useful.

And now for the better Regulation of Players and Play-houses, by the 10 *Georg. 2.* it is enacted, 'That every Person, who shall for Hire, Gain, or Reward act, represent or perform, or cause to be acted, represented or performed any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or any Part or Parts therein, in Case such Person shall not have any legal Settlement in the Place where the same shall be acted, represented or performed, without Authority by Virtue of Letters Patent from his Majesty, his Heirs, Successors or Predecessors, or without Licence from the Lord Chamberlain of his Majesty's Household, for the Time being, shall be deemed to be a Rogue and a Vagabond, within the Intent and Meaning of the 12 *Ann.* and shall be liable and subject to all such Penalties and Punishments, and by such Methods of Conviction, as are inflicted on, or appointed by the said Act, for the Punishment of Rogues and Vagabonds, who shall be found wandering, begging, and misordering themselves, within the Intent and Meaning of the said Act.

And *Secl.* 2. it is further enacted, 'That if any Person having, or not having a legal Settlement as aforesaid, shall, without such Authority or Licence as aforesaid, act, represent or perform, or cause to be acted, represented or performed for Hire, Gain, or Reward, any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or any Part or Parts therein, every such Person shall, for every such Offence, forfeit the Sum of fifty Pounds; and in Case the said Sum of 50*l.* shall be paid, levied or recovered, such Offender shall not, for the same Offence, suffer any of the Pains or Penalties inflicted by the said recited Act.

And *Secl.* 3. it is further enacted, 'That no Person shall for Hire, Gain or Reward, act, perform, represent, or cause to be acted, performed or represented any new Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or any new Prologue or Epilogue, unless the Copy thereof be sent to the Lord Chamberlain of the King's Household for the Time being, 14 Days at least before the acting, representing or performing thereof, together with an Account of the Playhouse, or other Place where the same shall be, and the Time when the same is intended to be first acted, represented or performed, signed by the Master or Manager, or one of the Masters or Managers of such Playhouse, or Place, or Company of Actors therein.

And

And *Seet. 4.* it is further enacted, ‘ That it shall and may be lawful to  
 ‘ and for the said Lord Chamberlain for the Time being, from Time to  
 ‘ Time, and when and as often as he shall think fit, to prohibit the  
 ‘ Acting, Performing or Representing any Interlude, Tragedy, Comedy,  
 ‘ Opera, Play, Farce, or other Entertainment of the Stage, or any  
 ‘ Act, Scene or Part thereof, or any Prologue or Epilogue; and in case  
 ‘ any Person or Persons shall for Hire, Gain or Reward, act, perform or  
 ‘ represent, or cause to be acted, performed or represented, any new  
 ‘ Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment  
 ‘ of the Stage, or any Act, Scene or Part thereof, or any new  
 ‘ Prologue or Epilogue, before a Copy thereof shall be sent as aforesaid,  
 ‘ with such Account as aforesaid; or shall for Hire, Gain or Reward,  
 ‘ act, perform or represent, or cause to be acted, performed or represented  
 ‘ any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other  
 ‘ Entertainment of the Stage, or any Act, Scene, or Part thereof,  
 ‘ or any Prologue or Epilogue, contrary to such Prohibition as aforesaid;  
 ‘ every Person so offending shall, for every such Offence, forfeit  
 ‘ the Sum of 50*l.* and every Grant, Licence and Authority, (in case  
 ‘ there be any such,) by or under which the said Master or Masters, or  
 ‘ Manager or Managers, set up, formed or continued such Play-House,  
 ‘ or such Company of Actors, shall cease, determine, and become absolutely  
 ‘ void to all Intents and Purposes whatsoever.

Provided, *Seet. 5.* ‘ That no Person or Persons shall be authorized, by  
 ‘ Virtue of any Letters Patent from his Majesty, his Heirs, Successors  
 ‘ or Predecessors, or by the Licence of the Lord Chamberlain of his  
 ‘ Majesty’s Household for the Time being, to act, represent or perform  
 ‘ for Hire, Gain or Reward, any Interlude, Tragedy, Comedy, Opera,  
 ‘ Play, Farce, or other Entertainment of the Stage, or any Part or  
 ‘ Parts therein, in any Part of *Great Britain*; except in the City of *Westminster*,  
 ‘ and within the Liberties thereof, and in such Places where his  
 ‘ Majesty, <sup>his</sup> Heirs or Successors, shall in their Royal Persons reside,  
 ‘ and during such Residence only.

And *Seet. 6.* it is further enacted, ‘ That all the pecuniary Penalties  
 ‘ inflicted by this Act, for Offences committed within that Part of  
 ‘ *Great Britain* called *England, Wales*, and Town of *Berwick* called *Tweed*,  
 ‘ shall be recovered by Bill, Plaint or Information in any of his Majesty’s  
 ‘ Courts of Record at *Westminster*; in which no *Essoin*, Protection or Wager  
 ‘ of Law shall be allowed: And for Offences committed in that Part of  
 ‘ *Great Britain* called *Scotland*, by Action or summary Complaint before  
 ‘ the Court of Sessions or Justiciary there; or for Offences committed in  
 ‘ any Part of *Great Britain*, in a summary Way, before two Justices of  
 ‘ the Peace for any County, Stewartry, Riding, Division or Liberty,  
 ‘ where any such Offence shall be committed, by the Oath or Oaths of  
 ‘ one or more credible Witness or Witnesses, or by the Confession of the  
 ‘ Offender; the same to be levied by Distress and Sale of the Offender’s  
 ‘ Goods and Chattels, rendering the Overplus to such Offender, if any  
 ‘ there be, above the Penalty and Charge of Distress; and for Want of  
 ‘ sufficient Distress, the Offender shall be committed to any House of  
 ‘ Correction in any such County, Stewartry, Riding or Liberty, for any  
 ‘ Time not exceeding six Months, there to be kept to hard Labour, or to  
 ‘ the common Gaol of any such County, Stewartry, Riding or Liberty,  
 ‘ for any Time not exceeding six Months, there to remain without Bail  
 ‘ or Mainprize; and if any Person or Persons shall think him, her or  
 ‘ themselves aggrieved by the Order or Orders of such Justices of the  
 ‘ Peace, it shall and may be lawful for such Person or Persons to appeal  
 ‘ therefrom to the next General Quarter-Sessions, to be held for the said  
 ‘ County, Stewartry, Riding or Liberty, whose Order therein shall be  
 ‘ final and conclusive; and the said Penalties against this Act shall belong  
 ‘ one Moiety thereof to the Informer, or Person suing or prosecuting  
 ‘ Vol. III. 8 M curing

cutting for the same, the other Moiety to the Poor of the Parish where such Offence shall be committed.

And *Stat. 7.* it is further enacted, ' That if any Interlude, Tragedy, Comedy, Opera, Play, Farce, or other Entertainment of the Stage, or any Act, Scène or Part thereof, shall be acted, represented or performed, in any House or Place where Wine, Ale, Beer or other Liquors shall be sold or retailed, the same shall be deemed to be acted, represented and performed for Gain, Hire and Reward.

' Provided that every Prosecution, for any Offence within this Act, shall be commenced within six Kalendar Months after the Offence committed.

2 *Roll. Abr.*  
138.  
*Popb.* 141.  
*Cro. Jac.* 382.  
*Goals.* 259.  
*Cro. Eliz.* 548.  
1 *Roll. Rep.*  
156. 200.  
2 *Roll. Rep.*  
3, 4. 34.  
5 *Co.* 104.  
*Moor* 238.

It was formerly held, that the Erecting a Dove-house on a Man's own Frank-Tenement was a Nuisance; because the Pigeons and Doves were to be accounted tame Animals, in as much as they had *Animum reverendi*; and that therefore whoever erected such Houses, were answerable for the Damages done by them; and because they were not liable to every Man's Action, to avoid Multiplicity of Suits, it was thought a Matter indictable in the Leet; but the contrary Opinion prevailed; because it was allowed the Lord of the Manor might erect, or permit by his Licence any Person to erect a Dove-house; which he could not do, if it were a Nuisance, every Nuisance being *Malum in se*; besides, these Animals are rather to be accounted *Feræ naturæ*; and by Consequence, the only Remedy any Person had, for the Damage sustained by the Birds feeding on his Ground, was to kill them and take them to himself, which was the proper Relief according to the Common Law; in as much as the Birds were accounted no Man's Property. But it is said, that a Dovecote newly erected in a Manor, without the Lord's Licence, is a good Ground for an Action on the Case, at the Suit of the Lord.

*Vide Tit.*  
*Highways,*  
*Letter (E).*  
1 *Fon.* 221.  
*Cro. Car.* 184.  
1 *Bull.* 203.  
2 *Roll. Abr.*  
157.

It is clearly agreed to be a Nuisance to dig a Ditch, or make a Hedge over-thwart a Highway, or to erect a new Gate, or to lay Logs of Timber in it; or generally to do any other Act which will render it less commodious: But it seems that a Gate, which has continued Time out of Mind, is no Nuisance; but that the same may be justified by Prescription, being at first intended to have been set up by Consent, on a Composition with the Owner of the Land, on the Laying out the Road; in which Case, the People had never any Right to a freer Passage than what they still enjoy.

*Noy* 103.  
3 *Keb.* 640.  
159.

And as navigable Rivers are deemed Highways, it is a Nuisance to divert Part of the River, whereby the Current of it is weakened, and made unable to carry Vessels of the same Burthen as it could before; also the laying of Timber in a common River, tho' the Soil belong to the Party, is equally a Nuisance, as if the Soil was not his, if thereby the Passage of Boats, &c. is obstructed; and from hence also it seems to follow, that private Stairs, from those Houses that stand by the *Thames* into it, are common Nuisances; but it seems, that where there are Cuts made in the Banks, that are not Annoyances to the River, the Timber lying there is no Nuisance.

2 *Roll. Abr.*  
159. pl. 3.

It hath been holden to be a common Nuisance, to divide a House in a Town for poor People to inhabit in; by Reason whereof it will be more dangerous in the Time of Infection of the Plague.

6 *Mod.* 145.  
*The Queen*  
*ver. Leich.*

Bringing a great Ship of 300 Tuns into *Billinggate-Dock*, tho' a common Dock, yet being only so for small Ships coming with Provision to the Markets of *London*, is a Nuisance, in the same Manner, as a Man using with his Cart a common Pack and Horse Way, so as to plow it up, and thereby render it less convenient to Riders, is a Nuisance indictable.

2 *Roll. Abr.*  
139.  
*Cro. Car.* 510.  
*Hutt.* 156.  
*Palm.* 536.  
1 *Vent.* 26. 1

It seems the better Opinion, that a Brew-house, Glass-house, Chandler's Shop or Stie for Swine, set up in such inconvenient Parts of a Town, that they cannot but greatly incommode the Neighbourhood, are common Nuisances.

1 *Keb.* 500. 3 *Mod.* 158. *Salk.* 458, 460.



## (B) How far the Indictment must charge it to be an Annoyance to all the King's Subjects.

EVERY Nufance, punishable by a publick Prosecution, must be charged to be *ad commune nocumentum*, or to the general Annoyance of all the King's Subjects; for if they are only Injuries to particular Persons, they are left to be redressed by the private Actions of the Parties aggrieved by them.

And therefore an Indictment for Surcharging such a Common, or Inclosing such a Piece of Ground, or Disturbing such a Water-course, or doing any other Act, not apparently of a publick Nature, to the Nufance of the Inhabitants of such a Town, or of J. S. and his Tenants, is not good.

So an Indictment in a Court-Leet for keeping a Glass-house *ad maximum nocumentum* was quashed; because it was not a Nufance, unless it had been *ad commune nocumentum*.

So an Indictment for Stopping a Water-course was quashed, being only laid *ad nocumentum omnium prope inhabitantium*, without saying *& transigentium*.

But it hath been held, that an Indictment for not repairing a Bridge, *per quod liget Domini Regis transire non possunt, &c. ad nocumentum eorundem* is sufficient; for by the King's Liege People shall be understood all his Liege People.

Also an Indictment for doing a Thing which plainly appears immediately to tend to the Prejudice of Religion, or of the King; as for breaking the Walls of a Church, or imbezilling the King's Treasure, &c. is good, without expressly laying it as a common Grievance.

So an Indictment of a common Scold, by the Words *Communis rixatrix*, hath been held good, tho' it concluded *ad commune nocumentum diversorum* instead of *Omnium*; because, says *Hawkins*, from the Nature of the Thing, it cannot but be a common Nufance; and for the same Reason, says he, an Indictment with such a Conclusion, for a Nufance to a River, plainly appearing to be a publick and navigable River, or to a Way, plainly appearing to be a Highway, is sufficient; and perhaps, says he, the (a) Authorities, which seem to contradict this Opinion, might go upon this Reason, that in the Body of the Indictment it did not appear, with sufficient Certainty, whether the Way, wherein the Nufance was alleged, were a Highway, or only a private Way; and therefore it shall be intended, from the Conclusion of the Indictment, that it was a private Way.

## (C) How a Nufance is to be removed or abated.

HEREIN it is laid down by *Hawkins*, that any one may pull down or otherwise destroy a common Nufance; as a new Gate, or even a new House erected in a Highway, &c. for if one, whose Estate is or may be prejudiced by a private Nufance actually erected, as a House hanging over his Ground, or stopping his Lights, &c. may justify the Entering into another's Ground, and pulling down and destroying such a Nufance, whether it were erected before or since he came to the Estate; surely it cannot but follow *a fortiori*, that any one may lawfully destroy a common Nufance; and as the Law is now holden, it seems, that in a Plea, justifying the Removal of a Nufance, the Party need not show that he did as little Damage as need be.

If

3 *Aff.* 10. If a River be stopped to the Nuisance of the Country, and none appear bound by Prescription to clear it, those who have the Piscary, and the neighbouring Towns, who have a common Passage and Easement therein, may be compelled to do it.  
 2 *Rel. Abr.* 137.  
 1 *Hawk. P.C.* 200. said to have been adjudged.

(a) A Writ to prohibit a Bowling-Ally erected near St. Dunstan's Church, said by Hale to have been granted 8 *Car.* 1. on Noy's Motion 1 *Mod.* 76. — So a Prohibition restraining *Jacob Hall* a Rope-Dancer, who had erected a Stage at *Chaving-Cross*. 1 *Vent.* 169. 2 *Keb.* 845. 1 *Mod.* 76. & *vide Skin* 625. 5 *Mod.* 142.

It seems to be the better Opinion, that the Court of King's Bench may, by a (a) Mandatory Writ, prohibit a Nuisance, and order that the same shall be abated; and that if the Party disobeys the Writ, he subjects himself to an Attachment; but upon such Attachment, for proceeding after the Writ of Prohibition, there ought to be a Declaration, setting forth the Nature of the Offence, and that the same is a Nuisance, and that, notwithstanding the Writ of Prohibition, the Defendant proceeded or continued it; to which, if the Defendant can in Pleading set forth a sufficient Justification, his Proceeding *post prohibitionem regiam* will be good in Law, and himself discharged of all Contempt and Costs against the Complainant.

### (D) how the Offence is punishable.

2 *Rel. Abr.* 84. ALL common Nusances to the Publick are regularly punishable by 1 *Hawk. P.C.* 200. Fine and Imprisonment, at the Discretion of the Judges; but in some Cases, Corporal Punishment may be inflicted; as in the Case of a common Scold, who is said to be properly punishable, by being put into the Ducking-Stool; also the Offence of keeping a Bawdy-house is punishable, not only with Fine and Imprisonment, but also with such infamous Punishment, as to the Court in Discretion shall seem proper.

2 *Rel. Abr.* 84. Also a Person convicted of a Nuisance, done to the King's Highway, 1 *Hawk. P.C.* 200. may be commanded by the Judgment to remove the Nuisance at his own Costs; and *per Hawkins*, it is but reasonable that those, who are convicted of any other common Nuisance, should also have the like Judgment.

*Co. Lit.* 56 a. But it is clearly agreed, that common Nusances against the Publick are only punishable by a publick Prosecution; and that no Action on the Case will lie at the Suit of the Party injured; as this would create a Multiplicity of Actions, one Man being as well intitled to bring an Action as another; and therefore, in those Cases, the Remedy must be by Indictment at the Suit of the King.

9 *Co.* 113. 2 *Brownl.* 147. *Vaugh.* 341. *Cro. Eliz.* 664. 3 *Mod.* 294. *Carth.* 191. 1 *Salk.* 15.

*Co. Lit.* 56. But if by such a Nuisance, the Party suffer a (b) particular Damage, *Cro. Jac.* 446 as if by stopping up a Highway with Logs, &c. his Horse throws him, 1 *Keb.* 847. by which he is wounded or hurt, an Action lies.

2 *Jon.* 157. 1 *Salk.* 15 (b) But if a Highway is stopped, that a Man is delayed in his Journey a little while, and by Reason thereof he is damnified, or some important Affair neglected; this is not such a special Damage, for which an Action on the Case will lie; but a particular Damage, to maintain this Action, ought to be direct, and not consequential; as for Instance, the Loss of his Horse, or some Corporal Hurt, in falling into a Trench in the Highway, &c. *Carth.* 194

1 *Salk.* 10. Also an Action lies for continuing a Nuisance; as where, for erecting a Nuisance 2 *die Febr.*, the Defendant pleaded a prior Action, brought for erecting a Nuisance 20 *die Martii*, and a Recovery thereupon, and averred these to be the same Nuisance and Erection; and on Demurrer the Plaintiff had Judgment; for tho' he cannot have a new Action for the same Erection, yet he may for the Continuing the same Nuisance.

Obliga:

# Obligations.

(A) Of the Nature of the Security, called a Bond or Obligation.

(B) What Words create such a Security.

(C) Of the Ceremonies requisite to a Bond or Obligation; and herein of Signing, Sealing, Date and Deliberation.

(D) Of the Parties to the Obligation: And herein,

1. Who may bind themselves, or be Obligors;
2. Who may take such Security or be Obligees.
3. Who shall be said the Obligee; and therein of making several Obligees.
4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligee's Remedy against all or any of them.
5. Of their Remedies against each other.

(E) Of the Condition and Consideration of the Obligation: And herein,

1. Of possible and impossible Conditions.
2. Of repugnant Conditions.
3. Of lawful and unlawful Conditions.

(F) Of the Breach and Performance of the Condition of an Obligation: And herein,

1. What shall be a Breach or sufficient Performance.
2. Where there are disjunctive Conditions, how to be performed.
3. By and to whom to be performed.
4. At what Time to be performed.
5. At what Place to be performed.
6. What the Obligee must do, in order to intitle him to take Advantage of the Breach; and herein of Notice, Request, &c.
7. How the Breach must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

## (A) Of the Nature of the Security, called a Bond or Obligation.

Co. Lit. 172. a.

**O**BLIGATION, says my Lord Coke, is a Word of its own Nature of a large Extent, but is usually taken in the Common Law for a Bond, containing a Penalty with Condition for Payment of Money, or to do or suffer some Act or Thing, &c. and a Bill, says he, is most commonly taken for a single Bond without Condition.

(a) An Obligation may be made up on Parchment or Paper, and in loose Parchment or Paper, or in a Piece of

This Security is also called a Specialty; the Debt being therein particularly specified in (a) Writing, and the Party's Seal, acknowledging the Debt or Duty, and confirming the Contract; rendering it a Security of a (b) higher Nature than those entered into without the Solemnity of a Seal; and therefore Bonds or Specialties shall be (c) preferred to simple Contracts, in a Course of Administration; and from its being a higher Security, it is held, that for a Breach or Non-performance an Action of Debt (d) only will lie.

Parchment or Paper sowed in a Book, and either Way, it is good; but if it be made on a Talley, Piece of Wood, or any other Thing, but Paper or Parchment, (altho' it be sealed and delivered, it is void. *Bro. Oblig* 67, 30.) — Because these are least subject to Alteration or Corruption. *Co. Lit.* 229. a. — May be in a Letter, or other Writing, so it be sealed. *Comb.* 87. 3 *Mod.* 154. — But note, That by the late Statutes it must be on stamped Paper or Parchment. (b) Therefore, if a Man accepts an Obligation for a Debt due by simple Contract, this extinguishes the simple Contract Debt. 1 *Rel. Abr.* 604. 2 *Leon.* 110. — So if a Man accepts a Bond for a Legacy, he cannot after sue for his Legacy in the Spiritual Court; for by the Deed the Legacy is extinct, and it is become a meer Duty at Common Law. *Yelv.* 38. — Also from its being of a higher Nature than a simple Contract, the Defendant cannot plead *Nil debet*, but must plead *Solvit ad diem*, or *Non est factum*; for the Seal of the Party continuing, it must be dissolved *eo Ligamine quo Ligatur*. 2 *Ibst.* 651. *Hard.* 218. (c) For this, *vide* Head of *Executors and Administrators*. (d) And therefore it is held, that if the Obligor in a Bond, without any new Consideration, as Forbearance, &c. promises to pay the Money, an *Assumpsit* will not lie, but the Obligee must still pursue his Remedy by Action of Debt. 1 *Rel. Abr.* 8. *Hutt.* 34. *Cro. Eliz.* 240.

*Cro. Eliz.* 773.  
1 *Salk.* 141.  
3 *Lev.* 348.  
6 *Mod.* 228.

A Bond or Obligation is a Debt or Duty which adheres to the Obligor or Debtor, let it be contracted where it will, and let the Debtor fly to what Place he pleases; and being chargeable every where, it need not be dated from any particular Place; and therefore usually begins with *Noverint universi*; but yet the Plaintiff in his Declaration must lay a Place where it was made, that it may receive Trial, if it be denied.

Co. Lit. 232.  
(e) That being entered into to a Feme Sole, who after-

A Bond is (e) a *Chose in Action*, which cannot be assigned over, so as to enable the Assignee to sue in his (f) own Name; yet he has by the Assignment such a Title to the Paper and Wax, that he may keep or cancel it.

wards marries, and the Husband dies, it shall survive to her, being a *Chose in Action*, which the Husband might have reduced into Possession. — So if the Wife, who is the Obligee, dies, her Husband is no otherwise intitled to it than as Administrator to his Wife. *Noy* 149. *Stile* 205. for this, *vide* *Tit. Baron and Feme*. (f) And by the modern Practice, he may sue for it in the Name of the Obligee, as his Attorney; but *quare*, whether this can be done without an express Authority.

2 *Vern.* 595  
*Abr. Ej.* 44.  
there must be a Consi-

Also in Equity a Bond is assignable for a valuable (g) Consideration paid, and the Assignee alone becomes intitled to the Money; so that if the Obligor, after Notice of the Assignment, pays the Money to the Obligee, he will be compelled to pay it over again.

paid. 3 *Chan. Rep.* 90. (g) 2 *Vern.* 540. But Payment to the Obligee, without Notice of the Assignment, is good. 1 *Chan. Ct.* 232.

2 *Vern.* 428,  
692, 704.

The Assignee must take it, subject to the same Equity that it was in the Hands of the Obligee; as if, on a Marriage-Treaty, the intended Husband

Husband enters into a Marriage Brokake Bond, which is afterwards assigned to Creditors, yet it still remains liable to the same Equity, and is not to be carried into Execution against the Obligor.

Bonds are to be considered as Securities for the Performance of Contracts, and are usually entered into with (a) Penalties, which are to be considered as (b) Compensations for the Breach of the Contract; as that a Man shall pay 200*l.* if he omits to pay 100*l.* within such a Time, that he shall pay so much if he does not perform such and such Covenants, do or omit such and such Acts; and in those he may *cedere suo Jure*, provided the Thing be not unlawful in itself, or injurious to the Publick, &c.

payment of the Principal at the End of the Year, is not usurious within the Statute; because it is in the Power of the Borrower to avoid the Payment of the Money so reserved, by paying the Principal at the Day appointed. 5 Co. 69. Cro. Jac. 509. (b) A Contract or Covenant to give Bond for the Payment of a certain Sum of Money, without shewing of what Sum the Obligation shall be, is good, and shall be intended of double the Sum. 5 Co. 77. b. 78. a. 1 Lev. 88. — So where there was an Agreement to enter into certain Covenants, and to enter into a Bond for the Performance of the Covenants; and upon an Action, Breach was laid that he did not enter into Bond, &c. and a Verdict for the Plaintiff; and in Arrest of Judgment it was moved, that this Part of the Agreement was uncertain and void, because it was not expressed of what Sum the Bond should be, and here was no Certainty to guide it, as in the above Case; but *per Windham* Justice, the Sum in the Bond must be to the Value of the Agreement; *Et per cur'*, you should have entered into Bond, tho' the Sum were never so small, and why did you not tender such a one. 1 Sid. 270. 1 Keb. 776.

If a Man enters into a Bond of such a Sum, on Condition to be void on Payment of a lesser Sum; or if a Man bind himself in the Penalty of 100*l.* that he will pay 50*l.* by such a Day, after the Day of Payment is past, the Penalty or Sum of 100*l.* is the legal Debt; and for so much it hath been (c) resolved, an Executor of an Obligor of such forfeited Bond, may cover the Assets of his Testator.

And as the Penalty, by the Bond's being forfeited, becomes the legal Debt; so there was no Remedy against such Penalty, but by Application to a Court of Equity, which relieves in those Cases, on Payment of Principal, Interest, and Costs; also tho' at Law there can be no Remedy beyond the Penalty; because in that the Obligee seems to have taken up his Security; yet, as it is on the Foundation of doing equal Justice to both Parties that Equity proceeds, it will, on any Application for a Favour from the Obligor, compel him to pay the Principal, Interest and Costs, tho' exceeding the Penalty.

And this Rule of compelling the Party to do Equity who seeks Equity, seems to be the Reason why an Obligee shall have Interest after he has entered up Judgment; for tho' in Strictness it may be accounted his own Fault why he did not take out Execution, and therefore not entitled to Interest; yet, as by the Judgment he is intitled to the Penalty, it does not seem reasonable that he should be deprived of it, but upon paying him Principal and the Interest, which incurred as well before as after the entering up of the Judgment.

Also by the 4 & 5 Ann. cap. 16. it is enacted, 'That where any Action of Debt shall be brought on any single Bill; or where an Action of Debt, or *Scire facias*, shall be brought upon any Judgment; if the Defendant hath paid the Money due on such Bill or Judgment, such Payment shall and may be pleaded in Bar of such Action or Suit; and where an Action of Debt is brought upon any Bond, which hath a Condition or Defeazance to make void the same, upon Payment of a lesser Sum at Day or Place certain; if the Obligor, his Heirs, Executors or Administrators have, before the Action brought, paid to the Obligee, his Executors or Administrators, the Principal and Interest due by the Defeazance or Condition of such Bond, tho' such Payment was not strictly made according to the Condition or Defeazance; yet it shall and may be pleaded in Bar of such Action, and shall be as effectual a Bar thereof, as if the Money had been paid at the Day and Place

Telv. 192.  
2 Med. 201.  
1 Sand. 66.  
(a) That the Reservation of a greater Sum than is allowed by the Statute for Interest, for the Non-payment of the Principal at the End of the Year, is not usurious within the Statute; because it is in the Power of the Borrower to avoid the Payment of the Money so reserved, by paying the Principal at the Day appointed. 5 Co. 69. Cro. Jac. 509. (b) A Contract or Covenant to give Bond for the Payment of a certain Sum of Money, without shewing of what Sum the Obligation shall be, is good, and shall be intended of double the Sum. 5 Co. 77. b. 78. a. 1 Lev. 88. — So where there was an Agreement to enter into certain Covenants, and to enter into a Bond for the Performance of the Covenants; and upon an Action, Breach was laid that he did not enter into Bond, &c. and a Verdict for the Plaintiff; and in Arrest of Judgment it was moved, that this Part of the Agreement was uncertain and void, because it was not expressed of what Sum the Bond should be, and here was no Certainty to guide it, as in the above Case; but *per Windham* Justice, the Sum in the Bond must be to the Value of the Agreement; *Et per cur'*, you should have entered into Bond, tho' the Sum were never so small, and why did you not tender such a one. 1 Sid. 270. 1 Keb. 776.  
Cro. Car. 490.  
1 Vent. 354.  
3 Lev. 368.  
(c) Hill. 9.  
Geor. 2. in D.  
R. the Bank of England  
ver. Morris.

Show. Par.  
Ca. 15.  
Abr. Ep. 91,  
92.  
1 Salk. 154.  
1 Vern. 342,  
350.  
2 Vern. 509.  
Abr. Eq. 92,  
288.

Place according to the Condition or Defeazance, and had been so pleaded.  
 And it is further enacted by the said Statute, *Stat. 14.* 'That if at any Time, pending an Action upon any such Bond with a Penalty, the Defendant shall bring into Court, where the Action is (a) depending, all principal Money and Interest due on such Bond, and also all such Costs, as have been expended in any Suit or Suits in Law or Equity upon such Bond; the said Money so brought in, shall be deemed and taken to be in full Satisfaction and Discharge of the said Bond; and the Court shall and may give Judgment to discharge every such Defendant of and from the same accordingly.

(a) One cannot move to stay Proceedings upon a Bond upon Payment of Principal, Interest and Costs, till Bail be put in; for till then the Parties are not in Court. 6 *Mod.* 11.

### (B) What Words create such a Security.

*Yelv.* 193.  
 2 *Roll Abr.*  
 146 7.

Herein we must observe, that the Law does not seem to require any particular set Form of Words, as essentially necessary to create an Obligation, but that any Words, which declare the Intention of the Party, and denote his being bound, will be sufficient; because such Obligation is only in Nature of a Contract, or a Security for the Performance of a Contract, which ought to be construed according to the Intention of the Parties.

*Dyer* 22. b.

Therefore if a Man useth this Form of Words, *viz. This Bill witnesseth, that I A. B. have borrowed 10 l. of C. D. or this Form, Memorandum quod talis debet to B. ten Pounds; or thus, Memorandum all Things reckoned and accounted between A. and B. A. cognovit se debere to B. ten Pounds; all these Forms are good, and shall as effectually bind the Party and his Executors, as if the most formal Words were made use of, provided the Writing be sealed and delivered.*

1 *Leon.* 25.

So a Writing in this Form, *Memorandum I A. B. have agreed to pay J. S. 20 l. tho' this be in the preterperfect Tense, yet if it hath all other Ceremonies essential, it shall amount unto an Obligation.*

*Cro. Eliz.*  
 729.

So in this Form, *This Bill witnesseth, that I R. S. have received of T. P. 40 l. to the Use of R. and J. S. Children of, &c. equally to be divided between them; which Sum I confess to have received to the Uses aforesaid, and the same to repay at such Time as shall be thought best for the Profits of the said R. and J. S. and this was resolved to be a good Obligation.*

*Cro. Eliz.* 561.  
 & vide *Cro. Eliz.* 758.

So a Writing in this Form, *Memorandum that I bind myself to J. M. to pay him as much Money as my Brother owes him; and in the End of the Bill is wrote the Sum of 40 l. which is said to be the Debt due from the Brother; this is a good Obligation.*

*Cro. Eliz.* 886.

*Memorandum, that I owe and promise to pay to A. 10 l. at any Time after the Feast, &c. when thereto required, for Payment whereof I bind myself to J. H. by these Presents; this is a good Bill to A. by the first Words, and the latter being Surplusage are void, and to be rejected.*

*Moor* 537.  
*Parry* ver.  
*Woodward*  
 adjudged.  
 And that  
 the Words  
 together

It is held in *Moor* and *Cro. Eliz.* that a Bill in this Form, *Be it known, &c. that I owe to B. 14 l. to be paid at the Feasts, &c. together with 6 l. which I owe him upon Bills and Reckonings subscribed with my Hand, amounts only to a Bill for 14 l. but (b) Dyer holds it a good Obligation for the whole Debt of 20 l.*

with 6 l. which I owe by Bills, &c. are only an Explanation of the precedent Debt. *Cro. Eliz.* 537. S. C. adjudged, and that that which comes after the *Solvendum* is void, as that which comes after an *Habendum.* (b) *Dyer* 22. b. in Margine.

In Debt for 20 l. the Plaintiff declared, that the Defendant *concessit se teneri per Scriptum suum Obligatorium, &c.* and the Words of the Deed were, *I do acknowledge to Edward Watfon by me twenty Pounds upon Demand, for doing the Work in my Garden; and upon Demurrer to the Declaration, it was adjudged a good Bond.*

1 Vent. 258.  
Watson ver.  
Sneed.

These Words, *I am content to give to W. 10 l. at Mich. and 10 l. at our Lady-day, amount to an Obligation, and an express Ingagement to pay, &c.*

3 Leon 119.  
2 Rol. Abr.  
146. S. P.

It hath been held in Variety of Cases, that a seeming *Latin Word*, not properly expressing the Quantity of the Sum, in which the Party intended to be bound, should, notwithstanding, be so construed, as to answer the Intention of the Parties, rather than that the Obligation should be void; as *Quinquageffimis Libris*, for *Quinquaginta Libris*, has been held good; so *Trigintate* for *Triginta*, *Sexingenta* for *Sexaginta*; and it is said in general, that in most Cases where the *Cent* or *Cent*, or the *Sex* or *Sept* are right, the Obligation has been held well.

But for this  
vide 10 Co.  
133. a.  
Telv. 96, 193,  
206  
Hob. 119.  
Cro. Jac. 290,  
309, 355,  
603, 607.  
Cro. Car. 147.  
1 Brownl. 62.

2 Rol. Abr. 146. 5 Mod. 154. 2 Jon. 58. Comb. 60, 86, 187, 226, 477.

A Bond *in viginti nobilis* has been held a good Bond for 6 l. 8 s. for tho' *nobilis* be not a *Latin Word*, yet it being a Term signifying 6 s. and 8 d. it may properly be made use of.

Cro Jac. 203.  
2 Rol. Ab. 146.  
Eurkin ver.  
Vaughan.

Debt brought upon a Bond for 60 l. the Bond was in *Italian*, and the Sum therein expressed was in these Words, *viz. in Cessanta Libris*, and adjudged to be good.

Cro. Jac. 208.  
Parker ver.  
Rennaday.

In Debt upon a Bill obligatory, demanding thirty-two Pounds four Shillings and 7 Pence; the Defendant demanded Oyer of the Bill, and 'twas threty-two Ponds four Shillings and 7 Pence, so threty for thirty, and Ponds for Pounds; and on Demurrer for this Cause, it was adjudged for the Plaintiff.

Cro. Jac. 607.  
Hulbert ver.  
Long.

So a Bill, in which the Party bound himself in the Sum of *Sextene Pounds*, has been held a good Obligation for 17 l. in order to answer the Intention of the Parties.

10 Co. 133. a.  
in Osborn's  
Case.  
2 Rol. Ab. 147.  
S. P. cited.

## (C) Of the Ceremonies requisite to a Bond or Obligation; and herein of Signing, Sealing, Date and Delivery.

IT is said, that there are only three Things essentially necessary to the making a good Obligation, *viz.* Writing in Paper or Parchment, Sealing and Delivery; but it hath been (a) adjudged not to be necessary, that the Obligor should sign or subscribe his Name; and that therefore if in the Obligation the Obligor be named *Erlin*, and he signs his Name *Erlwin*, that this Variation is not material; because Subscribing is no essential Part of the Deed, Sealing being sufficient.

2 Co. 5. a.  
Goddard's  
Case.  
Noy 21, 85.  
Moor 28.  
Stil. 97.  
(a) 2 Salk. 462.  
5 Mod. 281.  
Vide Tit.  
Mistomer.

And tho' the Seal be necessary, and the usual Way of declaring on a Bond is, that the Defendant *per Scriptum suum Obligatorium Sigillo suo Sigillatum* acknowledged, &c. yet if the Word *Sigillat'* be wanting, it is cured by Verdict and pleading over; for when he saith *per Scriptum suum Obligatorium, &c.* all necessary Circumstances shall be intended; and if it were not sealed, it could not be his Deed or Obligation.

Dyer 19. a.  
Cro. Eliz. 571,  
737.  
Cro. Jac. 420.  
2 Co. 5.  
1 Vent. 70.  
3 Lev. 348.  
1 Salk. 141.  
6 Mod. 306.

- 2 Co. 5. a. Also tho' Sealing and Delivery be essential to an Obligation, yet there is no Occasion in the Bond to mention that it was (a) sealed and delivered; because, as my Lord Coke says, these are Things which are done good, tho' it afterwards want in *cujus* Rei Testimonium. Moor 3. 1 Leon. 25. 2 Co. 5. a.
- 2 Co. 5. Goddard's Case. Noy 21, 85, 86. Hob. 249. Stil. 97. Cro. Jac. 136, 264. Telv. 193. 1 Salk. 76. (a) An Obligation is good tho' it wants a Date, or hath a false or impossible Date; for the Date, as hath been observed, is not of the Substance of the Deed; but herein we must take Notice, that the Day of the Delivery of a Deed or Obligation is the Day of the Date, tho' there is no Day set forth; and if a Deed bear Date one Day, and be delivered at another, it was really dated when delivered, tho' the Clause of (b) *Gerens Dat'* be otherwise.
- (b) A Difference has been taken between *Gerens Dat'* and *Cujus Dat'*, that the first refers to the express Date, but that *Cujus Dat'* is always intended of the real Date, which is the Delivery. 5 Mod. 285. Comb. 477. 2 Salk. 463.
- Cro. Eliz. 773. 3 Lev. 348. 1 Salk. 141. If a Man declare on a Bond, bearing Date such a Day, but does not say when delivered, this is good; for every Deed is supposed to be delivered and made on the Day it bears Date; and if the Plaintiff declare on a Date, he cannot afterwards reply, that it was *Primo deliberat'* at another Day; for this would be a Departure.
- 1 Brownl. 104. 2 Lev. 196. But if a Bond bear Date such a Day, but was really delivered at a Day after, the Obligee may declare on a Bond of such a Date, but *Primo deliberat'* at a Day after; and if the Obligee declare on a Bond of such a Date generally, the Obligor may plead it was *Primo deliberat'* on such a Day after; but then he must traverse that it was delivered on the Day of the Date.
- 2 Co. 4, 6. 3 Keb. 332. If the Bond was delivered before the Date, on Issue, *non est factum*, joined on such a Deed, the Jury are not estopped to find the Truth, viz. that it was delivered before the Date, and it is a good Deed from the Delivery.
- 1 Vent. 9, 110. 1 Salk. 274. In Debt on an Obligation, the Defendant pleads that he delivered it as an Escrow, *& hoc Paratus est verificare*; this is ill, for he ought to show to whom he delivered it, and conclude *issint nient son fait*; *& de hoc ponit se, &c.*
- Hob. 246. 1 Vent. 9. So pleading that he delivered it to the Obligee as an Escrow, to be his Deed on certain Conditions, is ill; for by the Delivery of it to the Obligee, it is become his Deed absolutely.
- Co. Lit. 36. a. Cro. Eliz. 835. A Bond or Deed may be delivered by Words, without any Act of Delivery; as where the Obligor says to the Obligee, go and take the said Writing, or take it as my Deed, &c. so an actual Tradition, without speaking any Words, is sufficient; otherwise, a Man that is mute could not deliver a Deed; but (c) where on an Issue of *non est factum*, the Jury found that the Defendant signed and sealed the Obligation, and laid it on a Table, and that the Plaintiff came and took it up, this was held not to be the Defendant's Deed, without other (d) Circumstances found by the Jury.
- (c) Legn. 193. Cro. Eliz. 122. Evidence was, that the Obligation was written in a Book, and that in the same Leaf the Defendant put his Hand and Seal thereto; and this was held to be sufficient Evidence for the Jury to find it his Deed, which they having accordingly done, it was held good without Question. Cro. Eliz. 613. Fox ver. Wright.
- 5 Co. 119. b. If an Obligation be delivered to another to the Use of the Obligee, and the same is tendered, and he refuses, the Delivery has lost its Force.



(D) Of the Parties to the Obligation : And  
herein,

1. Who may bind themselves, or be Obligors.

ALL Persons who are enabled to contract, and whom the Law supposes to have sufficient Freedom and Understanding for that Purpose, may bind themselves in Bonds and Obligations.

But if a Person is illegally restrained of his Liberty, by being confined in a common Gaol or elsewhere, and, during such Restraint, enters into a Bond to the Person who causes the Restraint, the same may be avoided for Durefs of Imprisonment.

So in Respect of that Power and Authority which a Husband has over his Wife, the Bond of a Feme Covert is *ipso facto* void, and shall neither bind her nor her Husband.

So tho' an Infant shall be liable for his Necessaries, such as Meat, Drink, Cloaths, Physick, Schooling, &c. yet if he bind himself in an Obligation, with a (a) Penalty for Payment of any of these, the Obligation is void.

<sup>1</sup> Salk. 279. (a) For this Incapacity of Infants arises from his being Incapable of contracting for any Thing but for his Benefit ; but it never can be for his Benefit to enter into a Penalty. *Cro. Eliz.* 920. *Vide* Head of *Infants*.

Also tho' a Person *non compos Mentis* shall not be allowed to avoid his Bond, by Reason of Infanity and Distraction ; because no Man can be allowed to stultify himself, because of the ill Consequences that might attend counterfeit Madnefs ; yet may a Privy in Blood, as the Heir, and Privies in Representation, as the Executor and Administrator, avoid such Bonds ; also if a Lunatick after Office found enters into a Bond, it is merely void.

But if an Infant, Feme Covert, Monk, &c. who are disabled by Law to contract and to bind themselves in Bonds, enter together with a Stranger, who is under none of these Disabilities, into an Obligation, it shall bind the Stranger, tho' it be void as to the Infant, &c.

If a Servant makes a Bill in this Form, *Memorandum, that I have received of Ed. Talbor, to the Use of my Master Serjeant Gaudy, the Sum of 40 L to be paid at Michaelmas following, and thereto set his Seal,* this is a good Obligation to bind himself ; for tho' in the Beginning of the Deed, the Receipt is said to be to the Use of his Master, yet the Repayment is general, and must necessarily bind him who sealed ; and the rather, because otherwise the Obligee would lose his Debt, he having no Remedy against Serjeant Gaudy.

2. Who may take such Security, or be Obligees.

Infants, Ideots, as also a Feme Covert may be Obligees ; and as to this the Husband is supposed to assent, being for his Advantage ; but if he disagrees, the Obligation has lost its Force ; so that after the Obligor may plead *non est factum* ; but if he neither agrees nor disagrees, the Bond is good, for his Conduct shall be esteemed a tacit Consent, since it is a Turn to his Advantage.

But a Feme Covert can neither be Obligor nor Obligee to her Husband, nor *vice versa*, being but one Person in Law ; also by the better Opinion,

<sup>5</sup> Co. 119.  
<sup>4</sup> Co. 124.  
<sup>1</sup> Rol. Abr. 340.

*Co. Lit.* 253.  
<sup>2</sup> *Inst.* 482.  
*Vide* Tit.  
*Durefs.*

*Vide* Tit. *Baron and Feme.*

*Doct. &*  
*Stud.* 113.  
*Co. Lit.* 172.  
*Cro. Jac.* 494,  
560.  
<sup>1</sup> *Sid.* 112.

<sup>4</sup> Co. 124.  
*Beverly's*  
*Calc. Vide*  
Head of *I-*  
*deots and*  
*Lunaticks.*

<sup>1</sup> *Rol. Rep.* 41.

*Yelo.* 137.  
*Talbot ver.*  
*Godbolt.*

But for this  
*Vide* Tit. *Baron and Feme,*  
Opinion, *Letter (E).*

Opinion, a Bond entered into to a Feme Sole, by the Person whom she afterwards marries, is, by the Marriage, at Law extinguished.

*Co. Lit.* 129. b. An Alien may be an Obligee; for since he is allowed to trade and traffick with us, it is but reasonable to give him all that Security which is necessary in his Contracts, and which will the better enable him to carry on his Commerce and Dealings amongst us.  
*Moor* 431.  
*Cro. Eliz.* 142, 683.  
*Cro. Car.* 9. *Salk.* 46. *Farell.* 15. *Vide* Head of Alien.

*Cro. Eliz.* 464. Sole Corporations, such as Bishops, Prebends, Parsons, Vicars, &c. cannot be Obligees, and therefore a Bond made to any of these, shall enure to them in their natural Capacities; for no sole Body Politick can take a Chattel in Succession, unless it be by (a) Custom; but a Corporation aggregate may take any Chattel, as Bonds, Leaves, &c. in its Political Capacity, which shall go in Succession, because it is always in being.  
 (a) As the Chamberlain of London, whose Successor, by Custom, may have Execution of a Bond or Recognizance acknowledged to his Predecessor for Orphanage Money. 4 *Co.* 65. *Cro. Eliz.* 464, 682.

### 3. Who Shall be said the Obligee; and therein of making several Obligees.

2 *Rel. Abr.* 148. If *A.* by his Bill obligatory, acknowledges himself to be indebted to *B.* in the Sum of 10*l.* to be paid at a Day to come, and binds himself and his Heirs in the same Bill in 20*l.* but does not mention to whom he is bound, yet is the Obligation good, and he shall be intended to be bound to *B.* to whom he acknowledged before the 10*l.* to be due.  
*Franklin ver. Turner.*

*Dyer* 167. a. If *A.* enters into an Obligation to *B.* which he delivers to *C.* to the Use of *B.* tho' this immediately, upon the Execution and Delivery to *C.* becomes the Deed of *A.* yet, if after it is presented to *B.* he (as he may) disagrees to it in *Pais*, by such Refusal the Obligation (*b*) loses its Force.  
*N. Bendl.* 75.  
*Co. Ent.* 145.  
 1 *Rel. Abr.* 148. and  
 1 *Salk.* 301.  
 S. C. cited. (b) In 3 *Co.* 26. b. where my Lord *Coke* cites this Case, he says, that peradventure in an Action brought on the Bond, *A.* cannot plead *non est factum*, because that it was once his Deed.— But in 5 *Co.* 119. b. he says, that in such Case the Obligee may plead *non est factum*, in Regard the Obligation, by the Refusal of the Obligee, loses its Force.

*Dyer* 350. a. Tho' there may be several Obligees, yet a Person cannot be (*c*) bound to several Persons severally; and therefore an Obligation of 200*l.* to two, *Solvend'* the one Hundred Pound to the one, and the other to the other, is a void *Solvend'*.  
*pl.* 20.  
*Hob.* 172.  
 2 *Brownl.* 207.  
*Yelv.* 177.  
 (c) But a Man may covenant with 2 severally, for that sounds only in Damages. *March* 103.

*Cro. Jac.* 251. A Bond was worded in the Words following, *Be it known that I A. do acknowledge myself to owe and be indebted to B. and C. in the Sum of 91 l. 12 s. 8 d. for which Payment to be made I bind myself to B. in 100 l.* and whether *B.* alone should bring the Action for the 100*l.* or both should join in an Action for the 91*l.* 12*s.* 8*d.* *dubitatur* & *adjurnatur*.  
*Foxhall ver. Sands.*

*Yelv.* 177. If an Obligation be made to 3 to pay Money to one of them, they must all join in Suit, for they are but as one Obligee; and if he to whom the Money is to be paid dies, the others must sue, altho' they have no Interest in the Sum contained in the Condition.

1 *Sid.* 238, 420. So if an Obligation be made to 3, and 2 bring their Action, they ought to shew the third is dead.

1 *Vert.* 34. If *A.* bind himself in a Sum to *B.* *Solvendum* to *C.* who is a Stranger, a Payment to *C.* is a Payment to *B.* and in an Action upon it the Count must be upon a Bond *Solvend* to *B.*  
 1 *Sid.* 295.  
 2 *Keb.* 81.

In

In Debt the Declaration was, that the Defendant became bound in a Bond of——, for the Payment of—— to him, his Attorney or Assigns, and on Oyer of the Bond it appeared, that the *Solvendum* was to the Plaintiff's Attorney or Assigns, without Mention of himself; and on Demurrer for this Variance it was held good; and that the Declaration must not be according to the Letter of the Obligation, but according to the Operation of the Law thereupon.

So if *A.* make a Bond to *B.* *Solvendum* to such Person as he shall appoint; if *B.* does appoint one, Payment to him is a Payment to *B.* and if *B.* appoint none, it shall be paid to *B.* himself.

#### 4. Where there are several Co-obligors or Sureties; and herein, where they shall be said to be jointly and severally bound, and of the Obligor's Remedy against all or any of them.

It is clearly agreed, that two or more may bind themselves jointly in an Obligation, or they may bind themselves jointly and severally; in which last Case the Obligee may sue them all jointly, or he may sue any one of them, at his Election; but if they are jointly, and not severally bound, the Obligee must sue them jointly; also, in such Case, if one of them dies, (a) his Executor is totally discharged, and the Survivor and Survivors only chargeable.

(a) If two are bound jointly, and one dies, the Survivor only is liable in Equity; but it is otherwise if they were bound jointly and severally.

If three enter into an Obligation, and bind themselves in the Words following, *Obligamus nos & utrumque nostrum per se pro toto & in solido*, these make the Obligation joint and several.

So where two bound themselves, or any of them, their Heirs, Executors or either of their Heirs, &c. and the Obligation was sealed and delivered by both of them jointly; this was held to be a joint and several, and not a joint Bond only; and that the Word *vel* should be understood the same as *et*; and that therefore the joint Delivery and Acceptance could not make that joint only, which by the Words was joint or several, at the Election of the Obligee.

If two jointly and severally bind themselves in an Obligation, which they severally deliver at different Times and Places, yet is the Obligation joint or several, at the Election of the Obligee.

If three are bound in a Bond by these Words, *Obligamus nos & quemlibet nostrum conjunctim*; this is a joint Obligation, and one of them alone cannot be sued; for the Word *Conjunctim* makes the Obligation joint, which the Word *Quemlibet* cannot make several; being inserted, for no other Purpose, but to express more strongly that they should be all bound, not that they were to be severally bound.

If by Indenture between three on the one Part, and two of the other, the two covenant jointly and severally to perform a certain Act, and the three likewise covenant jointly and severally with the said two, that after the Performance of the said Act, they would pay the said two a certain Sum of Money, &c. and then follow these Words, *viz. Pro vera & reali performance omnium articulorum & agreementorum predictorum alterutrum una partium predictorum obligavit se, heredes, executores, administratores & assignatos suos, in & subter penaltatem sexaginta librarum sterlingorum*; and Action of Debt for the 60*l.* on this last Clause, cannot be brought against one of the three only, being only joint, and not joint and several, like the precedent Covenant.

Serjeants, at the Table in *Serjeant's Inn* in *Fleet-street*, on its being proposed to them,

10 H. 7. 16. Altho' two or more may bind themselves jointly, or jointly and severally, in which Case the Obligee may sue them all jointly or severally, at his Election; yet if three or more bind themselves jointly and severally, yet the Obligee cannot sue two of them (a) only jointly.  
 Yelv. 26.  
 1 Sid. 238.  
 (a) Unless it appear to the Court that the other Persons are dead. *Hard.* 198. *Cro. Eliz.* 494. 1 *Sand.* 291. 1 *Sid.* 238, 420. *Allen* 21, 41.  
 1 *Lutw.* 696. *Cro. Jac.* 152. 1 *Keb.* 840, 936.

Also, if two be bound in a Bond jointly, and one is sued alone, tho' he may plead this Matter, in Abatement of the Writ, yet he cannot plead *Non est factum*; for it is his Deed, tho' not his sole Deed.  
*Co. Lit.* 283. a.  
 5 *Co.* 119.  
*Whelpdale's* Case.  
*Doff. Pl.* 198. *Cro. Jac.* 152. 1 *Vent.* 34. *Poph.* 161. 9 *Co.* 110. 3 *Mod.* 323.

And therefore in Debt against one, on an Obligation wherein two are jointly bound, after Impar lance and Oyer, the Defendant cannot plead that the other sealed and delivered; for as that must come on the Defendant's Side, and it is too late to plead it after Impar lance, it shall be taken, that the other did not seal, &c. nor will the Oyer help it, for it does not appear by it, without special Averment; but of (b) Records therefore in Oyer is sufficient, without Averment.  
 1 *Vent.* 76,  
 135.  
 2 *Keb.* 795.

(b) And a *Scire facias* brought against three Bailees or Sureties, upon a Recognizance acknowledged by them and the Principal jointly and severally; on Demurrer the Writ abated; because, this being founded upon a Record, the Plaintiff ought to set forth the Cause of the Variance from the Record; as that one was dead: But if an Action be brought upon Bond in the like Case, there the Defendants ought to shew that it was made by them, and others in full Life not named in the Writ; because the Court shall not intend that the Bond was sealed and delivered by all that are named in it; and therefore the Defendants cannot demur upon it, tho' it be entered *in hac Verba*. *Allen* 21. *Blackwell* ver. *Ajhton*.

So in Debt against one, on a Bond wherein two are jointly bound, after Oyer the Defendant demurred, and the Plaintiff had Judgment; for tho' another be named in the Bond, yet it does not appear, without Averment, that he sealed, and then the Bond is single, but it ought to have been pleaded in Abatement.  
 1 *Saund.* 291.  
 1 *Sid.* 420.  
*Cabel* ver.  
*Vaughan*.

Also, if two or more be jointly bound, tho' regularly one of them alone cannot be sued, yet if Process be taken out against all, and one of them only appears, but the others stand out to an Outlawry, he who appeared shall be charged with the whole Debt.  
 9 *Co.* 119. a.  
 in *Whelpdale's* Case.

If two are jointly bound, and there is Judgment against both, Execution likewise must be taken out against both, and must be of the same nature: Also, if two are jointly and severally bound, and there is Judgment in a joint Action against both, the Execution must be joint against both, and of the same Nature; so that you cannot take out a *Capias* against one, and an *Elegit*, &c. against the other; for tho' the Plaintiff might have sued them severally, yet by suing them jointly he has made his Election, and the Execution must ensue the Nature of the Judgment; and tho' they be several Persons, yet they make but one Debtor, when *J. S.* sues them jointly; but if the Obligee sues them severally, he may sever them in their Kinds of Executions; for tho' the Obligation be but one, yet the Originals, Suits, Pleadings, Judgments and Executions, are as different as if they were upon several Obligations.

But if there be a joint Judgment against two, and one dies, a *Scire facias* lies against the other alone, reciting the Death; and he cannot plead, that the Heir of him that is dead has Assets by Descent, and demand Judgment, if he ought to be charged alone; for at (c) Common Law, the Charge upon a Judgment being (d) personal survived; and the Statute of *Westm.* 2. that gives the *Elegit*, does not take away the Remedy of the Plaintiff at the Common Law, and therefore the Party may  
*Raym.* 26.  
 1 *Lev.* 30.  
 1 *Keb.* 92,  
 123. *S. C.*  
*Edsat* ver.  
*Smart*.  
 (c) So adjudged 1 *E.* 3.  
 13. pl. 41.  
 3 *E.* 3. pl. 37. & vide 29 *Aff.* pl. 37. 29 *E.* 3. 29. (d) For the Difference between a real and personal Execution; and that a personal Execution will survive, tho' a real will not, vide 3 *Co.* 14. *Yelv.* 209.  
*Raym.* 153. 2 *Keb.* 3, 331. 4 *Mod.* 315. 3 *Keb.* 295. 1 *Salk.* 319, 320. 1 *Shew* 402.

take out his Execution which Way he pleases; for the Words of the Statute are, *Sit in electione*; but if he should, after the Allowance of this Writ and Revival of the Judgment, take out an *Elegit* to charge the Land, the Party may have Remedy by (a) Suggestion, or else by *Audita querela*. (a) For this, vide F. N. B. 166. 44 E. 3. 10.

If two are bound in an Obligation jointly and severally, and Judgment given against each in two several Actions, one in *Banco*, the other in *Banco Regis*, and after one is taken in Execution in *Banco Regis*, and after an Execution is taken in *Banco* against the other by *Elegit*, and Land and Goods (b) delivered in Execution thereupon; he, that is in Execution by his Body in *Banco Regis*, shall be delivered upon an *Audita querela*; because the Execution upon an *Elegit* is a Satisfaction. Hob. 2. Cro. Jac. 338. 2 Bulst. 97. Godb. 257. 1 Rol. Rep. 8, 9 S. C. adjudged, between *Craw-*

ley and Lidgent. (b) But if, after Execution by *Elegit*, the Judgment in *Banco* is reversed, perhaps the other shall not have an *Audita querela*; per *Croke*, contra *Dodderidge*. 2 Bulst. 100. — And my Lord Coke says, that if upon an *Audita querela*, the other be once discharged, altho' afterwards the Judgment in *Banco* be reversed, yet he shall not be taken in Execution again. 1 Rol. Rep. 10. 2 Bulst. 101.

If A. and B. are bound in an Obligation jointly and severally, and Judgment given against each upon several Actions brought, and both taken in Execution, and after A. escapes; yet B. shall not be delivered upon an *Audita querela*; for tho' the Obligee may have an Action against the Sheriff for the Escape; yet, till he is actually satisfied, the other shall not have an *Audita querela*, nor the Obligee be compelled, whether he will or no, to take his Remedy against the Sheriff, who may die or be insolvent. 5 Co. 86. Cro. Eliz. 478. 479. 555. Co. Ent. 85. vide Tit. Escape.

If several Obligors are bound jointly and severally, and the Obligee make one of them his Executor, it is (c) a Release of the Debt; and the Executor cannot sue the other Obligor. 8 Co. 136. 1 Salk. 300. & vide 1 Jon. 345.

(c) But tho' it be a Release in Law, in Regard it is the proper Act of the Obligee, yet the Debt by this is not absolutely discharged; but it remains Assets in his Hands, to pay both Debts and Legacies. Cro. Car. 373. Yelv. 160. & vide Tit. Evidence, Letter (G).

A. and B. were jointly bound to J. S. who made the Wife of A. Executrix, and died; A. and his Wife brought Debt against B. who pleaded this Matter in Abatement: It was argued by Serjeant Turner, for the Defendant, that by making the Wife of one of the Obligors Executrix, the other Obligor is discharged. Hob. 10. Fryer ver. Gildridge. 21 E. 4. 81. b. Bro. Exec. 118. And that it would be so, if they were bound jointly and severally; Plow. 38. a. Platt's Case; Kelw. 63. 8 Ed. 4. 3. Bro. Debt 156. the Reason is, because a Debt, or personal Thing, once suspended is gone for ever; and here the Plaintiff, one of the Obligors, is discharged, for he and his Wife cannot sue himself; and of that the other shall take Advantage. Dyer 140. Co. Lit. 264. b. It is a Release in Law, of which his Companion shall take Advantage, notwithstanding the Opinion 21 H. 7. 37. But if it was but suspended for the Time of the Executorship, yet it is for the Defendant, having pleaded in Abatement. 11 H. 7. 4. b. 1 Rol. Abr. Tit. Extinguishment, 940. Moor 855. pl. 1174. 1 Cro. Dorchester ver. Webb, 272. Yelv. 160. Flud ver. Ramsey. 8 Co. 136. Per Cur': The Plea being pleaded in Abatement, it is for the Defendant; for during the Coverture and Executorship there is a Suspension of the Debt; but it was agreed, that this Debt due by the Baron was Assets in his Hands, and liable to the Creditors, tho' it should be adjudged an Extinguishment; for as North said, this is a Release, but it is but by Will; and therefore in Nature of a Legacy, which shall not be preferred to a Debt; but it was doubted, if it had been pleaded in Bar, if it should be for the Defendant; and North, Ellis and Windham thought not; but that, after the Death of the Baron, it might be sued for; for the Suspension is but during the Coverture, and the Baron is Executor

Hamond & Ux' ver. Bennet, Pasch. 26 Car. 2. Rot. 712.

- Executor only in Right of his Wife; but of this *Atkins* doubted; but in the principal Case there was Judgment for the Defendant.
- 8 Co. 156. a. If a Feme Sole Obligee take one of the Obligors to Husband, this is  
March 128. said to be a Release in Law of the Debt, being her own Act.
- Hob. 10. If one Obligor makes the Executor of the Obligee his Executor, and leaves Affets, the Debt is deemed satisfied; for he has Power, by Way of Retainer, to satisfy the Debt; and neither he nor the Administrator *de bonis non*, &c. of the Obligee can ever sue the surviving Obligor.
- 2 Lev. 73. But if two are bound jointly and severally to A. and the Executor of one of them make the Obligee his Executor, yet the Obligee may sue the other Obligor.
- Co. Lit. 232. a. If two are jointly and severally bound in an Obligation, and the Obligee release to one of them, both are discharged.
- 2 Lev. 220. Three were bound jointly and severally in an Obligation, and an Action was brought against one of them, who pleads, that the Seal of one of the others was torn off, and the Obligation cancelled, and therefore  
Seaton ver. void against all; upon Demurrer it was adjudged, that the Obligation,  
Henson. by the Tearing off the Seal of one of the Obligors, became void against  
2 Show. 28-9 all, notwithstanding the Obligors were (a) severally bound.  
S. C. adjudged, nisi.  
(a) Where several Merchants covenant *separatim*, and the Seal of one of them being torn off, it was held, that this should avoid the Covenant, as to him whose Seal was so torn off only, but not as to the others. 5 Co. 23. *Matthewson's Case*. March 126. S. C. cited, and a Difference there taken between a Bond and a Covenant.
- March 125. So where three were bound in a Bond jointly and severally, and the  
Bayly ver. Seals of two were eaten by the Rats; and the Court inclined that the  
Garford. Bond was void against all.  
2 Show. 29. S. C. cited, as adjudged to have been void.
- Owen 8. Michael's Case. But where two were bound jointly and severally, and it was found by  
Dyer 59. pl. special Verdict, that after Issue joined, and before the *Nisi prius*, the  
12, 13. S. C. Seal of one of the Obligors was taken off the Bond; it was held, that  
and S. P. this being after Issue joined, the Bond was good.  
where the Jury were directed to try, whether it was his Bond at the Time of the Plea pleaded.
- Abbr. Eq. 93. If A. be bound in a Bond for Payment of Money, and B. be bound  
Sheffield ver. with him, as his Surety only, and the Bond happens to be lost; Equity  
Lord Castleton. will set up the Bond, as well against the (b) Surety as against the Principal,  
(b) Especial- because the Bond was once a legal Charge against both.  
ly if the Money was lent principally upon the Surety's Credit. 1 Chan. Ca. 77. & vide 2 Chan. Ca. 22. 1 Vern. 196.
- Abbr. Eq. 93. In Equity, a Bond-Creditor shall have the Benefit of all Counter-  
Maure ver. Bonds or collateral Securities given by the Principal to the Surety; as if  
Elarrifon. A. owes B. Money, and he and C. are bound for it, and A. gives C. a Mortgage or Bond to indemnify him, B. shall have the Benefit of it to recover his Debt.
- 1 And. 121. A Bond made to secure a just Debt, payable with lawful Interest,  
Moore 752. shall not be avoided by Reason of Usury, or any corrupt Agreement  
pl. 1035. between the Obligors, to which the Obligee was no Way privy; as where  
Cro. Jac. 32, A. being indebted to B. in 100*l.* agrees to give him 30*l.* for the For-  
33. bearing of that 100*l.* for a Year, and gives him a Bond of 60*l.* for  
Kelv. 47. Payment of the 30*l.* and for the Payment of the 100*l.* enters into a Bond of 200*l.* together with B. for the Payment of a true Debt of 100*l.* due from B. to C.

5. Of their Remedies against each other.

If one of the Sureties pays all the Bond, yet the Obligee is not compellable by Law to assign the Bond to him, but the Surety's Remedy must be in (a) Chancery.

(a) Or perhaps he may have Remedy by Writ *De plegiis acquietandis*. 1 Lev. 72.

And on this Foundation, that there is a Remedy in Equity, it hath been adjudged, that if *A.* together with *B.* is bound to *C.* for the proper Debt of *B.* &c. and *A.* pays the Money, and *B.* dies, and makes *D.* his Executor, and *D.* in Consideration that *A.* will forbear to sue him till such a Time, assumes and promises to repay him; this Consideration is good, tho' *D.* was liable in Equity only. 1 Sid. 89. 1 Lev. 71. Scot and Stevens. 1 Rel. Rep. 27. S. P. per Croke.

Also it is held clearly in Equity, that one Surety may compel another to contribute towards Payment of a Debt, for which they were jointly bound. 1 Chan. Ca. 246. 1 Chan. Rep. 34, 120, 150.

Therefore it hath been held, that if the Obligee sue in Chancery the Executor of one Obligor to discover Affets, he must make all the Obligors Parties, that the Charge may be equal; but it is made a *Quære*, whether he may not sue the Principal, and leave out them which are bound only as Sureties. 2 Vent. 348.

But it is held, that if a Judgment be had at Law against one Obligor, you may sue the Executor of him alone, to discover Affets, because the Bond is drowned in the Affets. 2 Vent. 348.

If the Principal in a Bond, being arrested, gives Bail, and Judgment is had against the Bail, and the Sureties are afterwards sued on the original Bond, and are obliged to pay the Money; the Sureties shall have the Judgment against the Bail assigned to them, in order to reimburse them what they had paid, with Interest and Costs; and the Sureties in the original Bond are not to be contributory, for the Bail stands in the Place of the Principal. 2 Vern. 608. Parson ver. Priddock.

(E) Of the Condition and Consideration of the Obligation: And herein,

1. Of possible and impossible Conditions.

**B**ONDS, as hath been observed, are either single, as for the Payment of a certain Sum of Money, or with a Condition annexed, that under a certain Penalty, mentioned in the Bond, the Obligor shall perform such and such Acts, pay double the Sum, if he neglects to pay the principal Sum by such a Day; and herein we must take Notice, that as to such Conditions being possible or impossible, that if the Condition of a Bond be impossible at the Time of the making thereof; as for the Obligor to go to *Rome* the next Day, the Bond is single, being the same as if there were no Condition at all. Co. Lit. 206. Savil 96. 2 Leon. 189. 1 Rol. Abr. 420.

So if the Condition be, that the Pope shall be at *Westminster* to Morrow; this is a good Condition. 22 E. 4. 26. 1 Rol. Abr. 420.



1 *Rel. Abr.*  
420.

So if the Condition be, *quod delect plure cras*, this is a good Condition; for tho' the Obligor is not certain thereof, yet if he will take this upon himself and run the Hazard, he may at his Peril, for this is not impossible of it self.

1 *Rel. Abr.*  
419.

So if the Condition of an Obligation be, that the Obligor shall assign to the Obligee a Commission of Bankruptcy; this is an impossible Condition, and therefore void, and the Obligation single, for it is impossible to assign the Commission.

*Savil* 96  
*Wood ver Ave-*  
*ry*, adjudg'd.  
2 *Leon.* 189.  
S. C. adjudg-  
ed, because  
tied by his own Act; but the Law never binds Men to Impossibilities.

So if the Condition of an Obligation be to sustain and maintain an House in sufficient Repairs, and so to leave it at the End of the Term; if at the Time of the Entry into the Bond, the Timber was so rotten that it was impossible to sustain and maintain it in Repairs, yet the Obligation is good.

*Co. Lit.* 206. a.

But if the Condition of a Bond is possible at the Time of making, but before it can be performed becomes impossible by the Act of God, of the Law, or of the Obligee, the Obligation is saved.

1 *Salk.* 170.

But it hath been adjudged, that if the Condition of an Obligation be, that the Obligor shall make the Obligee a Lease for Life by such a Day, or pay him 100 *l.* and the Obligee die before the Day, that his Executor shall have the 100 *l.* and the Ground of (a) *Laughter's* Case was denied by *Treby* C. J. to be universal.

(a) 5 *Co.* 21.  
Where it is  
held, that

if the Condition of an Obligation consists of two Parts in the Disjunctive, both possible at the Time of the making, and one of them becomes impossible by the Act of God; the Obligor is not bound to perform the other; the Condition being inferred for the Benefit of the Obligor, and he having it in his Election to perform which he pleases; & vide *Raym.* 373, where likewise this Doctrine laid down in *Laughter's* Case seems to be a little shaken.

*Abr. Eq.* 18.  
*Haltham ver.*  
*Ryland.*

So where the Condition of a Bond was to settle certain Lands in such a Manor by such a Day, and the Obligor died before the Day; tho' the Bond was saved at Law, yet Chancery decreed an Execution in *Specie*.

## 2. Of repugnant Conditions.

2 *Saund.* 78.  
1 *Sid.* 456.  
1 *Mod.* 35.  
2 *Keb.* 625.  
*Maleverer*  
*ver. Hauxby.*

If the Condition of an Obligation be made in this Manner, *viz. The Condition of this Obligation is such, that if the Obligor shall appear coram Dom' Rege apud Westmonasterium, such a Day, ad respondend', &c. then the Condition of this Obligation shall be void, or else the same shall be in full Force and Virtue*; this is a good Condition; for the Sense is perfect without these last Words, and they shall be rejected for their Absurdity and Repugnancy.

1 *Fon.* 180.  
*Palm.* 552.  
*Eaton ver.*  
*Butler.*

If the Condition of an Obligation be, that if the Obligor should die without Issue, that then if he, by his last Will or otherwise in his Lifetime, shall lawfully assign and convey certain Lands to the Obligee and his Heirs, that then the Obligation shall be void, &c. this Condition is not repugnant, but shall be construed according to the Intention of the Parties, to be collected out of the Words of the Condition.

1 *Lev.* 77.  
*Vern ver. Al-*  
*lop.*

*Raym.* 68.  
S. C. adjudg-  
ed; because  
the Condi-  
tion is sense-  
less, and

If an Obligation is conditioned for the Payment of 7 *l.* by 2 *s.* per Week, till 7 *l.* is paid; and that if he fails of Payment of the 2 *s.* at any of the Days on which it ought to be paid, that the Obligation shall be void, or else remain in Force; this Condition shall be taken distributively, *reddendo singula singulis, viz.* that if he pays the 7 *l.* the Obligation shall be void, but that if he fails in Payment of the 2 *s.* at any of the Days, it shall be in full Force; for the Obligation shall not be taken

therefore the Obligation is single. 1 *Sid.* 105 S. C. adjudged; and that the Obligation was single, and the Condition repugnant and void. 1 *Keb.* 556, 415, 451.



to be of no Effect, if by any Means it may be made good; and accordingly adjudged upon Demurrer to the Defendant's Plea, that he did not pay 2 s. at one of the Days.

So in Debt on a Bond for 100 l. Defendant demands Oyer of the Condition, which was, Whereas the Defendant is truly indebted to the Plaintiff in 50 l. now the Condition is such, that if the Defendant do not pay the said 50 l. on or upon, &c. then the Obligation to be void, &c. and pleads, that he did not pay the said 50 l. the Plaintiff demurred, and had Judgment; for when the Condition recites a Debt, and after lays an Obligation not to pay it, it is in that (a) repugnant and void.

ply Mistakes in Conditions of Bonds. 2 Show. 16, & vide 39 H. 6. 12. 1 Rol. Abr. 419;

(a) That it is just to sup-  
1 Rol. Abr. 419;

### 3. Of lawful and unlawful Conditions.

A Condition to do any lawful Act is clearly good; as to make a Release, perform a Covenant not to play at Cards, Dice, not to be Surety, &c. but a Condition against Law, or such as obliges a Person to the Performance of a Thing which is *Malum in se*, or obliges him to omit or neglect what is his Duty, or encourages him in the Commission of an evil Act, (b) is void: Also it is (c) said, that by the Law of Nature, all useless Agreements are void, as not to wash one's Hands, &c. being for no Body's Advantage.

Bro. Obliga-  
tion 20.  
Co. Lit. 206.  
Perk 139.  
Palm. 172.  
Hob 12.

(b) But  
wherever  
there can be  
a Way found  
good. Perk.

out to perform the Condition, without Breach of the Law, the Bond shall be esteemed good. Perk. 139. Hob. 12. Cro. Eliz. 705. (c) Puffendorf de Jur. Nat. lib. 5. cap. 2.

A Bond, with Condition to rob or kill 7. S. is void; but a Feoffment on like Condition is good, and vests the Estate absolutely in the Feoffee; and the Reason of the Difference is, lest the Party should have any Temptation to do the Act, the Law secures to him the Possession of the Land, without performing the Condition, and in the other, frees him from the Penalty of the Bond; so that the Law has the same End in View in making the Feoffment good, and the (d) Bond void, viz. the Prevention of the Fact.

Co. Lit. 206.  
1 Rol. Abr.  
418.

(d) Also it is  
said to be an  
Offence pu-

nishable in the Party who takes such Bond. 2 Vent. 109.

If the Condition of an Obligation be, that the Obligor shall be always ready to give Evidence and to testify the Truth, in any of the King's Courts, in all Things which shall be demanded of him, and that he shall not hurt, endanger or molest the Obligee in his Lands or Goods, *relatione alicujus rei*; this is a good Condition, and not against Law; for as to the first Part, if he had not been obliged thereto, he had been compellable by Law; and by the last Part it shall be intended, that he shall not hurt tortiously, but not to restrain him from pursuing the Obligee for Felony, or other just Cause.

Cro. Eliz. 705  
Dohson ver.  
Crew, ad-  
judged.

But if A. is imprisoned for Felony, and B. bound by Recognizance to prosecute him; if B. after gives Bond to C. conditioned, that B. will not give Evidence against A. the Condition is against Law, and the Bond void.

1 Vent. 109.  
Mason ver.  
Watkins.

So a Condition to do a Thing that will be Maintenance is void; as to save harmless from such an Appeal of Robbery as B. hath against him.

18 Ed. 4. 28.  
1 Rol. Abr. 417.  
Carter 229.  
Allen 60. S. P.

If the Condition of an Obligation be, not to sell the Apparel of the Wife, this is good; though it was objected it was against Law; (e) because against the Liberty of the Husband.

1 Rol. Rep.  
334. per Coke.  
(e) A Bond  
that a Man

shall not plough his Land, or that a Man shall not go out of his House, are said to be void; because a Man must serve the King, and do his Duty with his Liberty and his Labour. 7 E. 3. 64. Marb 191.

<sup>1</sup> *Rel. Rep.* 334. So if a Man gives Bond to a Stranger, conditioned for the (a) Payment of 20*l.* yearly to his Wife, this is good.  
*Co. Lit.* 206.  
 (a) But a Condition to enfeoff the Wife is void, because against a Maxim in Law. *Co. Lit.* 206.

<sup>1</sup> *Rel. Abr.* 417. If a Parson, on his being presented to a Living, gives a Bond conditioned to resign; such Condition may be lawful, and not against 31 *Eliz.* of Simony; as if the (b) Condition be to restrain the Incumbent from Non-residence, a vicious Life, or that he shall resign when the Patron's Son, *Cro. Car.* 180. Kinsman or Friend, become qualified to take the Living.  
*Lit. Rep.* 135. *Hutt.* 111.  
<sup>1</sup> *Jon.* 220; <sup>2</sup> *Keb.* 445. <sup>1</sup> *Sid.* 389. *Raym.* 175. *Comp. Incumb.* 40, 41. (b) So a Bond conditioned for the Payment of Money to the Son of the last Incumbent, so long as he should continue a Student in Cambridge unpreferred, &c. is good. *Noy* 142. — So where a Patron took a Bond from his Presentee to pay 5*l.* yearly to the Wife and Children of the last Incumbent: Earl of *Suffex's* Case, cited by Foster Judge. *Noy* 142. — But *per Comp. Incumb.* 39. these charitable Resolutions, if any such there were, do not seem to be Law.

*Comp. Incumb.* 39. But if the Condition be for a Lease of the Glebe or Tithes, or a Sum of Money; this is clearly Simony within the Statute, and therefore the Condition void, being against Law.

— That  
 the Condition must be averred to have been entered into for a Simoniacal Purpose, *vide Cro. Jac.* 274. *Hutt.* 110. *Moor* 64. — And where a special Averment may be, that the Obligation was made for a Matter against Law. <sup>1</sup> *Leon.* 75, 203. *Godb.* 29. *Moor* 158.

<sup>2</sup> *Chan. Cr.* 399. Also it hath been ruled in Equity, that where a Bond of Resignation is general, as to resign upon Request, some special Reason must be shewn to require a Resignation; for tho' such Bonds may, in Strictness of Law, be good, yet if they are made an ill Use of, as to extort Money from the Incumbent, &c. Equity will grant a (c) perpetual Injunction against them.  
*1 Vern.* 151, 411.  
*Abr. Eq.* 86, 87.  
*Preced. Chan.* 182.

(c) Also the Ordinary may refuse to accept of a Resignation made by the Restraint of such Bonds. *Comp. Incumb.* 31.

<sup>1</sup> *Rel. Abr.* 417. If the Sheriff of a County make B. his Under-Sheriff, and takes a Bond or Covenant from him, that he will not serve Executions above 20*l.* without his special Warrant; this is a void Covenant, because it is against Law and Justice; in as much as, when he is made Under-Sheriff, he is liable by the Law to execute all Process, as well as the Sheriff is.  
*Hob.* 12.  
*Moor* 856.  
*Godb.* 212.  
<sup>1</sup> *Brownl.* 65.  
<sup>2</sup> *Brownl.* 282.

*Hob.* 12, 13. But if an Under-Sheriff covenants with the High Sheriff, to discharge and save him harmless from all Escapes of Prisoners arrested by the Under-Sheriff, or any by him appointed; this is a good Covenant; for since the High Sheriff transfers his Authority, it is but reasonable he should take Security for the faithful Execution of it; and there is nothing intended against Law, but rather to prevent than connive at Escapes.  
*Moor* 856.  
*Godb.* 212.  
<sup>1</sup> *Brownl.* 65.

*Cro. Eliz.* 529. If A. being a Custom-house Officer by Patent, makes B. his Deputy, and covenants *inter alia* to surrender the old Patent, and procure a new one to B. and himself before a Day, and that if B. dies before A. that A. shall pay 300*l.* to the Executors of B. and gives Bond for the Performance thereof; admitting these Covenants void (d) *per 5 Ed.* 6. *cap.* 16. the whole Bond is void; tho' some of the Covenants are not void or illegal.  
*Lee & Ux' ver. Colpill.*  
<sup>2</sup> *And 55. S.C.* adjudged, because the Obligation is one entire Act and Deed

of the Party. <sup>3</sup> *Co.* 82. *S. C.* cited. (d) So where a Sheriff takes a Bond for a Point against 23 *H.* 6. and also for a just Debt; the whole Bond is void, according to the Letter of the Statute; for a Statute is a strict Law, but the Common Law divides according to common Reason, and having made that void which is against Law, lets the rest stand. *Hob.* 14. *Moor* 856. *pl.* 1175. *Godb.* 213. <sup>10</sup> *Co.* 100. *Latch* 143. <sup>1</sup> *Mod.* 35. <sup>2</sup> *Brownl.* 282. <sup>1</sup> *Vent.* 237. *Carter* 230.

As to Bonds entered into in Restraint of Trade, it seems to have been always admitted, and hath been frequently adjudged, that a Bond restraining Trade in general, as that a Person shall not follow such a Trade in any Part of the Kingdom, is void; the Reasons whereof are, that such Bond tends to a Monopoly, and is against the Publick Good; deprives the Party of his Means of Livelihood; enables Masters to lay Hardships upon their Servants, Apprentices, &c. tends to Oppression; and is attended with immediate and apparent Damage to the one Side, only to free the other from the Fear of a distant Damage that may or may not happen: But it seems to be now agreed, that a Condition restraining Trade in a particular Place, if done fairly, and upon a good and lawful Consideration, and with no ill Intention, is good; also it seems to be now settled, that there is no (a) Difference between a Bond and Promise in these Cases, viz. That a Bond should be void, and a Promise good; but that the true Distinction in these Contracts, whether by Bond, Covenant or Promise, is between those entered into upon a just, fair and reasonable Consideration, and those entered into upon no Consideration, or a vicious one; that the former will be good, the latter void.

*Co. Eliz.* 872.  
*At. 115*  
*Pl.* 259, 242.  
*Pl.* 579.  
*2 Leon.* 210.  
*3 Leon.* 217.  
*At. 191.*  
*Owen* 143.  
And there said by *Anderson*, that he might as well bind himself that he would not go to Church.  
*3 Lev.* 241.  
(a) The Difference formerly held was, that in Covenant or Promise, all

being to be recovered in Damages, the Jury may assess them, in regard to the Consideration; but otherwise of a Bond; because then the whole Sum must be recovered, be the Damages or Consideration never so small. *3 Lev.* 242.

And therefore where *A.* and *B.* living in the same Town, and being both Mercers, *A.* desired *B.* to buy his old Goods, which *B.* did, at such a Price, upon Condition, that he would not follow his Trade within the said Town; and this was held a lawful Contract. 1<sup>st</sup>, Because it was a voluntary Restraint, and the Rule is *volenti non fit injuria*. 2<sup>dly</sup>, That it was made upon a valuable Consideration, the Use of his Trade being compensated by the Price given him for his old Goods. 3<sup>dly</sup>, That the Agreement was neither *Malum in se*, nor *Malum prohibitum*. 4<sup>thly</sup>, That a Man may bind himself not to live in such a Place, and by Consequence not to trade there. 5<sup>thly</sup>, That these Kind of Bonds are very frequent in *London*.

*Cro. Jac.* 596.  
*1 Fon.* 13.  
*March* 77.  
*2 Rol. Rep.* 201.  
*Folliffe ver. Bride.*

So where the Condition of a Bond was, that whereas *A.* had taken the Shop of *B.* who was a Baker, for the Term of so many Years, and had given *B.* so much Money for it, the Condition of the Obligation was such, that if, during the Term aforesaid, *B.* should not exercise the Trade of a Baker within the (b) Parish where the Shop was, that then the Bond should be void, otherwise to remain in full Force; and this was held a good Bond.

*Ca. in Law and Eq.* 27.  
*85, 130, &c.*  
*Mitchel ver. Reynolds.*  
(b) So of a Street, *Comb.* 122.

If the Condition of a Bond is, that the Obligor shall not buy any Sheeps-Trotters of any Person of whom the Obligee had or should buy, nor above such a Quantity; this is void, being in Restraint of Trade, and tending to a Monopoly.

*1 Show.* 2.  
*Comb.* 121.  
*Thompson ver. Harvey.*

A Bond conditioned to save the Plaintiff harmless against all Escapes, which he had suffered, as Warden of the Fleet Prison, was held good; and herein the Court took this Diversity, that a Bond to save harmless against future Escapes would be void, otherwise of a Bond to save harmless against past Escapes; and that tho' it were unlawful to suffer them, yet one may contract to indemnify one against a Penalty already incur'd against Law.

*6 Mod.* 225.  
*Fox ver. Tilly.*  
*2 Salk.* 653.  
S. C. but not the S. P.

## (F) Of the Breach and Performance of the Condition of an Obligation: And herein,

## 1. What shall be a Breach or sufficient Performance.

*Bro Condition*  
158.  
17 E. 4. 3.  
1 Rol. Abr.  
426.  
(a) A Man bound by Obligation to leave the Obligee the third Part of his Estate, making him and 2 others Executors, seems a good Performance. 2 *Shou.* 69.

**I**N the Performance of the Condition of an Obligation, the Intention of the Parties is chiefly to be regarded; and therefore a Performance in (a) Substance is sufficient, tho' it differ in Words or some immaterial Circumstance; as if one be bound to deliver the Testament of the Testator, if he plead that he had delivered *Literas Testamentarias*, it is sufficient.

1 *Keb.* 739. If the Condition of an Obligation be to procure a lawful Discharge, this must be by a Release, or some Discharge that is pleadable, and not by Acquittance, which is but Evidence.

*Hob.* 304.  
*Hutt.* 40.  
1 Rol. Abr.  
429.

If the Condition of an Obligation be, that he shall not be aiding and assisting to *E.* in any Action to be prosecuted against *L.* the Obligee, and after the Obligor joins in a Writ of Error with *E.* and another against *L.* upon a Judgment in Trespass against them three, which is apparently erroneous; this is not any Breach of the Condition; for this is not properly an Action, but a Suit to discharge himself of a tortious Judgment, in which they ought all to join.

*Cro. Jac.* 525.  
2 Rol. Rep.  
63. by 2  
Judges against one,  
who said, that the Act of the Attorney was his own Act. (b) So if a Man lease Land, upon Condition that the Lessee shall not do Waste, and after a Stranger does Waste; yet this is not any Forfeiture, because a Condition shall be taken strictly. 1 Rol. Abr. 428. 1 *Leon.* 64. 4 *Leon.* 39.

If the Condition of an Obligation be, that the Party shall not continue such an Action, and he by his (b) Attorney, but without his Privity, continues; this is said to be no Breach of the Condition.

*Co. Lit.* 221,  
222.  
*Poph.* 110.  
1 Co. 25. a.  
1 Rol. Abr.  
447.  
5 Co. 21. a.  
(c) A Feme Sole enters into a Bond, conditioned that she would from Time to Time, and at all Times

If the Party, who is bound to perform the Condition, disables himself, this is a Breach; as where the Condition is, that the Feoffee shall reinféoff, or make a Gift in Tail, &c. to the Feoffor, and the Feoffee, before he performs it, makes a Feoffment or Gift in Tail, or Lease for Life, or Years *in presenti* or *futuro* to another Person, or (c) marry or grant a (d) Rent-Charge, or be bound in a Statute or Recognizance, or become professed; in all these Cases the Condition is broken; for the Feoffee has either disabled himself to make any Estate, or to make it in the same Plight or Freedom in which he received it, and being once disabled he is ever disabled, tho' his Wife should die, or the Rent, &c. should be discharged, or he should be deraigned, &c. before the Time of the Reconveyance.

upon Request, do all such Acts for the assuring of Lands, &c. at the Charge of the Obligee, and after marries, and whether this was a Breach, *Hard.* 463. *dubitatur*; it was said, that by the Marriage, her Husband had a Possibility of being Tenant by the Curtesy, and that now an Assurance could not be made without Fine, and so the Obligee must be at greater Charge than intended. (d) Tho' the Grantee brings a Writ of Annuity, by which the Land is discharged *ab initio*. *Co. Lit.* 222. a.

*Cro. Eliz.* 7.  
*Moor* 709.  
*Goult.* 177.  
1 *Leon.* 52.  
(e) Like Point in Case of a Covenant. 1 *Sid*  
48. *Raym.* 25. 1 *Keb.* 103. — So in Case of a Promise. 1 Rol. Abr. 448.

If *A.* is bound to *B.* in an (e) Obligation, conditioned that *A.* shall deliver to *B.* before such a Day, an Obligation, in which *B.* is bound to *A.* if *A.* sues *B.* upon the Obligation, and recovers, and after before the Day delivers it to *B.* this is no Performance of the Condition; for, notwithstanding the Delivery of the Obligation he may take Benefit of the Judgment, and so the Intent of the Condition is not performed.

If *A.* being a common Brewer, covenants that *B.* shall have seven Parts of all his Grains made in his Brewhouse for seven Years, and after *A.* puts in great Quantities of Hops into his Malt, of which the Grains were made, by Means whereof the Grains are spoiled; this is a Breach, because in all Contracts the Intention of the Parties is to be considered; and here it was the Intention of the Parties, that *B.* should have the Grains pure, and in such a Manner as to be useful to his Cattle.

So if a Person covenant to deliver so many Yards of Cloth, and he cut it in Pieces, and then deliver it, this is a Breach; for the Law regards the (a) real and faithful Performance of Contracts, and discountenances all such Acts as are done *in fraudem Legis*.

of a Bond be to pay 50*l.* tho' it is not said of Money, yet it must be so intended, and the Oblige cannot tender fifty Pounds Weight of Stone. 1 *Sid.* 151. said by *Twissden*, that he remembered it to have been so adjudged. — But if a Man covenants that his Son, then *infra Annos nobiles*, shall marry the Daughter of *B.* before such a Day, and he marries her accordingly, but at the Age of Consent disagrees to the Marriage, yet is the Covenant performed; for it was a Marriage, tho' subject to be defeated by Disagreement, and no other could be had within the Time. *Owen* 25. adjudged.

If one be obliged to assure 20 Acres of Lands, the Acres shall be accounted according to the Estimation of the County where the Land lies, and not according to the Measure limited by the Statute.

If one is bound to make to another a sure, sufficient and lawful Estate in certain Lands, by the Advice of *J. S.* if he makes an Estate to him according to the Advice of *J. S.* tho' it be insufficient, and not a lawful Estate, yet is he excused from the Obligation.

If by the Condition of an Obligation, the Obligor is to deliver a Release to the Oblige, it is not enough to say, that it was writ and wax affixed to it, and that he was ready to seal and deliver it, and that the Oblige refused to accept, &c. but he ought to have done all that was in his Power, and ought to have put his Seal to it.

If *A.* and *B.* are bound in 60*l.* to *C.* and *A.* binds himself in another Obligation to *B.* upon Condition to acquit, discharge and save harmless the said *B.* from the said Obligation; and after *C.* sues *B.* upon the Obligation of 60*l.* and hath Judgment against him upon *nihil dicit*, and after before Execution sued, *A.* delivers to *B.* the 60*l.* for which, &c. yet his Obligation is forfeited; for he hath not acquitted *B.* as he ought, for he is damaged by the Suit and (b) Judgment, by which his Lands, Goods and Body are subjected to an Execution.

sumes to save *B.* harmless from a Recognizance entered into by *B.* for the Appearance of *A.* if *A.* doth not appear, this is a Breach; for the Recognizance being forfeited, tho' not sued, he is subjected to be sued thereupon. *Yelv.* 287. & vide 1 *Brownl.* 24.

So if the Condition of an Obligation be, that whereas the Oblige became bound for the Obligor in 200*l.* for the Payment of 100*l.* to *J. S.* if therefore the Obligor shall save and keep harmless the Oblige from all Suits, Grants, Demands, touching and concerning the said Bond of 200*l.* then this Obligation to be void; and at the Day of Payment of the 100*l.* the Oblige comes to the Place where the hundred Pound is to be paid, and perceiving no Body there present to pay the 100*l.* for the Obligor, he to save the Penalty pays it; the Counterbond is forfeited; for the Payment of the 100*l.* is a Damage and Harm, and if he had not paid it, greater Harm would have ensued, and it is not necessary the Oblige should be sued.

In Debt upon an Obligation, conditioned to save the Plaintiff harmless from an Obligation, in which he was Surety for the Payment of such a Sum such a Day; the Defendant pleads *non damnificatus*; Plaintiff replies, that the Defendant had not paid the Sum at the Day of Payment; Defendant rejoins, that he had tendered the Money at the Day, which was refused; *alsque hoc*, that the Plaintiff is *onerabilis* to said Obligation, and on

on Demurrer it was adjudged for the Plaintiff, tho' it was objected, that the bare Forfeiture of the Obligation, and the Fear of an Arrest, was no Damification, unless Process were sued out.

## 2. Where there are disjunctive Conditions, how to be performed.

1 *Rel. Abr.*  
444.  
*Owen* 52.  
1 *Leon.* 74.  
*Goulf.* 71.

Where the Condition is in the Conjunctive, regularly both Parts must be performed; yet, to supply the Intention of the Parties, it is held, that if a Condition in the Conjunctive be not possible to be performed, it shall be taken in the Disjunctive; as if the Condition be, that he and his Executors shall do such a Thing, this is in the Disjunctive, because he cannot have an Executor in his Life-time; so if the Condition be, that he and his Assigns shall sell certain Goods, this is in the Disjunctive, because both cannot do it.

1 *Mod.* 265.  
2 *Mod.* 200.  
*Basset* ver.  
*Basset.*

If the Condition of an Obligation be, that if the Obligor, within 6 Months after the Death of *B.* shall assure a Rent of 20 *l.* yearly to *C.* as the Counsel of *C.* shall advise, at the Costs and Charges of *C.* if *C.* require the same; or if the Obligor shall not grant the Rent, if then he shall pay to *C.* 300 *l.* the Obligation shall be void, and *B.* dies, and *C.* tenders no Grant of the Rent within the Time, the Obligee is not bound to pay the 300 *l.* by 3 Judges against one, who said the Condition is not disjunctive, till Request to seal a Deed of Annuity, and that therefore the Obligor ought to pay the 300 *l.*

1 *Leon.* 69.  
*Moor* 241. *pl.*  
377.

If the Condition of an Obligation be to pay 30 *l.* or 20 Kine, within a Month after the Death of *K.* at the Election of the Obligee, he must at his Peril make his Election within the Time limited; for the Obligor is not bound to tender both; but in such Case, or where the Condition is to pay such a Day 10 *l.* in Gold or Silver at the Election of the Obligee, if he does not make his Election before the Day, yet the Duty remains payable, being Parcel of the Penalty.

2 *Mod.* 304.  
*Wright* ver.  
*Bull* adjudged.

If the Condition of an Obligation be, that the Obligor shall work out 40 *l.* at the usual Prices in Packing, when the Obligee shall have Occasion for himself or Friends to employ him therein, or otherwise shall pay 40 *l.* if the Obligee hath no Occasion to make use of him in Packing, he must pay the 40 *l.*

*Gre. Jac.* 594.

If an Obligation be conditioned to pay *B.* or his Heirs annually 12 *l.* at *Midsummer* and *Christmas*, or to pay him or his Heirs at any of the said Feasts 150 *l.* the Obligor hath Election to pay the 12 *l.* or the 150 *l.* tho' he may at any Time determine the Payment of the 12 *l.* by Payment of the 150 *l.*

2 *Sid.* 107.  
*Sir Paul*  
*Neale* ver.  
*Reeve* adjudged.

If *A.* covenants with *B.* that *A.* or his Son *C.* or either of them, shall work with *B.* at the grinding and polishing of Glasse, *B.* paying to each of them so much, &c. and *B.* requests *C.* to work with him, &c. if he doth not, the Covenant is broke; for *B.* had the Election to require both, or any one of them, to work with him.

1 *Lev.* 54.  
*Sayer* ver.  
*Glean* adjudged.

If an Obligation be conditioned to pay Money if a Ship puts to Sea, or the Goods or the Obligor return safe, and the Obligor dies before his Return, yet the Money is payable; for all those Things being contingent and uncertain which of them will happen; the Law supplies the Words *which shall first happen*, and forecloses the Election of the Obligor; and is not like the Case, where a Man is bound to pay Money at *Lady-day* or *Michaelmas*, and he dies after *Lady-day* and before *Michaelmas*.

1 *Vent.* 58.  
*Hosvile* ver.  
*Coats.*

So where the Condition of a Bond was, that the Obligor should bring the Son and Daughter of *J. S.* at their full Age, to give such Releases as a third Person should require; the Defendant pleads, that the Son is alive

alive and under Age; and on Demurrer to this Plea it was held, that the Force of the Bond was not suspended 'till they are both of age; because it is to be taken not conjunctively, but respectively and distributively; for the Obligor undertakes, that the Daughter shall release at her full Age as well as Son, and if she does not, the Condition is broken.

So if one enters into an Obligation or Contract to pay Money, &c. on two several Contingencies, the Obligee may have an Action of Debt on the happening of either of them; for the putting, in that he shall pay at the one or other, must be taken to have been inserted for the Benefit of the Obligee, and the rather because every Contract is to be construed most strongly against the Obligor. *vid. Tit. Election.*

### 3. By and to whom to be performed.

Tho' regularly the Condition must be performed by, and to those only who are specified in the Contract; yet, if there be no Specification, or it be doubtful who was meant, the Law will construe it according to the Intention of the Parties; as (a) if the Condition of an Obligation be, that the Obligor shall make all the Linen the Obligee shall wear during his Life, the Obligee must deliver to the Obligor the Cloth of which it is to be made; for all Contracts are to be interpreted according to the Intent and the subject Matter; and this seems the most genuine Interpretation in the present Case; especially, as it did not appear that the Obligor was a Sempstress, or such Person that used to make Linen, and find the Materials. *9 E. 4. 12. Perk. Sect. 1. 785. (a) 1 Lev. 93. Oles ver. Thornhill, adjudged.*

So if a Taylor is bound, or promises to make a Suit of Cloaths, the Obligee ought to deliver him the Cloth; because this is usual, and not for him to find it. *1 Lev. 93. per cur'.*

But if a Shoemaker is bound to make a Pair of Shoes, he is also bound to find the Leather, because that is usual. *1 Lev. 93. per cur'.*

If the Condition of an Obligation be to pay a less Sum, if my (b) Servant by my Command tenders it to the Obligee, this is sufficient. *2 H. 6. 3. b. 1 Rel. Abr. 421.*

(b) So if a Stranger tenders for, and by the Assent of an Infant above fourteen. *Moor 222. pl. 13. per Cur'.*

So if the Condition of an Obligation be to pay 10 l. &c. it is a good Performance if he pays it to his Attorney, or the Person whom he has deputed to receive all Money due to him. *42 E. 3. 13. b. 1 Rel. Abr. 421.*

So if a Bond, conditioned for the Delivery of 40 Pair of Shoes at Holborn Bridge, within a Month to J. S. a common Carrier, for the Use of the Obligee, and J. S. did not come to London within the Month, but the Obligor delivered them to his Porter; and 'twas adjudged a good Performance; for that the Delivery to the Man was a Delivery to the Master, within the Intent of the Condition. *2 Mod. 309.*

If the Condition of an Obligation is to pay 20 l. to the Obligee and others, the Parishioners of D. (c) it may be paid to any two of them. *Moor 68. pl. 183.*

the Condition is to pay Money to Baron and Feme, it may be pleaded to have been paid only. *Goult. 73. & vide 2 Sid. 41.* (c) Where to the Baron

If the Condition of an Obligation be to pay 10 l. per Ann. after the Death of the Obligee, to the Executors of the Obligee, for the Use of his Children, and he dies without making any Executors, the Money shall be paid to his Administrators. *Hest. 113. Lit. Rep. 156.*

But if a Man be bound in 20 l. upon Condition to pay 10 l. to such Person as the Obligee shall name by his last Will, and after the Obligee names no Person by his Will, the Obligor is not bound to pay *1 Rel. Abr. 421. Lit. Rep. 173. Hob. 9. 1t Godb. 192.*

*After 845.* &c. it to his Executors, because the Condition hath Reference to his Nomination.  
*per Coke.* there is a  
 Diversity, where the Condition is to pay 10*l.* to the Assignee of the Obligee, and where to the Obligee or his Assigns; for in the last Case it vests as a Debt in the Obligee, and shall go to his Executors.

*1 Rol. Abr.* But if the Condition be to lease certain Lands for 3 Lives to the Obligee or his Assigns, and after the Obligee demands a Lease to be made to 3 Strangers for their Lives, he ought to make it them accordingly, or otherwise the Condition is broke; for here by the Word *Assigns*, is intended Assigns by Nomination; for he cannot have other Assigns, in as much as the Estate is not assignable before he hath it.

#### 4. At what Time to be performed.

*Co. Lit. 208.* If the Condition of an Obligation be to do a local Act to the Obligee, to which the (a) Concurrence of the Obligor and Obligee is necessary; *6 Co. 30. b.* as to make a Feoffment, and no Time is limited, the Obligor hath Time (a) But the during his Life to perform it, if not (b) hastened by Request. the Condition is legal, yet, if it may be performed for the Benefit of the Obligee in his Absence, as the Acknowledgment of Satisfaction on Record, &c. it ought to be done in convenient Time. *Co. Lit. 208. 6 Co. 30. b. Hard. 10.* (b) But when by the Condition the Obligor, Feoffor, Feoffee or Stranger are to do a sole Act or Labour, which in no Manner concerns the Obligee, Feoffor, &c. nor their Benefit; as to go to Rome, &c. they shall have Time during Life, and cannot be hastened by Request. *Co. Lit. 208, 209. b. 6 Co. 31. 1 Leon. 125.*

*6 Co. 31.* But when the Act, by the Condition of an Obligation to be done to the (c) Obligee, is of its own Nature transitory, as Payment of Money, *Co. Lit. 208.* Delivery of Charters, and the like, and no Time limited, it ought to be performed in (d) convenient Time. *1 Rol. Abr. 436.* Several Cases to this Purpose. (c) So if to be performed to a Stranger. *1 Rol. Abr. 437.* (d) Where the Condition was, in convenient Time to assure the Land for the Maintenance of a School, and the Party did not do it in 8 Years, adjudged a Breach. *1 Co. 25. b.*

*Cro. Eliz. 798.* So if the Condition of an Obligation be to pay a less Sum, and no Day of Payment limited, he ought to pay it presently, *scilicet*, within a convenient Time.

*Co. Lit. 212.* If the Condition of an Obligation be to pay so much to the Obligee, or to a Stranger such a Day, if he pays it before the Day, this is a good Performance; because Payment before, contains Payment at the Day; *1 Rol. Abr. 440.* and upon pleading *solvit ad Diem*, such Payment may be given in Evidence. *Cro. Car. 284. Cro. Jac. 435. Moor 367.*

*pl. 502. Cro. Eliz. 142. 1 And. 198. S. wil 96. Owen 45. Dyer 222. Godb. 10. 2 Sid. 78.*

*2 Saund. 80.* But after a Breach the Defendant cannot plead his Being ready to pay; as where in Debt on a Bond, conditioned to save a Parish harmless concerning a Bastard Child, which the Obligor was forced to Father, he plead *non damnificat*; they reply that the Child was ready to starve, and that therefore they put it out to nurse, which cost them 4*l.* Defendant rejoins, that he was ready to repay the Money, and save the Parish harmless; upon this they demurred, and had Judgment, because the Rejoinder is a Departure; for the Defendant ought to have taken Issue upon the Child's being ready to starve; for if the Plaintiffs were once at Expence about the Child, and were actually damnified, the Defendant's being ready to pay the Money, will not save the Condition of the Bond.

*1 Sid. 444. 1 Med. 43. 2 Keb. 612, 619. Richards ver. Hodges.*



If the Condition of an Obligation be to do a Thing within a certain Time, the Obligor may perform it on any Part of the last Day, before Sun-set of the Time appointed.

8 H. 4. 14  
but for this  
C. de Cro. Eliz.  
14.

Moor 122. pl. 166. 1 Rol. Abr. 442.

If the Condition of an Obligation be to deliver to the Obligee 20 Quarters of Corn, the 29th of February next following the Date, and the next February hath but 28 Days, he is not bound to deliver it till a Leap-year.

1 Leon. 101.  
adjudged.

If an Obligation bear Date the 1st of May, and the Condition is to pay a Sum of Money the 15th Day of May next ensuing, this shall have Relation to the Day, and not to the Month; so as to be payable the 15th Day of May following, and not to 15th of May next come Twelvemonth, being (a) a Fortnight after the Date.

Cro. Jac. 646.  
adjudged,  
but a Writ  
of Error be-  
ing brought,  
the Parties  
compounded.

(a) But where being payable the next Day, the Court held, that it should have Relation to the Month.  
Cro. Jac. 677.

So where an Obligation was made the 17th Day of November, and the Condition was to pay 5 l. the 21st of November following, and 5 l. the 20th of December next after, it was held, that the 1st 5 l. ought to be paid the 21st Day of November next ensuing, and that it referred to the Day, and not to the Month.

1 Rol. Ab. 442.  
Price ver. Coa.  
2 Rol. Abr.  
251. S. C.

But it hath been lately adjudged, that a Bond dated 12 May, with Condition to pay a certain Sum on the 13th of May next following, should have Relation to the Month, and not to the Day; for it is said, the Month following as well as the Day following, which the present Month cannot be, and therefore the Money not payable before the 13th of May come Twelvemonth; for these Contracts are to be construed *secundum subjectam Materiam* and the Meaning of the Parties.

Hill. 5. Geo. 2.  
in B. R. Kettle  
ver. Jones.

If a Man enters into a Bill obligatory, for the Payment of several Sums of Money at (b) several Days, an Action of Debt will not lie till the last Day is past.

Co. Lit. 47,  
292. b.  
3 Co. 22. a.  
128. b.  
Cro. Jac. 505.

Cro. Car. 241. (b) If to pay 20 l. in Manner following, viz. 10 l. at one Day, and 10 l. at another Day, Debt lies not till after the last Day, because one entire Duty; but if a Man binds himself to pay 7 s. 10 l. at one Day, and 10 l. at another Day, after the first Day Debt lies for 10 l. because it is in itself a several Duty. Owen 42. — So if A. makes a Bill to B. for the Payment of 20 l. viz. 10 l. &c. and thereby covenants and grants with B. that if he makes Default in either of the said Payments, that he will then pay what of the Whole shall be unpaid; after Default at the first Day, Debt lies for the Whole. 1 Leon. 208. adjudged.

So upon a Contract Debt lies not till all the Days of Payment are past; for where there is but (c) one Contract there can be but one Debt, and consequently but one Action of Debt for the Recovery of it.

Co. Lit. 292.  
3 Co. 22.  
4 Co. 94.  
5 Co. 51. S. P.  
(c) But it a

Recognizance be to pay Money at 5 several Days, after the first Day of Payment Execution lies for the Sum that then ought to be paid; for it is in the Nature of several Judgments. Co. Lit. 292. b. and the Law is the same of such a Covenant or Promise to pay Money, &c. for as often as the Money is not paid according to the Covenant and Promise, so often is there a Breach of the Covenant or Promise, and consequently so often an Action lies. Co. Lit. 292. b.

If a Bill of Debt be brought against an Attorney upon 3 several Obligations, and upon Demand of Oyer it appears by the Condition of one of the Obligations, that the Day of Payment thereof is not yet come; after a Verdict for the Plaintiff, upon Conditions performed pleaded, and Costs and Damages given, tho' the Plaintiff cannot have Judgment for this Obligation, of which the Day of Payment is not yet come; yet upon his Release of Costs and Damages, he shall have Judgment for the other Obligations.

Hob. 178.  
1 Rol. Abr.  
785.  
1 Saund. 285.  
S. C. cited.

If by Bond Money be payable by Instalments, and in such Manner, that the Non-payment of a particular Sum, at a particular Day, makes

Mich. 7 Geo. 2.  
Webb ver.  
Dingle,  
a For-

a Forfeiture of the whole Bond ; and accordingly for the Non-payment of such Sum, there is a Verdict for the Plaintiff, finding it the Deed of the Party ; tho' in Strictness the whole Bond is forfeited ; yet, upon the Defendant's bringing into Court all that the Master shall hold to be due, and letting the Verdict stand as a Security for future Payment, the Court will by Rule stay all further Proceedings on the said Bond.

### 5. At what Place to be performed.

*Cro. Eliz.* 14. If by the Condition of the Obligation Money be to be paid to the  
*Moor* 122. Obligee at or before the 29th of *September*, at such a Place, it cannot  
*Hawley ver.* be tendered at the Place before the last Day, unless the Obligee is there  
*Simpfen*, ad- ready to receive it ; but if the Obligor meet the Obligee at a Place be-  
 judged. fore the Day, he may there tender it, and the Obligee ought to re-  
*Co. Lit.* 211. ceive it.  
*Salk.* 140. S. P.

*Moor* 545. If an Obligation be conditioned to be at *A.* at a certain Day, there to  
*Mansb ver.* chuse two Arbitrators, to be joined to two others to be chosen by the Ob-  
*Edmunds.* ligee, to arbitrate all Matters between them, he ought to be there in  
*Cro. Eliz.* 549. such a Time, that the Arbitrators may be chosen and all ended that  
 S. C. adjudg- Day ; and therefore his Pleading, that he was there the last Instant to  
 ed, that the make his Choice, is not sufficient.  
 Plea was  
 naught ; be-  
 cause he shewed not what Hour of the Day he came, nor how long he continued there, nor that his  
 Arbitrators were present there also.

21 *E. 4.* 6 b. If the Condition of an Obligation be to pay a small Sum, and no  
*Co. Lit.* 210 b. Place is limited, he ought to seek the Obligee wherever he may be  
 3 *Leon.* 260. found ; but if the Condition be to deliver twenty Quarters of Wheat, or  
 twenty Load of Timber, &c. to the Obligee, the Obligor is not bound  
 to carry the same about and seek the Obligee ; but the Obligor, before  
 the Day, must go to the Obligee, and know where he will appoint to re-  
 ceive it, and there it must be delivered.

1 *Roll. Abr.* If a Place be limited and agreed on by the Parties where the Con-  
 445. dition is to be performed, the Party, who is to perform it, is not obliged  
 to seek the Party to whom, &c. elsewhere ; nor is he, to whom it is to  
 be performed, (a) obliged to accept of the Performance elsewhere.  
 (a) But he  
 may accept  
 it at another Place, and it is good. *Moor* 567. pl. 502.

21 *E. 4.* 52. If the Condition of an Obligation be to pay 10*l.* at *D.* such a Day,  
*Bro. Condition* or 10*l.* at *S.* such a Day, if he tenders it at *D.* the first Day, the Con-  
 174. dition is saved.

*Co. Lit.* 210 b. If the Condition of a Bond be to make a Feoffment, it is sufficient to  
*Allen* 24, 25. tender it upon the Land, because the Estate must pass by Livery.  
*Stile* 61.

1 *Roll. Abr.* If the Condition of an Obligation be, to appear *coram Justiciariis apud*  
 445. *Mus-* *Westmonasterium*, he ought to appear in *C. B.* and not in *B. R.* for this is  
*grave ver. Ro-* not the Stile of the King's Bench.  
*binson.*

*Co. Lit.* 211. a. If a Man is bound to pay 20*l.* at any Time during his Life, at a  
*Dyer* 554. Place certain, the Obligor cannot tender the Money at the Place when  
 pl. 32. he will, for then the Obligee should be bound to perpetual Attendance ;  
*Latch* 158. and therefore the Obligor, in respect of the Uncertainty of the Time,  
 8 *Co.* 92. b. must give the Obligee Notice, that on such a Day, at the Place li-  
*Salk.* 214. mited, he will pay the Money ; and then the Obligee must attend  
 there to receive it.

By the Condition of an Obligation, a Master is bound to make his Apprentice free, on Request, at the End of seven Years; and in Debt on this Obligation the Master pleads, that *ad finem* of the said seven Years, or after, till the Time of Action brought, he was not requested; and it was held, that in this Case, the Request was material, being Part of the Condition; and *Holt* held, that the Request here ought to have been on the last most convenient Time of the last Day of the seventh Year, and that it would come too late the next Day; but *Powell* inclined, that a Request in a Day or two after the seven Years would do well.

6 Mod. 227,  
259. *Fitz-  
Hugh* ver.  
*Demington*.  
2 Salk 585  
S. C. adjudg-  
ed *per totam*  
*Cariam*, on a  
Writ of Er-  
ror of a  
Judgment in  
the Mar-

shal's Court for the Plaintiff, and the Judgment there reversed.

# 6. What the Obligee must do, in order to intitle him to take Advantage of the Breach; and herein of Notice, Request, &c.

Herein we must take Notice of a Diversity in the Books, between a Bond for doing a collateral Act and a Bond which creates a Duty of it self; that in the first Case, Notice or Request must be averred, tho' not in the last: Also, whenever the Condition is to do a Thing when thereunto required, or if thereunto required, there the Request is Part of the Condition, and to be averred.

1 Brownl. 13.  
Hob. 10.  
2 Saund. 33.  
6 Mod. 227.

As if the Condition of an Obligation be, to account before such Auditors as the Obligee will assign; the Obligee, upon his assigning Auditors, ought to give Notice to the Obligor; so where a Man is obliged to account when he shall be thereunto required; there must be a reasonable Time and Place appointed upon the Request.

Bro. Notice 13.  
Cro. Jac. 391.  
8 Co. 92. b.

So if one be bound by Obligation to enfeof such Persons as the Obligee shall name; the Obligee is bound to name the Persons, and give Notice thereof to the Obligor.

8 E. 4. 15.

In Debt upon a Bond conditioned to save harmless from twelve Bonds entered into to the King's Majesty for Customs; and so Debt against an Under-Sheriff, upon a Bond conditioned to save harmless the High Sheriff, and a small Breach alledged; resolved, that it was not requisite, that the Defendant should have Notice of the Damage, for he must save harmless at his Peril.

1 Vent. 35, 78.  
1 Sid. 442.  
2 Keb. 529.  
King ver.  
Atkins.

If the Condition of an Obligation be, to pay a Sum at a certain Day, the Obligor must tender it without any Demand; so if a Person be bound to be attendant on another at all Times when he comes to his Manor of *D.* he is bound to take Notice when he comes to his Manor of *D.* at his Peril.

1 Rol. Abr. 458.

Also, where the Obligor or Covenantor has disabled himself to perform the Act, tho' before Notice and Request were necessary, yet hereby are they dispensed with, and the Obligation forfeited.

5 Co. 21.  
Moor 452.  
pl. 619.  
Cro Eliz. 450.

479. Popb. 109. Hutt. 48. Winch 29, 30.

As if *A.* leases to *B.* for twenty-one Years, and covenants, at any Time during the Life of *B.* upon Surrender of the old Lease, to make a new Lease, for the Residue of the Term; and after *A.* leases to a Stranger; though *B.* by the Words of the Indenture, ought to do the first Act, yet, because *A.* hath disabled himself to make a new Lease, *B.* shall not be obliged to surrender his old Lease, without Possibility of a new Lease; but may bring Covenant, without making any Surrender. that Covenant lay, without making any Request, tho' by the Covenant the new Lease was to be made upon Request.

5 Co. 20, 21.  
Sir Anthony  
Maine ver.  
Scott.  
Cro. Eliz. 450.  
Popb. 109.  
Moor 452.  
pl. 619. S. C.  
adjudged,

So if *A.* covenants to enfeof *J. S.* upon Request, and after enfeoffs another, *J. S.* may have Covenant, without making any Request.

5 Co. 21. 1<sup>st</sup>  
Cur.

*1 Rol. Abr.* 458. If the Condition of an Obligation be (a) to levy a Fine to the Obligee, he is not bound to levy it, if the Obligee does not sue a Writ of Covenant against him.

*1 Rol. Abr.* 422. *S. P. cont.*

(a) So if the Condition be, that a Stranger shall levy a Fine to the Obligee. *Hutt.* 48. *Winch* 30. — So if the Condition be to acknowledge a Judgment to *J. S.* he must sue out an Original. *Winch* 30. *Hutt.* 48.

*1 Vent.* 71.

If the Condition of an Obligation be, to pay all such Costs as shall be stated by two Arbitrators, by the Obligor and Obligee to be chosen; the (b) So if the Obligee (b) must chuse an Arbitrator before he can shew any Fault in the Condition be Obligor.

to inrol a

Deed in *Guild-hall*, he is not bound to do it before Request made by the other. 39 *E. 3.* 5. *1 Rol. Abr.* 458.

*1 Rol. Abr.* 465.

*Bridg.* 128.  
*Linghen ver.*  
*Pain*, adjudg-  
ed.

If the Condition of an Obligation be, that whereas the Obligor is Lessee for Years from the Obligee of certain Lands, if he renders up the Possession of the Land at the End of the Term to the Lessor, his Heirs or Assigns, upon Request, then the Obligation shall be void, &c. and after the Lessor assigns over his Reversion, and the Assignee, at the End of the Term, requests him to render up the Possession to him; he is bound to do it, without any Notice given him that he is Assignee; for he ought to take Notice thereof at his Peril, in as much as he hath bound himself to render it up to the Assignee.

*1 Rol. Abr.* 465. *Stooke's*  
*Cate.*  
*Cro. Jac.* 652.  
like Point  
adjudged.

If the Condition of an Obligation be, that if the Obligor, with two others, make, an dupon Request seal to the Obligee an Obligation of 40 *l.* then, &c. it is sufficient for the Obligee to make Request only, without tendering any Writing to them, for he ought to do it at his Peril.

## 7. How the Breach must be assigned and set forth, and the Manner of pleading Performance, and in Bar.

*Cro. Jac.* 420.  
*Cro. Eliz.* 773.  
3 *Lev.* 348.  
1 *Salk.* 141.  
6 *Mod.* 306.

The usual Way of declaring and setting forth the Breach on a Bond is, that the Defendant *per scriptum suum obligatorium sigillo suo sigillatum*, acknowledged, &c. and therein to lay a Place where it was made, that it may receive Trial, in case it be denied; also it is usual to say, that the Bond was sealed and delivered; but this has been held not to be of Necessity, and to be cured by pleading over, the calling it *scriptum suum obligatorium* implying so much; but it hath been held, not to be sufficient for the Plaintiff to declare *quod reddat ei* so much, without adding *quas ei debet & injuste detinet*.

(c) *Cro. Jac.* 499.

*Cro. Car.* 436  
*Allen* 57.

2 *Vent.* 129.

(d) 3 *Bull.*

244.

1 *Rol. Rep.*

425.

(c) In an Action of Debt for Part of a Debt upon Contract or Obligation, the Plaintiff must acknowledge Satisfaction of the Residue; for there must be no Variance from the Specialty; but (d) in Debt upon two Bonds, the Plaintiff in his Declaration may acknowledge the Payment of 10 *l.* in Part, without shewing upon which Bond it was paid; for it is immaterial, and can no way prejudice the Defendant; also the Money might have been paid generally, without any Application to either Bond.

1 *Lev.* 88.

*Salk.* 326.

In Debt on a Bond with Condition, the Plaintiff may declare generally, and it is on the Defendant's Part to shew the Condition, which goes by Way of Defeasance; and if he demand Oyer and demur, the Plaintiff shall have Judgment.

*Cro. Jac.* 315.

*Kirby ver.*

*Hinfaker.*

1 *Mod.* 298.

*S. C.* cited, and allowed to be Law; and so in 3 *Mod.* 135. 1 *Vent.* 84. 2 *Lev.* 37. but 3 *Lev.* 325. 1 *Mod.* 66. seems *contra*; and there said by *Jones*, that, since this Case, the Statutes 21 *Jac.* 1. and 16 & 17 *Car.* 2. have greatly strengthened Verdicts.

the Breach was assigned in the Recovery by Verdict in Ejectment, upon a Lease made by one *E.* and does not shew what Title *E.* had to make the Lease, but avers, that *E.* had good Title; and it might have been, that he had Title from the Plaintiff himself after the Obligation made; and therefore he ought to have shewed a good and *Eigne* Title before the Lease made; & *per Cur.* The Replication is ill; for it ought to (a) comprehend a full and manifest Breach, otherwise it is not good.

(a) That in Debt upon a Bond to perform

form Covenants, the Replication must shew a certain Breach; but in Covenant, it is sufficient to assign a general Breach. 1 Salk. 139.

If the Condition of an Obligation be to deliver, before the 5th of *Jan.*, 1 Salk. 140. twenty Quarters of Corn out of a Ship into a Barge, to be brought by the Plaintiff to receive the said Corn; and he assigns for Breach, that he did not deliver it 5 *Jan.* it is good; for when one is obliged to deliver and the other to accept, it shall be presumed, that the Plaintiff was there before the Time, ready to accept the Corn with his Barge.

If the Breach be assigned after the Action brought, it is ill; as if in Debt on an Obligation for Non-performance of Covenants, the Plaintiff replies, and assigns a Breach in Non-payment of Rent the 20th of *June*, 17 Car. 2. and the Bill was filed *Trin.* 17 Car. 2. which Term ended the 14th of *June*; this was held ill.

1 Sid. 307. *Champion ver. Skirweth*; but the Reporter says, that if the Obligation

be for Payment of Money, and the Money becomes payable pending the Action, this makes the Action good, *secus* where the Condition is for Performance of Covenants; & *vide Cro. Eliz.* 325. 4 Leon. 98. 1 Keb. 106.

It is said, that in an Obligation for Performance of Covenants, the Breach ought to be more precise and particular than in Actions of Covenant; but that yet if what is material, and the Substance is alledged, it is sufficient; as where the Condition of an Obligation was, that the Defendant, a Bailiff, should not let at large any Prisoner arrested, without Licence of the Plaintiff an Under-Gaoler; and the Breach assigned was, that the Defendant had let at large such a one, whom he had arrested at *Westminster*, without Licence, &c. this was held sufficient, tho' the particular Time and Place were not set forth, the Escape being the material Part of the Covenant or Condition.

1 Sid. 30. *Ferkins ver. Hancock.* *Cro. Eliz.* 152.

If the Replication be repugnant to the Declaration, it makes the Declaration ill, because the subsequent Pleading falsifies the Declaration; as if a Man declares on a Bond made 10 *Martii*, if the Plaintiff replies, that the Bond was delivered 30 *Martii*, this falsifies the Declaration; because it could not be made the first; so if the Rejoinder falsifies the Bar, the Bar is vicious.

*Cro. Jac.* 264. 1 Sand. 116, 226.

In Debt on a Bond, with Condition for Performance of several Things, the Defendant pleads *quod conditio ejusdem facti nunquam infra facta fuit per se ipsum*, &c. and held an ill Plea; because, for saving the Bond, it is necessary for the Defendant to shew how he hath performed the Condition; and this Sort of Pleading was never admitted.

2 Vent. 156.

So if he had pleaded *performavit omnia*, it had been ill; for the Particulars being expressed in the Condition, he ought to plead to each particularly; but if the Condition were for Performance of Covenants in an Indenture, Performance generally were a good Plea.

1 Lev. 302.

Debt on a Bond conditioned to deliver Goods on such a Day; the Defendant pleads, that he delivered them according to the Form of the Condition; the Plaintiff demurred, because he ought to have pleaded expressly, according to the Words of the Condition, that he delivered them on the Day; and the Court inclined to that Opinion. — (b) So in Debt on a Bond conditioned to pay a Sum of Money at *D.* such a Day, the Defendant pleads Payment at the Day *secundum effectum conditionis*; the Plaintiff demurred specially, because he does not say where he paid it; and it was held

1 Lev. 145. *Nels Lutw.* 263.

(b) 3 Lev. 245.

held to be Form at least; the Plaintiff having demurred specially had Judgment; (a) 2 Salk. 520. (a) and generally, where Performance is pleaded, it ought to be pleaded in the Words of the Condition.

3 Lev. 154.

In Debt on an Obligation for Payment of Money, &c. the Defendant pleads, that at the Time and Place *paratus fuit* to pay the Money, but that no Body was there to receive it; and held ill, on a general Demurrer, for Want of an *obtulit solvere*; for the Tender only is traversable, not the *Paratus*.

1 Vent. 196.

Cro. Eliz. 913.

Salk. 26; &

vide Tit. A-

mendment and

Jewells.

1 Lev. 55, 84.

3 Lev. 17, 24.

In Debt on an Obligation by a Master of a Ship against a Merchant, for performing of Agreements in a Charter-party; the Declaration was, *Et ad performance conventionum ex parte dicti mercatoris obligasset se dicto magistro*, &c. adjudged insufficient, for Want of the Word *Ipse*, or *Ipse predictus mercator obligasset*, &c.

In Debt on a Bond with Condition, the Defendant pleads a collateral Plea, which is insufficient; the Plaintiff demurs, and had Judgment, without assigning a Breach; for the Defendant by pleading a defective Plea, by which he would excuse his Non-performance of the Condition, saves the Plaintiff the Trouble of assigning a Breach, and gives him Advantage of putting himself on the Judgment of the Court, whether the Plea be good or not; but if the Plaintiff had admitted the Plea, and made a Replication which shewed no Cause of Action, it had been otherwise; but if the Replication were idle, and the Defendant demurred, yet the Plaintiff should have Judgment, without assigning a Breach.

Salk. 138. vide  
Tit. Arbitra-  
ment.

And in all Cases of Debt on an Obligation with Condition, (that of a Bond to perform an Award only excepted,) if the Defendant pleads a special Matter, that admits and excuses a Non-performance, the Plaintiff need only answer, and falsifie the special Matter alledged; for he that excuses a Non-performance admits it, and the Plaintiff need not shew that which the Defendant hath supposed and admitted.

1 Salk. 138.

But if the Defendant pleads a Performance of the Condition, tho' it be not well pleaded, the Plaintiff in his Replication must shew a Breach; for then he has no Cause of Action, unless he shew it; and this Difference will give the true Reason, and reconcile the Cases in the \* Margin.

\* 1 Lev. 55,

84, 226.

1 Saund. 102, 159, 317. 3 Lev. 17, 24. 1 Vent. 114. Cro. Eliz. 320. Yelv. 78.

1 Lev. 194.

In Debt on an Obligation to pay for what Goods an Apprentice shall waste; the Plaintiff in Pleading need not shew what the Goods were, for he is to recover the Penalty of the Bond; otherwise in Covenant.

Saund. 116.

2 Vent. 278.

1 Lev. 194.

Pleading the Breach of a Condition of a Bond, *eo quod* it was not paid, &c. is a good Affirmation; as in Avowry, *Et quia* the Rent was Arrear, is good; so in all *Assumpsits* on collateral Promises to pay on Request, *licet* such a Day and Place he requested, is an Affirmation, and traversable.

2 Lev. 12, 75.

1 Saund. 275.

3 Lev. 50.

Pleading a Bond by a *Testatum existit* is not good, tho' it be with a *hic in Curia prolat'*.

Debt on an Obligation conditioned to perform Articles, the Defendant demands Oyer, and then pleads the Articles and Performance; the Plaintiff prays they may be entered *in hac verba*, and then demurs; because the Defendant in pleading the Articles omitted Part; and the Plaintiff had Judgment; for perhaps he might have assigned the Breach in those omitted, of which Advantage he is by this Means deprived.

1 Salk. 172.

In Debt on a Bond, with Condition to exhibit an Inventory to the Ecclesiastical Court before such a Day, it is not enough for the Defendant to plead, that there was no Court held, but he must plead also that he was there ready; for he must shew that he has done all that could be on his Side toward a Performance. So if the Condition were to levy a Fine *in Oet. Hill.* by which the Obligee is to sue out the Writ of Covenant; it is not enough for the Defendant to plead, that no Writ of Co-

venant

venant was sued out, but he must plead that he was there ready at the Day, and no Writ of Covenant was feed out; so if the Condition were to pay Money to J. S. at a certain Time and Place, it is not enough for the Defendant to say that the Obligee came not, without saying that he was there ready and offered, &c.

In Debt on a Bond, the Defendant may have several Pleas in Bar; as if the Plaintiff sue as Executor, the Defendant may plead the Release of the Testator for Part, and for the Residue the Release of the Plaintiff; so he may plead Payment as to Part, and as to the rest an Acquittance. 1 Salk. 180.

In Debt on an Obligation, if Not guilty be pleaded, and there be a Verdict for the Plaintiff, it is aided by the 16 & 17 Car. 2. because being an ill Plea, and a false one, the Plaintiff ought to have his Judgment, both for the Badness of the Plea, and for its falshood; but tho' the Verdict had been for the Defendant, yet the Plaintiff should have Judgment, because the Declaration is not answered by the Plea. Noy 56.  
Cro Eliz. 773.  
2 Jen. 184.

In Debt on a Bond conditioned for the Payment of 105 l. the Defendant pleads Payment of 100 l. *secundum formam & effectum Conditionis*; the Plaintiff replies, *non solvit prædict' 105 l.* this is an immaterial Issue not aided by the Statute; for the Plaintiff has not traversed the same Payment that is in the Defendant's Plea. Cro. Jac. 585.  
Cro. Car. 593.

In Debt on an Obligation, the Defendant pleads Payment of 50 l. *14 Junii, 11 Jac.* according to the Condition; the Plaintiff replies, *quod non solvit 50 l. prædict' 14 Aug' anno 11. supradict', quasi ad eundem diem solvisse debuisset, & hoc, &c.* the Verdict found, *quod non solvit prædict' 14 Junii*, prout the Defendant had alledged. The Objection here was, that no Issue was joined; because they do not meet in the Time the Money was paid, but the Word *August* being plainly Surplusage; for when he said *quod non solvit prædict' 14 die*, it is a sufficient Traverse, without the Word *August*; and *August* is plainly repugnant to the Word *prædict'*, for *prædict'* refers to *June*; and such Surplusage, being a Repugnancy to what was before material, was idle and void. Cro. Jac. 549.  
1 Saund. 282,  
286.

If one declare on a Bond made 10 *Martii*, if the Plaintiff replies, that the Bond was delivered 30 *Martii*, this falsifies the Declaration, because it could not be made the first, and is therefore vicious. Cro. Jac. 264  
1 Saund. 116,  
226.

In Debt on an (a) Obligation the Defendant cannot plead *Nihil debet*, but must deny the Deed by pleading *Non est factum*; for the Seal of the Party continuing, it must be dissolved *eo Ligamine quo Ligatur*. Hard. 332.  
Hob. 218.  
(a) But if  
the Debt be

due by simple Contract, then he may plead *Nil debet*; for it does not appear that there is any Debt continuing. 2 Inst. 651. Hob. 218.

If the Condition of an Obligation be, that the Defendant shall discharge or acquit, or free the Plaintiff of or from such a Bond, or Rent or Action, or from any other particular Thing ascertained in the Condition, there the negative Plea, *Non damnificatus*, is not good; because the Defendant hath undertaken to do an Act in Discharge of the Plaintiff; but where the Condition is only to free, or to discharge or indemnify the Plaintiff from any Damage, or Cost, or Trouble which shall or may happen by Reason of such Bond, Rent or Action, or other particular Thing therein mentioned; in such Case the negative Plea is sufficient, because it doth not appear that any Damage hath happened to the Plaintiff; and if no Damages have happened, then it is impossible that the Defendant should shew in the Affirmative the Manner how he had freed or discharged the Plaintiff; therefore it lies on the Part of the Plaintiff, by Way of Reply wherein he was damnified. Carth. 375.



## Offices and Officers.

- (A) Of the Nature of an Office, and the several Kinds of Offices.
- (B) Offices, by what Authority created.
- (C) Who hath a Right of granting or assigning an Office; and therein of one Office's being incident to another.
- (D) Of the Grant of Offices by Ecclesiastical Persons.
- (E) Of the Ceremony requisite to a compleat Creation or Grant, and of the Oaths required by Statute.
- (F) Of the Offence of Buying and Selling an Office, and what Offices are prohibited to be thus disposed of.
- (G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.
- (H) Of the Nature of Offices as to their Duration and Continuance; and therein of their being grantable in Fee, for Life, Years, at Will and Reversion.
- (I) Offices by whom to be executed, and who are incapable thereof.
- (K) Of the Manner of executing them; and therein of Offices that are incompatible, and where an Office may be executed by two or more Persons.
- (L) Of the Execution of an Office by Deputy; and therein of Superiors being answerable for their Deputies.
- (M) Of the Forfeitures of an Office.
- (N) Where for Corruption and oppressive Proceedings Officers are punishable; and therein of Bribery and Extortion.

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### (A) Of the Nature of an Office, and the several Kinds of Offices.

*Carth.* 478. **I**T is said, that the Word *Officium* principally implies a Duty, and in the next Place the (a) Charge of such Duty; and that it is a Rule, that where one Man hath to do with another's Affairs against his Will, and without his Leave, that this is an Office, and he who is in it is an Officer.

*Fac.* 1. en-acts, that no Popish Recusant shall exercise any Office or Charge. *5 Mod.* 431.



There is a Difference between an Office and an Employment, every Office being an Employment; but there are Employments which do not come under the Denomination of Offices; such as an Agreement to make Hay, plough Land, herd a Flock, &c. which differ widely from that of Steward of a Manor, &c.

By the antient Common Law, Officers ought to be honest Men, legal and sage, & *qui melius sciat & possit officio illi intendere*; and this, says my Lord Coke, was the Policy of prudent Antiquity, that Officers did ever give Grace to the Place, and not the Place only to grace the Officer.

Officers are distinguished into Civil and Military, according to the Nature of their several Trusts.

Offices are distinguished into those which are of a Publick, and those which are of a private Nature; and herein it is said, that every Man is a Publick Officer, who hath any Duty concerning the Publick; and he is not the less a Publick Officer, where his Authority is confined to narrow Limits; because it is the Duty of his Office, and the Nature of that Duty, which makes him a Publick Officer, and not the Extent of his Authority.

It hath been held, that the Commissioners for purging Corporations could not take Notice of or remove an Attorney of a Court, it not being a Publick Office in which the Government was concerned.

It hath been doubted, whether the Censor of the College of Physicians, be such an Officer as is compellable to take the Oaths prescribed by the Statute 25 Car. 2. it being urged, that the Oversight and Inspection of Medicines was of a private Nature; and that no Offices were within the Intent of that Statute, but such as related to the Revenue, or to the Conservation of the Peace; and that particular Powers created for particular Purposes were not within that Statute.

Also Offices are distinguished into antient Offices, and those which are of (a) new Creation; and herein it is observable, that constant Usage hath not only sanctified the first Establishment of such antient Offices as have existed Time out of Mind, but also hath prescribed and settled the Manner in which they have and are to continue to exist, in what Manner to be exercised, how to be disposed of, &c.

fiicer, that is constituted by Act of Parliament, hath more Authority than the Act that creates him, or some subsequent Act of Parliament, doth give him; for he cannot prescribe as an Officer at Common Law may do.

There is also another Distinction of Offices into such as are Judicial, and such as are Ministerial Offices only; the first, relating to the Administration of Justice, or the actual Exercise thereof, must be executed by Persons of sufficient Capacity, and by the Persons themselves to whom they are granted; and herein also ancient Usage and Custom must govern.

## (B) Offices, by What Authority created.

THE King is the universal Officer and Disposer of Justice within this Realm, from whom all others are said to be (i) derived; but yet he cannot create any new Office inconsistent with our Constitution, or prejudicial to the Subject.

be in the King, where the King may grant or nominate to the Office, but hath not the Office in him to use or execute.

There

2 *Inst.* 540. There are three Things, says my Lord *Coke*, which have fair Pretences, yet are mischievous; 1<sup>st</sup>, New Courts; 2<sup>d</sup>, New Offices; 3<sup>d</sup>, New Corporations for Trade; and as to new Offices, either in Courts or out of them, these, he says, cannot be erected without Act of Parliament; for that under the Pretence of the common Good, they are exercised to the intolerable Grievance of the Subject.

1 *Fon.* 231. An Office granted by Letters Patent for the sole Making of all Bills, Informations and Letters missive in the Council of *Tork*, was held unreasonable and void.

1 *Co.* 116. One *Chute* petitioned the King to erect a new Office for registering all and several Strangers within the Realm, except Merchant Strangers, and to grant the Cases there cited to this Purpose. the said Office to the Petitioner with or (a) without a Fee; and it was resolved by all the Judges at *Serjeants-Inn*, that the Erection of such new Offices, for the Benefit of a private Man, was against all Law of what Nature soever.

(a) It hath been held clearly, that in the Constitution of a new Office or Officer, it is not necessary that an annual or casual Fee should at first be annexed to such Office. *Moor* 809.

4 *Inst.* 200. King *E.* 4. by his Letters Patent bearing Date 10 Oct. Anno 15. of his Reign, reciting, that where there was no Office of the Chancellor of the Garter, that there should be such an Office of the Chancellor of the Garter, and that none should have it but the Bishop of *Salisbury* for the Time being, we will and ordain, that *Richard Beuchamp*, now Bishop of *Salisbury*, should have it for his Life, and after his Decease, that his Successors should have it for ever; and amongst divers other Points it was resolved unanimously, that this Grant was void; (b) for that a new Office was erected, and it was not defined what Jurisdiction or Authority the Officer should have, and therefore for the Uncertainty it was void.

(b) So if the King grants an Office by the Name of an Office *cum feodis inde spectantibus*, and it appears to the Court to be new, the Grant is void. 9 *E.* 4. 10. 2 *Sid.* 141.

*Hob.* 63. The King cannot grant to any Person to hold a Court of Equity, tho' he may grant *tenere placita*; for the Dispensation of Equity is a special Trust committed to the King, and not by him to be intrusted with any other, except his Chancellor.

### (C) Who hath a Right of granting or assigning an Office; and therein of one Office's being incident to another.

4 *Co.* 32. *Mitton's Case.* Where-ever one Office is (c) incident to another, such incident Office is regularly grantable by him who hath the principal Office; and on this Foundation it hath been held, that the King's Grant of the Office of County-Clerk was void, it being inseparably incident to the Office of Sheriff, and could not by any Law or Contrivance be taken away from him.

(c) If a House or Land belong to an Office, by the Grant of the Office by Deed the House or Land passeth, as belonging thereunto. *Co. Lit.* 49. a. *Vaugh.* 178. cited.

1 *Salk.* 439. So the Office of Chamberlain of the King's Bench Prison is inseparably incident to the Office of Marshal; and therefore a Grant of the Office of Marshal with a Reservation of the Office of Chamberlain, is void.

*Per Holt C.J.*  
1 *Leon.* 320,  
321. Like Point.

So it hath been resolved, that the Office of Exigenter of *London* and other Counties in *England*, is incident to the Office of Ch. Just. of C. B. and that therefore a Grant thereof by the King, though in the Vacancy of a Chief Justice, is null and void.

*Dyer* 175. a.  
pl. 25.  
1 And. 152.  
Es. vide Show.  
Par. Ca. Sir  
Rowland Holt's Case.

My Lord *Coke* says, that the Justices of Courts did ever appoint their Clerks, some of which after by Prescription grew to be Officers in their Courts; and this Right which they had of constituting their own Officers, is further confirmed to them by *Westm. 2. cap. 30.* the Reasons whereof are twofold. 1<sup>st</sup>, For that the Law doth ever appoint those that have the greatest Knowledge and Skill, to perform that which is to be done. 2<sup>dly</sup>, The Officers and Clerks are but to enter, inrol, or effect that which the Justices do adjudge, award or order; the insufficient doing whereof maketh the Proceeding of the Justices erroneous, than the which nothing can be more dishonourable and grievous to the Justices, and prejudicial to the Party.

2 Inst. 425.  
4 Mod. 173.  
cited.

## (D) Of the Grant of Offices by Ecclesiastical Persons.

HERE it will be proper to take Notice how far Bishops, and other Ecclesiastical Persons, may grant Offices to bind their Successors, and how far not; wherein the Rule is, that such Offices as are antient, and of Necessity to be exercised by some other Person, they may grant, together with the antient Fee for exercising thereof; and as these Offices are not within 32 H. 8. to be granted by the Bishops or other Ecclesiastical Persons solely, so neither are they construed to be within the Restraint of 1 & 13 Eliz. and therefore remain perfectly at the Common Law, and by Consequence, to bind the Successor, must be confirmed in the same Manner as all other Grants or Alienations of Ecclesiastical Persons at Common Law must have been; and these Grants appear generally to have been made for the Life of the Grantees; for it were too severe and rigid a Construction, to confine them to be made determinable on the Death, Translation, or other Promotion of the Bishop, Dean, &c. who made them; and would discourage Men of Ability and Capacity to undertake the Exercise thereof; and to grant such Offices for twenty-one Years, or any other Term of Years, would introduce many Inconveniences, by letting in Executors, Strangers, and other unqualified Persons, to the Exercise thereof; and therefore any Grant of such Offices for Years, seems against the Policy of the Common Law and the Benefit of the Successors, which those Statutes intended to provide for, and by Consequence will not bind them.

Co. Lit. 44. d.  
1 Co. 58, 61.  
Bishop of  
Savum's  
Case.  
Cro. Car. 49.  
Ley 71, 79.

But if such Offices have been anciently granted to one for Life, this induces no Necessity of their being granted to two for their Lives; and therefore such Grant to two for their Lives, will not bind their Successor, tho' one of the Grantees should die in the Life of the Grantor, so as there were but one Life in Being against the Successor; because by such Grant to two the Grant was faulty in its Foundation, and therefore shall not be helped by any Accident after: So if the Office hath been antiently granted to one with an antient Fee, and after a Grant is made to another in Reversion, after the Death of the first Grantee; this shall not bind the Successor, for there can be no Necessity urged to justify this; besides that, the Grantee in Reversion, by Sicknefs or other Accident, may become incapable to exercise such Office before it comes into Possession.

10 Co. 61.  
Cro. Car. 49.  
11 Co. 4.

tion; and if the Bishop, or other Spiritual Person, might grant such Offices to two, or grant them in Reversion, they might abuse that Power, and grant them to twenty, or for twenty Lives in Reversion one after another, which as they cannot be justified from any Necessity, so they would be inconvenient, by tying up the Successor's Hands from choosing such Officers as he thought necessary and proper for the Discharge of such Offices; and therefore no Confirmation will make good such Grants against the Successor.

*Cro. Eliz.* 636.  
*Scambler ver.*  
*Watts.*  
*10 Co.* 61.  
*Cro. Car.* 50.  
*Ley* 74  
*Dyer* 80. *b.*  
in *Margine.*

The Bishop of *Norwich*, having the Office of High Steward of his Courts, to which a Fee of 10 *l.* *per annum* appertained, and also the Office of Under-Steward of the same Courts, to which a Fee of 4 *l.* *per annum* appertained, granted the Office of Under-Steward to three for their Lives, whereof one was within Age, and the other two being dead, the Infant grants over the Office to the Defendant, and then the Bishop grants both these Offices to the Plaintiff with the Fees; and by the Books, both these Grants seem to be void; the first, because it was granted to three, where the Custom warranted a Grant thereof only to one; and also, because the surviving Grantee was an Infant, and so not capable of a judicial Office, as the Steward of a Court is: The 2<sup>d</sup>, because both were granted to one Person, where they had usually been granted to two severally, with distinct Fees, and therefore the Grant of both to one Person neither necessary nor convenient, and by Consequence not binding against the Successor; also such Grant of either the said Offices in Reversion would not bind the Successor, for the Reasons before given.

*10 Co.* 61. *b.*  
*Cro. Car.* 48.  
*2 Brownl.*  
*127.* Bishop  
of *Ely's* Case.  
*Ley* 78, 80.

But altho' the Bishoprick, Deanery, &c. were founded but of late Times, yet the Grant of such Offices as are necessary, and cannot be exercised by the Bishop, Dean, &c. in Person, may be granted, together with a reasonable Fee for the Exercise thereof; (the Reasonableness whereof the Court where the Cause depends is to be Judge;) for these cannot be said to tend to the Impoverishment of the Successor, but rather for his Benefit, by providing Officers fit and qualified to take Care of the Revenues; and therefore such Grants are not within the Restraint of 1 & 13 *Eliz.* but not being warranted by 32 *H. 8.* they must be confirmed by all Persons interested therein; because they remain at Common Law, untouched by any of the Statutes.

*2 Lev.* 156.  
*3 Keb.* 472,  
*506.* *Ridley*  
*ver. Parnal.*

In an Action upon the Case, for disturbing him of his Office of Register to the Bishop of *Bristol*, which was a new Bishoprick taken out of the Bishoprick of *Sarum*, and founded in the Time of *H. 8.* and which had been granted *separalibus temporibus* after the Foundation to one, and his Assigns for three Lives, &c. these Differences were taken and agreed to by the Court. 1<sup>st</sup>, That the Bishop of a new Bishoprick may grant Offices of Necessity for Life. 2<sup>dly</sup>, If an Office hath been usually granted by the Bishop of a new Bishoprick, for three Lives, with the Consent or Confirmation of the Dean and Chapter, (a) before 1 *Eliz.* it may be now granted accordingly. 3<sup>dly</sup>, Be the Bishoprick new or old, if it was not so granted, but granted always before 1 *Eliz.* for one or two Lives, it cannot be granted by the Bishop after 1 *Eliz.* for three Lives. 4<sup>thly</sup>, If it was granted before 1 *Eliz.* for three Lives, and after the Statute but for one Life, yet this shall not abridge the Power of the Bishop, but he may grant it for three Lives, &c. And in the principal Case, the Verdict, finding that it had been granted *separalibus temporibus* after the Foundation to one and his Assigns for three Lives, was held defective, because it might be so granted after the Foundation, and yet be after 1 *Eliz.* and therefore a *Venire facias de novo* was awarded to supply that Defect.

(a) *Cro. Car.*  
258, 279.  
*1 Jen.* 311.  
*March* 38.  
accord, that  
such Grant  
before 1 *Eliz.*  
is a Badge  
of their ha-  
ving been  
antiently so  
granted.

*Bridg.* 50, 32.

The Bishop of *Chichester* was seised in Fee of a Park in Right of his Bishoprick, and had the Office of Park-keeper, which he by Deed 44 *Eliz.*

*Ley* 71.

*Bishop of Chichester ver. Freedland.* *Cro. Car.* 16. *Cook ver. Younger.* *Ley* 75.

grants to the Defendant for his Life, & *ulterius concessit pro executione officii prædicti* five Marks, with a Clause of Distress, *una cum a Livery*, or 13 s. 4 d. *per annum*,  *nec non pasturam pro duobus equis* in the said Park yearly, *una cum* the Windfalls, with Clause of Distress for the said Rent, or Annuity of five Marks, and Livery, or 13 s. 4 d. and this Grant was confirmed by the Dean and Chapter; and for Non-payment of the five Marks the Defendant distrains, and avers the Office and Fee of five Marks to be antiently granted, but makes no Averment for the Residue. The Plaintiff, in Bar of the Avowry, pleads the Statute 1 *Eliz.* and says, that the Pasturage was never granted before, and derives a Title to himself under the present Bishop, Successor to the Grantor; and in this Case it seems to be agreed by all, that if the new additional Fees had been in another Clause, distinct from the Grant of the Office and five Marks; or had been granted for another Consideration; or if the Bishop had granted the Office and five Marks for him and his Successors, and had granted the Pasturage, and other additional Fees, during his own Life only; that in these Cases the Grant had been good, for the antient Office and Fee, to bind the Successor, but not for the additional Fees; or if the Grant of the Office had been with a Fee of 5 *l.* where the antient Fee was but five Marks; there the Grant being intire would have been void *in toto* against the Successor; but whether these Grants were distinct or intire seems the only Dispute in the Case; wherein the Court was divided; two Judges holding that they were several and distinct, and two, that they were intire and depending on each other, and therefore void in the whole against the Successor; but a Variation in the Days of Payment of the antient Fee, as if it were formerly payable at one Day, and is now reserved payable at two, will not vitiate the Grant.

In Replevin, Defendant avows upon a Grant to him by the Dean and Chapter of, &c. of the Office of Cateriship of the Church for Life, with an Annuity of 6 *l.* *per annum*, for the exercising thereof, and a Clause of Distress; and avows for the Annuity, and avers, that it was an ancient Office pertaining to the Dean and Chapter, &c. but does not aver that the Annuity was an antient Annuity; the Defendant pleads 13 *Eliz.* &c. and shews the Death of the Dean Grantor, and the Election of another, &c. and upon Demurrer adjudged, that the Grant was void.

The Bishop of Landaff in 1672. granted the Office of Chancellor of his Diocese to A. and B. and the Survivor of them for Life, and this was confirmed by the Dean and Chapter; and now A. being dead it became a Question, whether this Grant to two were good against the Successor. And the Court held, that if it had been anciently so granted, it would bind the Successor; and to prove it antiently so granted, four Grants were produced, three of which were made in the Time of one Bishop, and the last in the Year 1620. from which Time to this present Grant in 1672. no such Grant to two had been made, and the first of these Grants was about 50 Years after 1 *Eliz.* yet the Court held this sufficient Evidence to prove this Office antiently grantable to two before the Statute 1 *Eliz.* (as the Prescription must be to warrant it;) and one Ridley's Case was mentioned of the Office of Register of Bristol, wherein my Lord Hale was of Opinion, that if it could be shewn, that such Grants were made some Time after the first *Eliz.* it would be an Evidence that such were also made before the Statute; and upon a special Verdict finding this Matter, the Court gave Judgment accordingly, that the Grant was sufficiently warranted by antient Usage; and had no great Regard to the Objection of its being a judicial Office, which cannot by Law be granted to two, being supported by such Usage, and no Diminution of the Successor's Revenue, which those Statutes were made to secure.

10 Co. 58-9.  
but *Quere*;  
for others  
hold, that  
the Avow-  
ant ought to  
make Aver-  
ment for all,  
because he is  
in the Nature

Some hold, that when such antient Office and ancient Fee are granted together, with some new additional Fees, yet if the Distress and Avowry be only for the antient Fee, that the Avowant need only make Averment, for that Fee for which he distrains, that it was antient; and the Plaintiff, if the other Fees were new, ought to shew it in Avoidance of the Grant; for the Avowry, being only for the antient Fee, needs meddle with no more, that being only in Question.

in the Nature of a Plaintiff, and is to make a Title. *Vide Cro. Car. 48 9, 50. Ley 73, 77.*

*Cro. Car. 258.*  
*1 Jon. 263.*  
*Walker ver.*  
*Sir John*  
*Lamb.*

In an Action upon the Case, for disturbing him in the Exercise of the Office of Commissary of the Bishop of *Lincoln*, and of Official to the Archdeacon of *Leicester*, upon Not guilty pleaded, it was found that these were antient Offices of Judicature, always granted to one Person for Life, the one by the Bishop and the other by the Archdeacon, till 1609. when they were granted by the Bishop and Archdeacon severally to *A.* and *B.* for their two Lives; and after 1614. were likewise granted to *B.* and *C.* with Confirmation of the Bishop's Grant, by the Dean and Chapter, and of the Archdeacon's Grant by the Bishop, Dean and Chapter; and that after the Death of that Bishop and Archdeacon their Successors severally granted both the said Offices to the Plaintiff; who being disturbed by *C.* brought this Action and had Judgment; for all the Court held these Offices Parcel of the Possessions of the Bishoprick and Archdeaconry, and expressly within the Word *Hereditaments* in the 1 & 13 *Eliz.* and therefore being usually granted in Possession, the Grant thereof in Reversion is without warrant, and no Necessity can be urged for so doing; and the Acceptance by *B.* of the second Grant, where *C.* was joined, was no Surrender of the first, and by Consequence the respective Successors were not bound by these Grants, but might lawfully, as they have done, grant both these Offices to the Plaintiff for his Life; and therefore he had Judgment.

*Cro. Car. 279,*  
*555.*  
*1 Jon. 310.*  
*2 Rol. Abr.*  
*153.*  
*Young ver.*  
*Stowel.*  
*March 38.*  
*3 Leon. 31.*  
*4 Mod. 279.*

But where the Office of Register of a Bishop hath been usually granted as well in Reversion as in Possession, there a Grant to one of such Office for Life, where by the Death or Surrender of the present Officer it shall become void, is good, and shall bind the Successor, and is not within the Restraint of either of the said Statutes; because, being usually so granted, it might proceed at first from a Reason of Convenience and Necessity, that the Office might always be kept full, and a Person always ready to execute it, for the Benefit of the King's Subjects; for tho' there is no Reversion of an Office, unless it be an Office of Inheritance, yet it may well be granted in Reversion, *habend'* after the Death of the present Officer; which is no more than a Provision of a Person to supply it, when it becomes void; and if such Provision has been usually made, the Custom and Usage gives Sanction to it; but then such Grant must be confirmed, as is said before; and therefore where some Books hold such Grant of Offices in Reversion not good, it must be taken with this Diversity, that they have not usually been so granted, but only in Possession, and then to grant them in Reversion is not warranted by the Custom, nor shall bind the Successor.

*Cro. Car. 279,*  
*555, 557.*  
*1 Jon. 310.*  
*2 Rol. Abr.*  
*123.*

But in the last Case, where the Office of Register was granted by the Bishop to an Infant, then about eleven Years of Age, *habend'* after the Death or Surrender of the present Officer, *exercend'* *per se vel suffic'* *Deput'* *suum cum vadiis*, &c. and when the Tenant for Life died, the Grantee in Reversion was then thirty Years of Age; all the Court held his Infancy, at the Time of the Grant, no Cause to avoid it; because, at the Time it fell into Possession, he was of sufficient Age to execute it; and tho' it had fallen vacant during his Minority, yet as this Case is, the Grant would have been good, because it is to be exercised *per se vel per suffic'* *Deputat'*, &c. and therefore tho' he were not capable of exercising

it himself, (as Writing and a little *Latin* would sufficiently qualify him for; it being only to write and register Acts done in Court,) yet he might have put in a sufficient Deputy; and therefore they denied the Opinion *Co. Lit.* 3. *b.* that the Grant of the Office of Steward of the Court of a Manor, either in Possession or Reversion, to an Infant was void, as incapable, and wanting Knowledge to exercise it, unless it were to be understood that there was no Clause of exercising it *per se vel fidei Deputat'*, and that the Infant himself was of such tender Age, that by no Intendment he was capable of exercising it himself; but they held, that (a) if there were such Clause, then it would be good, and he might appoint a sufficient Deputy; and if he did not, it would be a Forfeiture of his Office, notwithstanding his Infancy; and of the Sufficiency of the Deputy the Lord of the Manor, or Judge of the Court, were to be Judges; and if the Deputy should misdemean himself, or prove unskilful in his Office, it would be a Forfeiture at the Infant's Peril; and this seems to be the Diversity taken in the Books; besides, if the Case in *Co. Lit.* be meant of the Office of Steward of a Court-Leet, it may be good Law, because that is a Judicial Office, which perhaps cannot be executed by Deputy; but if it be meant of a Court-Baron, then the general Opinion of the (b) Books is against it, which held, that the Steward of a Court-Baron may make a Deputy, tho' there were no express Power given him for that Purpose; for that it is an Office purely ministerial, (for the Suitors are Judges in the Court-Baron) and consists in entring Plaints, Surrenders, Admittances, &c. in the Nature of a Register; and tho' an Infant should have the Stewardship of both Courts, *viz.* the Court-Leet and Court-Baron together, and that he should be incapable to exercise that of the Court-Leet, and therefore the Grant thereof to him should be void; yet for the Court Baron the Grant would continue good, and he might either exercise it in Person, or by a sufficient Deputy; and perhaps upon this Diversity the Books may be reconciled; for they agree, that if an Office of Judicature or Learning be given to a Man utterly incapable of it, no Clause of exercising it by Deputy, or otherwise, will mend the Case, or make the Grant good; for it must radically vest in the Grantee before it can go in Title of Procuration, or Deputation, to another.

(a) *Vide Cro. Jac.* 18.  
*Hob.* 148.  
11 *Co.* 87.  
8 *Co.* 44.

(b) *Vide 9 Co.* 48, 49.  
2 *Lev.* 245.  
2 *Fon.* 126.  
*Hob.* 148.  
11 *Co.* 87.  
*Cro. Jac.* 18.

But where the Dean of *Windsor*, having Ordinary Jurisdiction, by Deed made such a one his Commissary, which was confirmed by the Dean and Chapter, yet after his Death it was held the Successor was not bound thereby, because this was a Judicial Office and Authority; which tho' it may be exercised by a Substitute, yet it is in Law in the Ordinary himself; and Excommunication, Probate of Testaments, and such like, they may be transacted by the Commissary, yet it must be in the Name of the Ordinary, and if the Ordinary offends, the Substitute shall be punished; and therefore this Grant can continue no longer than the Ordinary himself who grants it; for if it should bind the Successor, then he could not remove him, tho' he were answerable for his Acts and Offences; which would be hard; therefore this Grant determines with the Death or Remotion of the Ordinary, and then no Confirmation can make it good after; and the Archbishops, in their several Provinces, have the Ordinary Jurisdiction *sede vacante*; and the Archbishop, Dean and Chapter, cannot grant the Jurisdiction of Guardian of the Spiritualties after the Death of the Bishop; which is a stronger Case.

*Noy* 153.  
Prebend of  
*Hat Herley's*  
Case.



(E) Of the Ceremony requisite to a compleat Creation or Grant, and of the Oaths required by Statute.

1 Rol. Abr.  
152.  
1 Co. 121.  
2 Sid. 137.  
14 Dyer 200.  
b. pl. 62.  
Hard. 351.

1 Mod. 123.

1 Leon. 248.

1 Mod. 123.

Cent. 1 Rol.

Abr. 154.

1 Leon. 219.

3 Mod. 147.

5 Mod. 388.

Co. Lit. 61. b.

(a) That a

Corporation

may make

a Bailiff

without Deed, Title Corporations, Letter (E).

Carth. 426.

2 Salk. 467.

5 Mod. 386.

Sanders ver.

Owen.

Where-ever the Right of granting and erecting new Offices is vested in the King as the Head and Fountain of Justice, he must use proper Words for that Purpose; as in the Erection of a new Office the Words *erigimus, constituimus, &c.* must be made use of; and it hath been adjudged, that the Word *Concessimus* is not sufficient, unless there be an Office already in Being, and then a Grant by the Word *Concessimus* is good.

If an Officer be created by Letters Patent, he is a compleat Officer before he is sworn, and before any Investiture.

But if a Person be created Herald at Arms, Investiture is necessary before he is a compleat Officer.

An Office, being a Thing which lies in Grant, cannot regularly be granted or transferred from one to another, but by Deed duly executed, which is an Instrument the Law hath appointed instead of Livery.

But it is said, that one may retain (a) a Steward to keep his Court-Baron and Court-Leet without Deed, and that such Retainer shall continue until he be discharged.

Also it hath been adjudged, that a parol Appointment of Clerk of the Peace by the *Custos Rotularum*, by the Words following, spoken in open Court, is good, *I do nominate the said Philip Owen to be Clerk of the Peace, according to the Act of Parliament*; but in *B. R.* tho' the parol Appointment was held good, yet that Court reversed the Judgment, because the Form of the Words used in the Nomination were insufficient; for he did not name any certain County of which he should be Clerk of the Peace, nor distinguish which Statute he intends; for there are two Statutes which concern this Matter, *viz.* 27 H. 8. and 1 W. 3. and moreover by his adding this Word, *viz.* said *Philip Owen*, it is altogether infensible; but the Judgment of *B. R.* was reversed in the House of Lords.

By the 13 Car. 2. Stat. 2. cap. 1. it is enacted, ' That no Person shall be placed, elected or chosen to any Office or Place of Mayor, Alderman, Recorder, Bailiff, Town-Clerk, Common-Council Man, or other Office of Magistracy, Place of Trust, or other Employment relating to the Government of any City, Corporation, Borough, Cinque-Port or other Port-Town, who shall not have received the Sacrament according to the Rites of the Church of *England*, within one Year next before such Election; and that every Person so placed or elected shall take the Oaths of Allegiance and Supremacy at the same Time when the Oath for the due Execution of the said Office, &c. shall be administer'd; and that the said Oath shall be administer'd and (b) tendered by those who administer the Oath of Office; and in Default of such, by two (c) Justices of Peace of the Corporation; and that in Default hereof every such Election, Placing and Choice, shall be void.

(b) It hath been adjudged, that it is no Excuse that the Oaths were

not tendered. 5 Mod. 316. 2 Jon. 121. Salk. 428. (c) Which makes it necessary in a Return to a *Mandamus*, setting forth that the Parry did not take the Oaths before the Mayor, &c. to add, that he did not take them before two Justices of Peace. 5 Mod. 317. Salk. 428.

By the 25 Car. 2. (commonly called the Test-Act,) it is enacted, ' That all Officers Civil and Military, (except those of Inheritance appointing sufficient Deputies,) and all who have any Fee, &c. by Patent



‘ from the King, (except such as shall be granted for valuable Considera-  
 ‘ tion for Life or Years, and not relate to any Office or Place of Trust)  
 ‘ and also all who have any Place of Trust or Employment in the King’s  
 ‘ Household, shall take the Oaths of Allegiance and Supremacy, and Test,  
 ‘ the next Term, (in the King’s Bench or Chancery, or Quarter-Sessions,)  
 ‘ and receive the Sacrament within three Months, and give in a Certificate  
 ‘ thereof, proved by two Witnesses, to the Court wherein they take the  
 ‘ said Oaths; and in case of Neglect shall be disabled to hold the said Of- (a) It hath  
 ‘ fices, &c. and (a) forfeit five hundred Pounds, except Feme Coverts, &c. been adjudg-  
 ed, that the  
 Persons so disabled lose only their Right to the Profits of their Offices from the Time of such Disa-  
 bility, but that they lose nothing vested in them before. *Lutw.* 910.

But it is provided by the last mentioned Statute, ‘ That the said Act  
 ‘ shall not extend to Constables or Church-wardens, or (b) such like infe- (b) It hath  
 ‘ rior Civil Officers, or to a Bailiff of a Manor or Lands, or such like been made a  
 ‘ private Officers. *Quare*, whe-  
 ther it ex-  
 tends to the Censor of the College of Physicians. *5 Med.* 431.

Tho’ the Words of the first of these Acts are so very strong, as to  
 make such Election, &c. void, and those of the second, to make such  
 Persons disabled in Law to all Intents and Purposes whatsoever to have,  
 occupy or enjoy the said Offices; yet it hath been strongly holden, that  
 the Acts of one under such a Disability, being intailed in such an Office,  
 and executing the same without any Objection to his Authority, may be  
 vald as to Strangers; for otherwise, not only those who no way infringe  
 this Law, but even those whose Benefit is intended to be advanced by it,  
 might be Sufferers for another’s Fault, to which they are no Way privy;  
 and one Chafin in a Corporation, happening thro’ the Default of one  
 Head Officer, would perpetually vacate the Acts of all others, whose  
 Authority in respect of their Admission into their Offices, or otherwise,  
 may depend on his.

## (F) Of the Offence of Buying and Selling an Office, and What Offices are prohibited to be thus disposed of.

THE taking or giving of a Reward for Offices of a publick Nature is said  
 to be Bribery; and surely, says *Harekins*, nothing can be more pal-  
 pably prejudicial to the Good of the Publick, than to have Places of the  
 highest Concernment, on the due Execution whereof the Happiness of  
 both King and People doth depend, disposed of not to those who are  
 most able to execute them, but to those who are most able to pay for  
 them; nor can any Thing be a greater Discouragement to Industry and  
 Virtue, than to see those Places of Trust and Honour, which ought to  
 be the Rewards of those who by their Industry and Diligence have qual-  
 ified themselves for them, conferred on such who have no other Recom-  
 mendation, but that of being the highest Bidders; neither can any Thing  
 be a greater Temptation to Officers to abuse their Power by Bribery and  
 Extortion, and other Acts of Injustice, than the Consideration of the  
 great Expence they were at in gaining their Places, and the Necessity  
 of sometimes straining a Point to make their Bargain answer their Ex-  
 pectations.

For

For the Exposition hereof, *vide* the Earl of *Maclesfield's* Trial.

For which Reasons, among many others, it is expressly enacted by 12 Ric. 2. cap. 2. ' That the Chancellor, Treasurer, Keeper of the Privy Seal, Steward of the King's House, the King's Chamberlain, Clerk of the Rolls of the Justices of the one Bench and of the other, Barons of the Exchequer, and all other that shall be called to ordain, name or make Justices of the Peace, Sheriffs, Escheators, Customers, Comptrollers, or any other Officer or Minister of the King, shall be firmly sworn that they shall not ordain, name or make any of the above-mentioned Officers for any Gift or Brokage, Favour or Affection; nor that none that sueth by himself, or by others, privily or openly, to be in any Manner of Office, shall be put in the same Office, or in any other, but that they make all such Officers and Ministers of the best and most lawful Men, and sufficient to their Estimation and Knowledge.

And by the 4 H. 4. cap. 5. it is enacted, ' That no Sheriff shall let his Bailwick to farm to any Man for the Time that he occupieth such Office.

But the principal Statute relating to this Matter is the 5 & 6 E. 6. cap. 16. which is *verbatim* as follows, *Sec. 1.* ' For avoiding of Corruption which may hereafter happen to be in the Officers and Ministers in those Courts, Places or Rooms, wherein there is requisite to be had the true Administration of Justice, or Services of Trust, and to the Intent that Persons worthy and meet to be advanced to the Place where Justice is to be ministred, or any Service of Trust executed, shall hereafter be preferred to the same, and no other.

*Sec. 2.* ' Be it therefore enacted, That if any Person or Persons at any Time hereafter bargain or sell any Office or Offices, or Deputation of any Office or Offices, or any Part or Parcel of any of them, or receive, have or take any Money, Fee, Reward or any other Profit, directly or indirectly, or take any Promise, Agreement, Covenant, Bond, or any Assurance to receive or have any Money, Fee, Reward or other Profit, directly or indirectly, for any Office or Offices, or for the Deputation of any Office or Offices, or any Part of any of them; or to the Intent that any Person should have, exercise or enjoy any Office or Offices, or the Deputation of any Office or Offices, or any Part of any of them, which Office or Offices, or any Part or Parcel of them, shall in any wise touch or concern the Administration or Execution of Justice, or the Receipt, Controlment, or Payment of any the King's Highness's Treasure, Money, Rent, Revenue, Account, Aulneage, Auditorship, or Surveying of any of the King's Majesty's Honors, Castles, Manors, Lands, Tenements, Woods or Hereditaments, or any the King's Majesty's Customs, or any Administration or necessary Attendance to be had, done, or executed in any of the King's Majesty's Custom-House or Houses, or the Keeping of any the King's Majesty's Towns, Castles or Fortresses, being used, occupied or appointed for a Place of Strength and Defence; or which shall concern or touch any Clerkship to be occupied in any Manner of Court of Record wherein Justice is to be ministred; that then all and every such Person and Persons, that shall so bargain or sell any of the said Office or Offices, Deputation or Deputations, or that shall take any Money, Fee, Reward or Profit, for any of the said Office or Offices, Deputation or Deputations, of any of the said Offices, or any Part of any of them, or that shall take any Promise, Covenant, Bond or Assurance for any Money, Reward or Profit, to be given for any of the said Office or Offices, Deputation or Deputations of any of the said Office or Offices, or any Part of any of them, shall not only lose and forfeit all his and their Right, Interest and Estate, which such Person or Persons shall then have of, in or to any of the said Office or Offices, Deputation or Deputations, or any Part of any of them, or of, in or to the Gift or Nomination of any the said Office or Offices, Deputation or Deputations, for the which

Office or Offices, or for the Deputation or Deputations of which Office or Offices, or for any Part of any of them, any such Person or Persons shall so make any Bargain or Sale, or take or receive any Sum of Money, Fee, Reward or Profit, or any Promise, Covenant, Bond or Assurance to have or receive any Reward, Money or Profit; but also that all and every such Person or Persons that shall give or pay any Sum of Money, Reward or Fee, or shall make any Promise, Agreement, Bond or Assurance for any of the said Offices, or for the Deputation or Deputations of any the said Office or Officers, or any Part of any of them shall immediately, by and upon the same Fee, Money, or Reward given or paid, or upon any such Promise, Covenant, Bond, or Agreement had or made for any Fee, Sum of Money or Reward, to be paid as is aforesaid, be adjudged a disabled Person in the Law to all Intents and Purposes to have, occupy or enjoy the said Office or Offices, Deputation or Deputations, or any Part of any of them, for the which such Person or Persons shall so give or pay any Sum of Money, Fee or Reward, or make any Promise, Covenant, Bond, or other Assurance to give or pay any Sum of Money, Fee or Reward.

*Sec. 3.* It is farther enacted, that all and every such Bargains, Sales, Promises, Bonds, Agreements, Covenants and Assurances, as be before specified, shall be void to and against him and them by whom any such Bargain, Sale, Bond, Promise, Covenant or Assurance shall be had or made.

*Sec. 4.* Provided always, that this Act, or any Thing therein contained, shall not in any wise extend to any Office or Offices whereof any Person or Persons is or shall be seised of any Estate of Inheritance; nor to any Office of Parkership, or of the Keeping of any Park-house, Manor, Garden, Chase or Forest, or to any of them; any Thing in this Act heretofore mentioned to the contrary thereof in any wise notwithstanding.

*Sec. 5.* Provided also, that if any Person or Persons do hereafter offend in any Thing contrary to the Tenor and Effect of this Act, yet that notwithstanding all Judgments given, and all other Act or Acts, executed or done, by any such Person or Persons so offending by Authority or Colour of the Office or Deputation, which ought to be forfeited, or not occupied, or not enjoyed, by the Person so offending, as is aforesaid, after the said Offence so by such Person committed or done, and before such Person so offending for the same Offence be removed from the Exercise, Administration and Occupation of the said Office or Deputation, shall be and remain good and sufficient in Law to all Intents, Constructions and Purposes, in such like Manner and Form as the same should or ought to have remained and been, if this Act had never been had or made.

Provided also, that this Act shall not extend to be prejudicial or hurtful to any of the Chief Justices of the King's Courts, commonly called the King's Bench or Common Pleas, or to any of the Justices of Assize that now be, or hereafter shall be; but that they and every of them may do in every Behalf, touching or concerning any Office or Offices to be given or granted by them or any of them, as they or any of them might have done before the making of this Act; any Thing above mentioned to the contrary in any wise notwithstanding.

In the Construction of the last mentioned Statute the following Opinions have been holden:

1. That the Offices of Chancellor, Register and Commissary in Ecclesiastical Courts are within the Meaning of the Statute, in as much as those Courts do not only determine Matters which are brought before them

*Cro. Jac. 269.*  
*3 Inst. 148.*  
*12 Co. 78.*  
*Salk. 468.*  
*3 Lev. 229.*

- 2 Vent. 187, them *pro salute animæ*, but also have the Decision of Disputes concerning the Lawfulness of Matrimony, and Legitimation of Children, which touch the Inheritance of the Subject; and also hold Plea of Legacies and Tithes, &c. in which Respects they are Courts of Justice.
- 2 Lev. 151. 2. It hath been adjudged, That Offices in Fee are out of the Statute; so if the King be seised in Fee of a Bailiwick, and he demise the same to *A.* who demises to *B.* rendring the Demise to *B.* is not within the Statute; for Offices in Fee being excepted out of the Statute, under Leases of such Offices are also excepted inclusively.
- 3 Bulst. 91. 3. It hath been resolved, that the Place of Cofferer is within this Statute, and a Person having once purchased this Place is for ever disabled to enjoy the same; and that the King is bound by this Statute.
- Sir Arthur Ingram's Case. Co. Lit. 234. S. C. and there said, that the King could not dispense with this Statute by any *Non obstante*. Cro. Jac. 385. S. C. cited.
- 4 Leon. 33. 4. It hath been agreed, that the Sale of a Bailiwick of a Hundred is not within the Statute, for such an Office doth not concern the Administration of Justice, nor is it an Office of Trust.
- Godholt's Case. 4 Mod. 223. S. C. cited.
- 2 And. 55, 107. Smith ver. Cotlesbill. 5. If *A.* being Surveyor of the Customs agrees with *B.* that *B.* shall be his Deputy, and that in Consideration thereof *B.* shall pay *A.* 600*l.* and 100*l.* annually, and it is further agreed, that *A.* will surrender his Patent, and procure a new one in the Names of *A.* and *B.* which is done accordingly, and *B.* gives *A.* a Bond for Performance of the whole Agreement; the Bond is void, as being within this Statute; for tho' Part of the Condition, such as procuring a new Patent, &c. may not be void within the Statute, yet being joined with that which is so, it makes the whole void.
- Pasch. 26 Car. 2. in C.B. Sparrow ver. Reynolds. 6. It hath been adjudged, that a Seat in the Six-Clerks-Office is not within the Statute, being a ministerial Office only; and they are but Under Clerks, who have so much a Sheet for Copying, &c. but one Judge held it not saleable at Common Law, for the following Reasons; 1<sup>st</sup>, Discouragement of Merit and Industry. 2<sup>dly</sup>, It is being the Occasion of Extortion and Exaction of excessive Fees. 3<sup>dly</sup>, From its being a great Charge to Suits. 4<sup>thly</sup>, It exempts the Persons, who enter by these Means, in a great Measure from the due Regulations under which they ought to be; for they are not so easily removed, as if they were at the Will of him who hath the Disposol of them.
- Preced. Chan. 199. 7. It hath been held, that this Statute doth not extend to Military Officers; and that the 7 *H. 8. M.* which requires, that every Commission Officer, before his Commission is registred, should take the Oath there mentioned, that he had not directly or indirectly given any Thing for procuring the Commission, but the usual Fees extend only to Horse, Foot and Dragoons, but not to the Marines.
- 4 Mod. 222. 8. It hath been adjudged, that the Sale of the Deputation of the Office of Provost Marshal of *Jamaica*, is not within this Statute; (*a*) because this Statute does not extend to the Plantations.
- Salk. 411. Blankard ver. Galdy. (*a*) 2 Mod. 45. S. P. undetermined, and there said *arguendo*, that so good a Law should have as extensive a Construction as possible.
- Trin. 9 Georg. 2. in B. R. Maccarty ver. Wickford. 9. In a Writ of Error on a Judgment in *Ireland*, it was held clearly, that the Office of Clerk of the Crown, and Clerk of the Peace, was within the Statute; but that this Law did not extend to *Ireland*, not being enacted there.
- Hob. 75. 10. It hath been held, that one who makes a Contract for an Office, contrary to the Purport of this Statute, is so far disabled to hold the same, that he cannot at any Time during his Life be restored to a Capacity of holding it by any Grant or Dispensation whatsoever.

11. It is held, that where an Office is within the Statute, and the Salary is certain, if the Principal make a Deputation, reserving a lesser Sum out of the Salary, it is good; so if the Profits be uncertain arising from Fees, if the Principal make a Deputation, reserving a certain Sum out of the Fees and Profits of the Office, it is good; for in these Cases the Deputy is not to pay, unless the Profits arise to so much; and tho' a Deputy by his Constitution is in Place of his Principal, yet he has no Right to his Fees, they still continue to be the Principal's; so that as to him, it is only reserving a Part of his own, and giving away the rest to another; but where the Reservation or Agreement is not to pay out of the Profits, but to pay generally a certain Sum, it must be paid at all Events; and a Bond for Performance of such Agreement is void by the Statute.

Salk. 468.  
6 Mod. 234.  
Godolphin ver  
Tudor.  
Comb. 356  
S. P.

12. It hath been held, that this being a publick Law, the Judges *ex officio* are to take Notice of it; but yet it seems the more regular and safe Way to plead it; but it hath been resolved, that a Person in pleading this Statute need not alledge, that the Party against whom it is pleaded is not within any of the Proviso's or Exceptions in the Statute; but that if he be, it must come on his Side to shew it.

Trin. 9 Geor.  
2. in B. R.  
Maccarty ver.  
Wickford.

### (G) What Remedies a Person having a Right to an Office must pursue, to be let into the Enjoyment of it, and how a Disturbance is punishable.

IT is held clearly, that an Assise lay at Common Law for an Office, and that therefore tho' the Statute of *West. 2. cap. 25.* speaks only of Offices in Fee, yet an Assise lies for an Office in Tail or for Life; but this is to be understood of Offices of Profit, for of an Office of Charge and no Profit, an Assise does not lie.

8 Co. 47. a.  
John Webb's  
Case.  
2 Inst. 412.  
S. P.

But a Man shall not have an Assise of the whole Office, unless he be disseised of the whole; but if a Man be disseised of Parcel of the Profits of an Office, he may have an Assise of that Parcel only.

3 Co. 49. b.  
2 Inst. 412.

In an Assise for an Office newly erected and constituted, the Demandant in his Plaint must shew what Fee or Profit is granted for the Exercise thereof; for this Office cannot have a Fee or Profit appurtenant to it, as an antient Office may, and for an Office without Fee or Profit no Assise lies.

8 Co. 49.  
Webb's Case.

But in an Assise for an antient Office, the Demandant in his Plaint need not shew what Fee or Profit is belonging to it, for it shall be intended there is some Fee or Profit.

8 Co. 49.

In an Assise for an Office, the Demandant must shew a Seisin; but it hath been held, that the taking of 3 d. for a *Capias* against B. is a sufficient Seisin of the Office of *Filizer de Banco*.

1 Pol. 219.  
270.

So if one by the House of Commons be committed to A. who before and long after was in Possession of the Office of *Serjeant at Arms* to the House, and the Prisoner compounds with B. for his Fees, and gives him twenty Shillings; this is a good Seisin of the Office by B. for he cannot be disseised thereof, but at his Election; and it was likewise held, that proving that B. being in the *Lobby* of the *House of Commons*, took hold of the Door of the House, and laid his Hand upon the Mace, then being in the Hands of A. to take it, but hinder'd by A. was good Evidence both of a *Seisin* and *Disseisin*.

2 Lev. 108.  
Cragg ver.  
Norfolk ad-  
judged.

But

<sup>1</sup> *Lev.* 108. But where the Serjeant of the Mace to the *House of Commons*, in an  
<sup>& vide 1 Mod.</sup> Action upon the Case for a Disturbance, recovered Damages; and whe-  
 122. where ther this was a sufficient Seisin, the Damages being recovered in Sa-  
 such Reco- tisfaction of the Fees, and he then being out of Possession of his Office,  
 very is held was doubted; some of the Judges inclining one way and some the other;  
 to be a suf- and it was intended to have been found specially, but the Plaintiff being  
 ficient Seisin. unwilling to stand to it was nonsuit.

<sup>3</sup> *Mod.* 273. Also in an Assise for an Office, the Demandant in his Complaint must set  
<sup>Saxer ver.</sup> forth a Title.

*Lenthall*; by which Book it appears, that the Demandant not being ready to set forth a Title, the Assise was  
 adjourned till the next Day, when he appeared and set forth a Title, and Process was prayed  
 against the Defendant.—But by *Salk.* 82. S. C. the Demandant was nonsuited the second Day for  
 not counting; and the Court told him, he might bring a new Assise. *Comb.* 173. S. C. and the Plain-  
 tiff nonsuited; & *vide Dyer* 114. pl. 63. 149. pl. 81. 152. pl. 9. 8 Co. 45. b.

8 Co. 47. An Assise lies for the Office of Register of the (a) Admiralty; for  
<sup>2</sup> *Inst.* 412. tho' their Proceedings are according to the Civil Law, yet the (b) Right  
<sup>11</sup> Co. 99. b. of their Offices is determinable at the Common Law; so of the Master-  
<sup>Dyer</sup> 152. ship of an Hospital being a Lay Fee.

(a) So the Right of the Office of Register to a Bishop is to be determined at Common Law, and not to be tried in the Spiri-  
 tual Court, tho' the Subject Matter is Spiritual; because the Office itself being Matter of Freehold,  
 is for that Reason of Temporal Cognizance.—For this, *vide 1 Rol. Abr.* 285. 4 *Mod.* 27, 28. *Carth.*  
 169. (b) So Chancellors, Registers, Proctors, &c. being Officers of Temporal Profit, are to sue  
 for their Fees in the Temporal Courts.—For this *vide Title Fees*, Letter (D).

<sup>1</sup> *Mod.* 122. A Man may bring an Action on the Case (c) for the Profits of an  
<sup>per Hale C. J.</sup> Office, tho' he never had Seisin.

(c) An Action on the Case for disturbing a Person in the Exercise of the Office of Parish-Clerk. 2 *Salk.* 468.—But  
 not so advisable as an Assise; because a Jury may not well compute the Damages in Proportion to the  
 Loss of a Man's Livelihood. *Carth.* 169.

2 *Mod.* 260. If the King grant the Office of Comptroller of the Customs to *A.*  
 adjudged, and *B. Durante beneplacito*, and *A.* dies, and afterwards the King grants  
 upon a spe- the said Office to *C.* and yet *B.* under Pretence of Survivorship exercises  
 cial Verdict the said Office, and receives the Profits thereof; *C.* may have an *Indebi-*  
 between *Ar-* *tatus Assumpsit* for so much Money had and received to his Use.  
<sup>ris ver. Stuke-</sup>  
<sup>ly.</sup>

2 *Fon.* 126. 2 *Lev.* 245. S. P. between *Harward ver. Wood*; where the Defendant, under Pretence of  
 Title, received the Fees belonging to the Plaintiff as Steward of a Court-Baron.

## (H) Of the Nature of Offices as to their Duration and Continuance; and therein of their being grantable in Fee, for Life, Years, at Will and Reversion.

9 Co. 97. OFFICES, in respect to their Duration and Continuance, are di-  
 stinguished in those which are of Inheritance, or in Fee, or Fee-  
 tail, those of Freehold or for Life, those for Years or a limited Time,  
 and those which are at Will only; and here we must again observe,  
 that tho' all Offices, in Relation to the Administration of Justice, are  
 originally and inherently lodged in the Crown, yet cannot the King  
 himself grant these in any other Manner than warranted by antient  
 Usage, or so as to be injurious or inconvenient to the Publick.

But where no Inconvenience can ensue to the Publick, there Offices are allowed to descend as Inheritances; as the Offices of (a) Earl Marshal of England; so of Park-keeper, Forester, Gaoler, (b) Sheriff, &c. *Dyer* 285. *7 Co. 33.* *Plov. 2.* *2 Inst. 382.*  
*2 Rol. Abr. 153.* (a) So the Office of Seneschal of England formerly belonged to the Earldom of Leicester, and came afterwards to the Staffords, and Dukes of Buckingham, and the last who had it in Fee was Edward Duke of Buckingham, who was attainted 13 H. 8. but now it is never granted to any Subject only *pro hac vice.* *4 Inst. 58, 127.* *Farell. 125.* cited. (b) The Mayor and Citizens of London have the Sherivalty of London in Fee, and the Sheriffs of London are Guardians under them, and removeable from Year to Year. *2 Inst. 382.*

And if one hath the Office of Park-keeper, Forester, Gaoler, Sheriff, &c. to him and his Heirs, he may grant these Offices to one for Life, Remainder to another for Life, &c. for *Omne majus continet in se minus*; and as they are grantable over in Fee, so may they be granted in Succession to one for Life, with Remainders over. *Plov. 379. b.* *381. a.* *9 Co. 48, 97.*

So Offices may be intailed, as the Office of Earl Marshal of England, or the Office of Steward, Bailiff or Receiver of a Manor, may be intailed; because these are demandable in a *Præcipe ut tenementa*, and being exercisable within the Manor, are therefore looked upon as Members or Branches of it. *7 Co. 33.* *Co. Lit. 20. a.* *1 Rol. Abr. 838.*

So a Woman may be endowed of an Office; as of the Office of the *Marshalsea* to have the third Part of the Profits, and in such Case she shall be contributory to a third Part of the Charge; so she may be endowed *de tertia parte exituum provenient de custodia goale abbacie Weston*, or of the third Part of the Profits of Courts, Fines, Heriots, &c. *Perk. Sect. 315.* *Co. Lit. 32.* *1 Rol. Abr. 676.* *Plov. 379. b.* *E. N. B. 149.*

It is said, that at Common Law, all Officers of Justice had Estates in their respective Offices during Life, and could not be removed but for Misdemeanors; so was the Office of Clerk of the Crown in B. R. and in Chancery; so are the Clerks in the Exchequer, and the Philazers in C. B. and in this Respect the Wisdom and Policy of the Law was very great; because, when Men held their Offices for Life, it was an Encouragement to the faithful Execution of their Duties; it was then also they endeavoured to acquire Knowledge and Experience in their Employments, having a durable and fixed Estate therein, and not liable to be displaced at the Pleasure of those who put them in. *4 Mod. 169.* *1 Show. 428.* *said arguendo.*

If an Office be granted to a Man to have and enjoy so long as he shall behave himself well in it; the Grantee hath an Estate of Freehold in the Office; for since nothing but his Misbehaviour can determine his Interest, no Man can prefix a shorter Time than his Life; since it must be his own Act (which the Law does not presume to foresee) which only can make his Estate of shorter Continuance than his Life; so if the Office had been granted to a Man *quamdiu se bene gesserit tantum*, his Estate had not been less for the Word *tantum*; for a Grant to a Man for so long Time as he shall behave himself well, are of equal Extent, and his Misbehaviour in each Case determines his Interest. *Co. Lit. 42.* *1 Rol. Abr. 844.* *Show. Parl. Cases 161.*

Therefore where by the Statutes directing in what Manner the *Custos Rotulorum* shall be appointed, &c. it is among other Things provided, that the *Custos* shall appoint and nominate the Clerk of the Peace, when void, who may execute it by himself or Deputy, for so long Time only as he shall demean himself well; in the Construction of which Words it was held that the Clerk had an Office for Life, and that it did not determine with the *Custos*. *4 Mod. 167.* *1 Show. 426* *to 536.* *H. v. court ver. Ex.*

The Judges of the several Courts at Westminster held formerly their Places *durante beneplacito*, but now by the 12 H. 3. their Commissions are *quamdiu se bene gesserint*, by which they hold their Offices for Life; but upon the Address of both Houses of Parliament it may be lawful to remove them. *4 Inst. 74.* *117.*



<sup>1</sup> *And.* 44. It hath been determined, that at Common Law the Patents of the  
*Dyer* 165. Judges, (a) Sheriffs, Escheators, Commissioners of Oyer and Terminer,  
*Cro. Car.* 1, 2. Gaol-Delivery and of the Peace, and of the Attorney and Solicitor Ge-  
*N. Bendl* 79. neral, are determined by the Death of the King, in whose Name they  
 (a) But the Office of She- are made.

riff in such

Places where he is chosen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demise of the King. <sup>7</sup> *Co.* 50. b. — Nor the Authority of a Coroner or Verderor. *Dalif.* 15. *Dyer* 165. <sup>2</sup> *Inst.* 175. <sup>1</sup> *Lev.* 120. — Nor does any Corporation Officer, who by the Charter is invested with Judicial Authority, lose it by such Demise. <sup>2</sup> *Hawk. P. C.* 3. & vide the Statutes <sup>7</sup> & <sup>8</sup> *W.* 3. cap. 27. and <sup>1</sup> *Ann.* cap. 1. for continuing all Patent Officers for six Months after such Demise, Title *Courts*, Letter (C).

<sup>9</sup> *Co.* 97. It hath been adjudged in *Sir George Reynold's Case*, that the Office of  
<sup>1</sup> *Rot. Abr.* the King's Bench Prison could not be granted for Years, for that being  
 847. an Office of great Trust concerning the Administration of Justice, in  
<sup>2</sup> *Rot. Abr.* keeping of Prisoners till they pay their Debts, if it should be granted  
 153. for Years might be injurious to the Publick, in that it would go to Exe-  
*Cro. Car.* 587. cutors or Administrators, or might be in Suspence till Probate of the  
<sup>1</sup> *Fon.* 563. Will, or Administration taken out; and if the Officer should die indebted,  
*Hob.* 153. that none would prove his Will, or take out Administration, then there  
<sup>3</sup> *Mod.* 145. would be no Officer at all, and Executors or Administrators would be  
 in by Act of Law, without Allowance of the Court; also it might be  
 a Question, if such Office should not be forfeited by Outlawry, or be  
 Assets in the Executor's Hands, and many other Inconveniences would  
 follow if such Grant for Years were allowed; for the same Reasons it  
 was held likewise, that the Offices of *Custos Brevium*, Chirographer,  
 Clerk of the Pipe of the King's Silver, or of the Crown, Remembrancer,  
 or Chamberlain of the Exchequer, Prothonotaries, and other Officers  
 in the several Courts of Justice, could not be granted for Years.

*Hard.* 46,  
 353.  
*Jones ver.*  
*Clerk.*

But such Offices as do not concern the Administration of Justice, but only require Skill and Diligence, may be granted for Years; because they may be executed by Deputy, without any Inconvenience to the Publick; therefore where a Grant for Years was made of the Office of Garbler of Spices in *London*, it was adjudged to be a good Grant, or at least a good Appointment for Years within the Intent of the Statute of <sup>1</sup> *Jac.* 1. cap. 19.

*Hard.* 351,  
*Exc.*  
*Hob.* 146.  
*Dyer* 303.  
<sup>3</sup> *Keb.* 80.  
<sup>1</sup> *Vern.* 11, 12.

The Office of Register of Policies of Assurance in *London* concerning Merchants, was granted by the King for Years, and adjudged to be a good Grant; because it did not concern the Administration of Justice in any Court, but required only the Skill of Writing after a Copy; so the Office of making and sealing *Subpœna's* was granted for Years, and allowed to be good; and there several Precedents are cited of Offices granted for Years; as first, Offices in which the Safety of the Realm was concerned; as the Office of Warden of a Haven or Port by *H.* 6. of Gun-powder, <sup>1</sup> *Car.* 1. of making Gun-powder by *Car.* 2. Also Offices concerning the Trade of the Realm have been granted for Years; as <sup>1</sup> *H.* 7. of the Exchange of Money; <sup>18</sup> *H.* 8. of Gager; <sup>17</sup> *R.* 2. of Aulnager, tho' a Seal belongs to it, with which the Officer is intrusted; of the Letter-Office <sup>13</sup> *Car.* 1. Also Offices in Courts of Justice have been granted for Years; as the Office of Surveyor of the Green-Wax; of the *6 d.* Writs in Chancery, and *Subpœna's*, of Comptroller and Customer, and making out Process in *C. B.* All these and several others have been granted for Years; but no Dispute having been made of the Validity of them, how far some of them would hold at this Day may be a Question.

<sup>2</sup> *Lev.* 245.  
<sup>2</sup> *Fon.* 126.  
<sup>6</sup> *Mod.* 57.

But where one made a Grant for Years of the Stewardship of a Court-Leet and Court-Baron; this was held void as to the Court-Leet, being a Judicial Office, but good as to the Court-Baron, being only Ministerial, and the Suitors Judges thereof; but the Grant appearing afterwards



afterwards to be for Years, determinable on the Death of the Lessee, it was held good for both ; because there was no Danger of its coming to Executors or Administrators.

The King may grant the Office of Sheriff (a) *durante beneplacito* ; and altho' he may determine the Office at his Pleasure, yet he cannot determine it for Part, as for a Vill, &c. nor can he abridge the Sheriff of any Thing incident or appurtenant to his Office.

4 Co. 33. a.  
(a) Where a Sheriff may grant to his Under-Sheriff

to hold at Will only, for he is his Deputy, and according to the Nature of a Deputation must be removable, as an Attorney is. *Hob. 13. Noy 55.*

The King may grant the Office of Chirographer of the Common Pleas *quamdiu nobis placuerit*, and it is good. *Dyer 176. pl. 28.*

The Office of the King's *Marshalsea* may be granted at Will.

9 Co. 97.  
3 Mod. 149.

If the King grants an Office at Will, and grants a Rent to the Patentee for his Life, for the Exercise of his Office, this is no absolute Estate for Life ; because the Rent being granted on Account of the Office, and in Discharge of the Duty of the Place, when-ever his Interest in the Office ceases, the Rent is determined ; because it was first granted for the Exercise of the Office, which he is no further concerned in.

Co. Lit. 42. a.

A (b) Judicial Office cannot be granted in Reversion ; for tho' the Grantee be never so fit at the Time of the Grant, he may become unfit when it takes Effect.

Co. Lit. 3. b.  
(b) So an Office partly Ministerial

and partly Judicial cannot be granted in Reversion ; as the Office of Auditor of Wards. 11 Co. 4. 2 R. L. Abr. 152.

of the Court of

The King may grant an Estate in an Office to commence *in futuro*, or upon a Contingency, which Estate shall arise out of the Inheritance he hath in the Office it self, for such he may have in Point of Interest tho' not in Execution.

But for the Difference between the King's Grant of an Office

in Reversion, and such a Grant in Reversion by a Subject, *vide Dyer 80. pl. 58. 259. pl. 18. 3 Leon. 31. Hob. 150. 2 Rel. Abr. 154. Cro. Car. 279. 11 Co. 4. 8 Co. 55. b. Carth. 350. 2 Salk. 465. 4 Mod. 275.*

It hath been adjudged, that the Office of Register being usually granted as well in Reversion as Possession, a Grant to one of such Office for Life, when by the Death or Surrender of the present Officer it shall become void, is good ; for tho' there is no Reversion of an Office, unless it be an Office of Inheritance, yet it may well be granted in Reversion, *Hakend'* after the Death of the present Officer ; which is no more than a Provision of a Person to supply it when it becomes void ; and if such Provision has been usually made, the Custom and Usage gives Sanction to it.

Cro. Car. 279, 555  
1 Jon. 310.  
2 Rel. Abr. 153.  
March 38.  
3 Leon. 31.

(a) But unless there have been

such Usage, it is not grantable in Reversion. 2 Vent. 183.

## (I) Offices, by Whom to be executed, and Who are incapable thereof.

IF an Office, either of the Grant of the King or Subject, which concerns the Administration, Proceeding or Execution of Justice, or the King's Revenue, or the Commonwealth, or the Interest, Benefit or Safety of the Subject, or the like ; if these or any of them be granted to a Man that is unexpert, and hath no Skill and Science to exercise or execute the same, the Grant is meerly void, and the Party disabled by Law, and

Co. Lit. 3. b.

inca-

(a) That an Incapable to take the same *pro commodo Regis & populi*; for only Men of Skill, Knowledge and Ability to exercise the same, are capable to serve the King and his People; an (a) Infant therefore is not capable of an Office of Stewardship of the Court of a Manor, either in Possession or Reversion.

less may he assign it over. *Cro. Eliz.* 636-7. *per Popham*.—But a Ministerial Office may be granted to an Infant, in Possession or Reversion, for he may exercise it by a Deputy. *11 Co.* 4. a.—As where the Office of Register to the Bishop of *Rochester* was granted to *J. S.* who was an Infant of twelve Years of Age at the Time of the Grant, *Habund'* after the Death of *J. D.* (who was the Register in Possession) for his Life, to be exercised by him or his Deputy, and afterwards *J. D.* died, *J. S.* being of the Age of thirty; this was held a good Grant at the Time of making of it, the Office being to be exercised by him or his Deputy. *Cro. Car.* 279. *2 Rol. Abr.* 153. *Young ver. Stowel.* *Cro. Car.* 555-6. *March.* 38. S. P. adjudged. *4 Mod.* 279. *2 Vent.* 188. *Pollexf.* 136. S. P. cited, and adjudged to be Law.

*Dyer* 150. b. Lord *Broke* gave the Office of Chief Prothonotary to *G.* but he appearing unfit, he revoked it, and granted it to *H.* and a Precedent was shewn, where the Office of Clerk of the Crown was granted by the King to one *Vintner*, who exhibited his Patent and desired to be admitted; and the Justices of the King's Bench refused to admit him, (b) because he never had exercised that Office, nor ever was brought up in it; and recommended a fit Person, whom the King *ore tenus* commanded to be admitted, and was sworn.

(b) If an Office of Learning be given to a Man utterly insufficient, it is void; and tho' it be to him and his Assigns, or to be exercised by a sufficient Deputy, it mends not the Case, but it must radically vest in the first Grantee, before it can go in Procuration or Deputation to any other. *Hob.* 148.—If the King should grant an Office in B. R. the Judges may remove such an Officer for Insufficiency, because they are proper Persons to judge of his Abilities. *4 Mod.* 30.

*Car.* 95. The Bishop of *Gloucester* granted the Office of Chancellor of his Diocese to one *S.* who, because he was unskilful in the Civil and Canon Law, was adjudged incapable.

*Latch* 228. *Noy* 91. *Palm.* 450. And in *4 Mod.* 27. S. P. was argued where the Grant was to him or his Deputy; in which Case it was insisted, that Insufficiency did not create an original Incapacity, so as to avoid the Grant; because that he might appoint a Deputy learned in those Laws, and that if he appointed one who was unskilful, it would be a Forfeiture of the Office.

*Cro. Jac.* 17. If the King by his Letters Patent grants the Office of Custody of the Castle of *Dunnington* to a Woman, to be exercised by her, or her sufficient Deputy, the Grant is good, and it shall not be intended a Castle of War rather than a private House.

(c) How far Dissenters from the Church are rendered incapable or excused from serving any Publick Office, *vide 2 Mod.* 299. *2 Vent.* 247. *2 Lev.* 151, 184, 242. *2 For.* 51, 137. *4 Mod.* 269. *Salk.* 167. *Skn.* 574. *Carth.* 306. *5 Mod.* 431. *Comb.* 315.

## (K) Of the Manner of executing them; and therein of Offices that are incompatible, and Where an Office may be executed by two or more Persons.

*4 Inst.* 100. OFFICES are said to be incompatible and inconsistent, so as to be executed by the same Person, when from the Multiplicity of Business in them they cannot be executed with Care and Ability; or when their

their being subordinate and interfering with each other, it induces a Presumption they cannot be executed with Impartiality and Honesty; and this my Lord *Coke* says is of that Importance, that if all Officers Civil, Ecclesiastical, &c. were only executed each by a different Person, it would be for the Good of the Common-wealth and Advancement of Justice, and Preferment of deserving Men.

And hence it is, that the King himself, tho' he may grant an Office, <sup>1 Inf. 100.</sup> yet cannot execute it himself; (a) nor can the Ch. Just. of B. R. be Pro- (a) <sup>1 Sid. 305.</sup>thonotary nor Clerk of the Papers, that he may dispose of those Places.

So if a Forester, by Patent for his Life, is made Justice in *Eyre* of <sup>4 Inf. 310.</sup> the same Forest *hac vice*, the Forestership is become void, for these Offices are incompatible; because the Forester is under the Correction of the Justice in *Eyre*, and he cannot judge himself; the same Law of a Warden of a Forest, and of a Justice in *Eyre* of the same Forest.

Upon a *Mandamus* to restore one to the Place of Town-Clerk, it was <sup>1 Sid. 305.</sup> returned, that he was elected Mayor and sworn, and therefore they chose <sup>2 Keb. 92.</sup> another Town-Clerk; and the Court were strong of Opinion that the <sup>Rex. ver.</sup> Offices were incompatible, because of the Subordination; a Coroner <sup>Pergam.</sup> made Sheriff ceases to be Coroner; so a Parson made a Bishop; a Judge of C. B. made a Judge of B. R. and the Town-Clerk's Office is to be attendant on the Mayor; in Re-disseisin the Sheriff is Minister and Judge, but that is by Act of Parliament; and by the (b) Customs of (b) Where upon a Writ of Error upon a Judgment in Northampton, some Places the Mayor has other Offices annex'd to his Place of Mayor, but here they are distinct; and the Court recommended the Case to the Town for an amicable Compofure.

and the Error assigned was, that the *Venire facias* was awarded to the two Bailiffs, and the Court was held before the Mayor and the two Bailiffs, so that the Bailiffs being Judges of the Court could not be Officers; but the Court conceived it might be good by Custom, and not Error; for the Judges are not the Bailiffs only, but the Mayor and Bailiffs; and it is a common Course in many of the ancient Corporations, where the Bailiffs are Judges, or the Mayor or they be Judges, yet in respect of executing Process they be the Officers also. *Cro. Car. 138. Crane ver. Holland. 4 Mod. 66. S. C. cited.*

Ministerial Offices may be granted to two, and so may also some Judicial Offices, which are established by Act of Parliament; but antient Offices cannot regularly be granted to two, nor otherwise than they have been; but it seems to be in the Discretion of the Judges, if they see an Office in their Courts comprehend too much for one Man to execute it, to put in more; but this must be where it is granted to several as one Office; for if divided to two or three, the Prescription is interrupted, and it is not a Grant of the antient Office.

Therefore a Grant of the Office of Chief Prothonotary of the Common Pleas to two hath been held void. <sup>2 Rol. Abr. 152.</sup> <sup>Hob. 153.</sup> <sup>3 Mod. 145.</sup> <sup>4 Mod. 17. cited</sup>

So a Grant to two to be Chief Justices of any of the Benches hath been held void; but a Grant to two to be Clerks of the Crown is good. <sup>2 Rol. Abr. 152.</sup> <sup>11 Co. 3.</sup>

If a Grant be made to two of the Office of one of the Auditors of the Court of Wards, it is good; yet it is but one Office, and partly Judicial; but this is by the <sup>32 H. 8. cap. 46.</sup> <sup>11 Co. 2. Auditor Carl's Case.</sup> <sup>2 Rol. Abr. 152.</sup> <sup>4 Mod. 18. S. C. cited.</sup>

The Office of Forester of *Waltham* Forest was granted to two, and *Dyer* 167 <sup>4.</sup> held good.

The Clerk of the King's Bench Office had granted the Office of Clerk of the Papers to *A.* and *B.* and the longest Liver of them; *B.* makes a parol Surrender, and prays that *C.* should be admitted in his Room, which was done accordingly; *B.* dies, *A.* commenced a Suit against *C.* supposing that he had no Right; but upon the Trial it appeared that the

Plaintiff agreed that C. should be admitted, which was looked upon as a Surrender of the former Grant, and the Taking of a new one; and it was ruled accordingly.

2 Mod. 260.  
Arris ver.  
Stukely.

The King granted the Office of Comptroller of the Customs in the Port of *Exeter durante beneplacito* to two; one died; and the Question was, whether the other should have the whole by Survivorship; & *per Cur'*, he shall not, for there shall be no Survivorship of an Office of (a) Trust, if it is not granted to them and the Survivor.

(a) It is said in general, *per Cur'*, that if an Office be granted to two, and one dies, the Office does not survive, but determines; as if two Sheriffs, and one dies, the other cannot act; otherwise, if granted to two and the Survivor of them.

1 Salk. 465.

Carth. 213.  
Jones ver.  
Beau.

1 Show. 289.  
4 Mod. 16.  
1 Salk. 465.  
S. C.

The Bishop of *Landaff* by Deed granted the Office of Chancellor or Commissary of his Diocese to Doctor *Loyd* and Doctor *Jones*, to hold the same *conjunctim & divisim* to them and to the Survivor of them; Doctor *Loyd* died, and the Successor of the Bishop granted the Office to another, who sued *Jones*; it was agreed by Counsel on both Sides, that this Office had been antiently and usually granted in this Manner; and on a Case stated out of Chancery, and referred to the Judges of *B. R.* the only Question was, whether this was such a Judicial Office as could be granted in this Manner; and after several Arguments it was adjudged, that this was a good Grant; and the principal Reason of the Judgment was, because of the long and constant Usage; and it was said, that the Offices of most of the Bishopricks in *England* are and have been constantly so granted.

### (L) Of the Execution of an Office by Deputy; and therein of Superiors being answerable for their Deputies.

(b) A Deputy is said to be one who occupieth in Right of another, and for whom regularly his Superior shall answer. *Perk. Sect. 100.*—The Difference, says my Lord *Coke*, between a Deputy and an Assignee is, that an Assignee is a Person who has an Estate or Interest in the Office it self, and does Things in his own Name, for which his Grantor shall not answer, unless in some special Cases; but a Deputy has not any Estate or Interest in the Office, but is as a Servant to the Officer, and does every Thing in the Name of the Officer, and nothing in his own Name, and for whom the Grantor shall answer. 9 Co. 49.—But *per Holt C. J.* it is said, that a Deputy cannot regularly have less Power than his Principal, cannot be restrained from exercising any Part of the Office by Covenant, or otherwise, must regularly act in his own Name, unless it be in case of an Under-Sheriff, who acts in the Name of the High Sheriff, because the Writs are directed to him.

1 Salk. 95.

2 Inst. 382.  
Plow. 380  
9 Co. 47.  
Style 357.

Offices of Inheritance for Years, and those which require only a Superintendency, and no particular Skill, may regularly be exercised by Deputy; such as that of (c) Earl Marshal of *England*, Forester, Park-keeper, &c.

(c) The Office of High Constable of *England* may be exercised by Deputy. *Keilw. 171. a.*—*John Wilsbire* held Lands in *Heydon* in *Effex* by Grand Serjeanty, to hold a Towel when the King should wash his Hands before Dinner the Day of the Coronation; but he having no Dignity was allowed to make a Deputy. *Co. Lit. 107. b.*—*Anne*, Wife of the Earl of *Pembroke*, held Lands of the King to perform the Office of Napery at his Coronation; but because a Woman could not do it in Person, she was allowed to make a Deputy: So the Heir of the said Earl was by Tenure to carry the Gold Spurs before the King at his Coronation; but because he was not of Age, he was allowed to make a Deputy. *Co. Lit. 107. b.*

A Sheriff, tho' he is an Officer made by the King's Letters Patent, and tho' it be not said that he may execute his Office *per se vel sufficientem Deputatum suum*, yet he may make a Deputy, which is the Under-Sheriff, against whom Actions may be brought by the Parties grieved.

And it is said in general, that when an Officer hath Power to make Assigns, he may (a) implicitly make a Deputy.

1 *Rot. Rep.* 274.  
Phelpe ver. Winscombe.  
9 Co. 49.  
(a) A Bishop on his Creation hath Power of appointing Deputies. 2 *Sid.* 138. The Office of Clerk of the Outlawries of the Common Pleas belongs to the Attorney General, who exerciseth it by Deputy. 4 *Inst.* 101.

A Judicial Officer cannot it is said make a Deputy, unless he hath a Clause in his Patent to enable him; because his Judgment is relied on in Matters relating to his Office, which might be the Reason of the Making of the Grant to him; neither can a Ministerial Officer depute one in his Stead, if the Office be to be performed by him in (b) Person; but when nothing is required but a Superintendency in the Office, he may make a Deputy.

3 *Mod.* 150.  
cited *arguendo*.  
(b) Therefore the Esquire of the King's Person cannot assign his Office; for the Law supposes it to have been given him in Consideration of his Diligence, Fidelity and Skill. 11 *E. 4.* 1. 2 *Rot. Abr.* 154.—The Office of Carver being a personal Trust cannot be assigned. *Dyer* 7. b.

It is clear, that the Judges of *Westminster-Hall*, as well as all (c) others having Judicial Authority, must hold their Courts in their proper Persons, and cannot act by Deputy, nor any (d) way transfer their Power to another.

9 *E. 4.* 32.  
31. a.  
Bro. Title Judges, 11.  
Perk. Sect.  
101. (c) But the Judges of the Ecclesiastical Courts may act by Deputy, as the ancient Custom hath been. *Latch*, & vide *supra* Letter (D). (d) And therefore where the Council of the Marches of *Wales* referred a Suit to certain Persons to hear and determine it; this was held to be illegal, and a Prohibition awarded to the Court, to stay their Proceedings against the Party for refusing to obey the Order of the Referrees. 1 *Rot. Abr.* 382. *March* 102.—So Justices of the Peace cannot delegate a certain Number of themselves, and invest them with a Power to make Rates and Orders. 6 *Mod.* 87.

A Coroner cannot make a Deputy, nor an Escheator; because these are Judicial Offices, which they must exercise in Person; but it is said, that the King by special Commission may appoint a Deputy Escheator, to inquire by Office of the Death of a Nobleman, or, as the Book seems to hold, of any other Person, tho' under that Degree.

It is held, that the Office of Constable being wholly Ministerial, and no way Judicial, he may appoint a Deputy to execute a Warrant directed to him, when by Reason of Sickneſs, Absence or otherwise, he cannot do it himself; for the Publick Good requires, that there should be always some Officer ready at Hand to execute such Warrants; and the too rigorous Restraint of the Service of them to the proper Officer could not but sometimes cause a Failure of Justice; but it is said, that a Constable cannot make a Deputy, without some such special Cause.

It seems the better Opinion, that a (e) Recorder of a Town cannot make a Deputy, without a special Grant or Custom for that Purpose, being a Judicial Office relating to the Administration of Justice.

76. (e) A Bailiff of a Liberty may have a Deputy. *Cro. Jac.* 241. 2. adjudged.

And therefore, where a Writ was directed to the Mayor, Alderman and Recorder of *Lancaster*, and the Record was certified by the Mayor, Alderman and Deputy Recorder, without shewing that the Recorder had Power to make a Deputy; the Return was held naught.

It is held, that the Marshal of the King's Bench, having the Inheritance of the Office, with Power to grant the same for Life, cannot notwithstanding

1 *Rot. Abr.* 752, 754.  
*Style* 183, 191, 203, 219.  
2 *Keb.* 385.

39 *H. 6.* 34.  
2 *Rot. Abr.* 154.

(a) That neither withstanding give Power to such Grantee for (a) Life to make a Tenant Deputy.  
 at Will nor  
 Tenant for Life can make a Deputy, if in the very Grant made to them there is not an express Clause for the Execution of the Office *per se vel sufficientem Deputatum suum.* 3 Mod. 147.

*Cro. Eliz.* 187. The Office of Aulnage, or Sealing of Cloths, cannot be exercised by Deputy, being an Office of Trust, unless there be a Clause in the Patent for that Purpose.

Regularly, a Deputy cannot make a Deputy, (b) because it implies an Assignment of his whole Power, which he cannot assign over; but if *A* be appointed Steward of a Copyhold Court, to be exercised *per se vel deputatum suum*, and he appoints *B.* his Deputy, who hath long exercised the said Office, and *B.* authorizes *C.* and *D.* jointly and severally, to take a Surrender of a Copyhold Tenement from *J. S.* which is done by *C.* without reciting his Power, or any Relation had to it, the Surrender is good, being only a single Act; for the Constitution in this Manner gives *C.* the Colour and Reputation of an Authority to act as a Steward (c) *de facto*; and what he does as such is sufficient among the Tenants, for they have no Power to examine his Authority, nor is he to render them any Account of it.

1 Salk. 95.  
*Parker ver. Kett*  
 (b) For a Deputy being only one who is authorized himself, he cannot delegate that authority; and if a Deputy might make a Deputy, so such second Deputy, and so *ad infinitum*, which would be highly inconvenient. *Lil. Reg.* 446. (c) Where the Deputy of a Deputy of a Custom, sitting in the Custom House with other Officers, and acting as an Officer, his Acts were held good as an Officer *de facto*, tho' not *de jure*; and that it would be very hard to put those who have to do with Custom-House Officers, to inquire into the Legality of their Institution. *Cro. Eliz.* 534.

4 Inst. 291. The Chief Justice in Eyre may by the Statute of 32 H. 8. cap. 35. make his Deputy; yet all the Writs of Summons antient and late are *coram the Justice itinerant aut ejus deputato.*

1 Leon. 219.  
 3 Mod. 147. It is said, there cannot be an Officer without Deed, (d) nor can there be any Deputation of an Office without Deed, being a Matter which lies (d) A Deputation of an

Office is in its own Nature grantable by Parol; and therefore tho' it should happen to be granted by Writing, yet since it is in it self grantable by Parol, it may be revoked by Parol. *Ca. Law & Eq.* 74.

3 Mod. 150. But the High Sheriff may make an Under-Sheriff, or his Deputy, without Deed, for he claims no Interest in the Office, but as Servant; and therefore (e) where an Action on the Case was brought against the Deputy of a Sheriff for an Escape, who pleaded, that the Sheriff made him his Deputy to take Bail of Prisoners, and that he took Bond, &c. and shewed no Deed of Deputation; yet the Plea was held good on a Demurrer.

4 Inst. 114,  
 115.  
 2 Lev. 121. ' By the Statute of 2 H. 6. cap. 10. it is ordained, that all Officers ' made by the King's Letters Patents within the King's Courts, who ' have Power and Authority, by Virtue of their Offices of old Time ' accustomed, to appoint Clerks and Ministers within the same Courts, ' shall be charged and sworn to appoint such Clerks and Ministers for ' whom they will answer at their Peril.

Upon the Rule of *Respondeat superior*, regularly all Officers shall answer for their (f) Deputies, in the same Manner as if the Act were done by themselves, unless it be in Criminal Cases; and therefore Sheriffs shall answer for the Escapes, Amerciaments, &c. of their Deputies, &c.

4 Co. 35.  
 2 Inst. 466.  
 2 Lev. 160.  
*Dyer* 278.  
 (f) But if a Clerk in an Office misenter any Thing, he himself shall be punished, and not the Master of the Office, because he takes a Fee for it. 1 Leon. 146. & vide *Hob.* 13.

If the Coroner be insufficient, the whole County who made Election and Choice of him shall *tanquam elector & superior* answer for him. 2 Inst. 466. — So the Lord of a Franchise shall answer for a Bailiff put in by him. 2 Lev. 160.

If a Person be appointed Customer, or Collector of the Customs in a certain Port, who is impowered by the Statute 1 Eliz. cap. 12. to appoint a Deputy, and a Deputy so appointed by him conceals the Goods of a Merchant, and the Customer himself being ignorant thereof returns on Oath into the Exchequer the Customs of this Port, according to the Information of his Deputy; he shall, notwithstanding his Ignorance, answer for the Act of his Deputy, and shall forfeit treble the Value of the Merchandize, and be fined, &c. pursuant to the Statute 3 H. 6. cap. 3. Dyer 238. b. pl. 38. adjudged in the Exchequer Chamber, as Saunders Ch. Bar. informed the Reporter.

If a Deputy suffers Escapes, it is a Forfeiture by the Principal, unless such Deputation be made for Life, and then the Grantee for Life only forfeits the Office. Dyer 278. Cro. Eliz. 534. Poph. 119. 2 Lev. 71.

Raym. 216. 3 Mod. 146. 3 Lev. 288. like Point.

It is said, that if one put in a Deputy, without any Allowance of Salary, he has no Remedy but by *Quantum meruit*, and that against his Principal. 6 Mod. 255.

It hath been held, That tho' a *Mandamus* will not lie for a Deputy, that yet it lies for him who deposes him, to have such his Deputy either admitted or restored; for that otherwise he might be deprived of his Power to make a Deputy; and in this Case, on a *Mandamus* to restore a Deputy Secretary of the Courts of Marches, it was held to be no good Return, that at the Time of the Writ delivered he was not constituted Deputy, for that they might have put him out of his Place before the Writ came to them. 1 Lev. 306. 2 Keb. 738. 742. 1 Vent. 110. 111. S. C. adjudged, because Returns must be certain, there being nothing to be pleaded to them.

## (M) Of the Forfeitures of an Office.

IT is laid down in general, that if an Officer acts contrary to the Nature and Duty of his Office, or if he refuses to act at all, that in these Cases the Office is forfeited. 11 E. 4. 1. b. 2 Rol. Abr. 155.

But herein it will be necessary to consider more minutely, what shall be said such Acts as are contrary to the Duty of his Office, and how far the same, whether they be Acts of Omission or Commission, amount to a Forfeiture; wherein it hath been clearly agreed, that a (a) Gaoler by suffering voluntary Escapes, by abusing his Prisoners, by extorting unreasonable Fees from them, or by detaining them in Gaol after they have been legally discharged and paid their just Fees, forfeits his Office; for that in the Grant of every Office it is implied, that the Grantee execute it faithfully and diligently. Co. Lit. 233. 9 Co. 50. 3 Mod. 143. (a) If a Sheriff suffer belongs to escape voluntarily, it is a Forfeiture of his Office, tho' the Office be

for Life or in Fee. Dyer 151. b. Sir John Savage's Case. 2 Rol. Abr. 155. 2 Bulst. 58. 3 Mod. 146. S. P.

But it is held, that one negligent Escape is not a Forfeiture, though one voluntary one is, but that two negligent Escapes amount to a Forfeiture. 39 H. 6. 33. 2 Rol. Abr. 155.

2 Vern. 173. & vide Stat. 8 & 9 W. 3. cap. 27. Tit. Gaoler, Letter (D).

6 Co. 50. There are, says my Lord Coke, three Causes of Forfeiture or Seizure  
 Co. Lit. 233. b. of Offices by Matter in Deed. 1<sup>st</sup>, By Abuser. 2<sup>dly</sup>, Non-user. 3<sup>dly</sup>, Re-  
 And where fusal. 1<sup>st</sup>, By Abuser; as by a Marshal or other Gaoler's permitting  
 Non atten- Escapes. 2<sup>dly</sup>, By Non-user; in which there is this Difference, when  
 dance or the Office concerns the Administration of Justice or the Commonwealth,  
 Non user of the Officer *ex officio* ought to attend without any Demand or Request,  
 an Office is a there by Non-user or Non-attendance the Office is forfeited; but  
 Forfeiture, where an Officer is not obliged to attend, but upon Demand or Re-  
*vide 2 Rel.* quest made by him whose Officer he is, there without such Demand or  
*Abr. 155.* Request, there can be no Forfeiture; and herein also my Lord Coke in  
*Kelw. 194.* another Place takes the following Diversity, *viz.* that Non-user of it  
*Dyer 151.* self, without some special Damage, is no Forfeiture of private Offices,  
 3 Mod. 146. but that it is otherwise of a publick one, which concerns the Admini-  
 4 Mod. 29. stration of Justice. 3<sup>dly</sup>, As to Refusal, he says, that in all Cases  
 —That Non- where an Officer is bound upon Request to exercise his Office, if he  
 attendance is a good does not do it upon Request, he forfeits it; as if the Steward of a Ma-  
 Cause of the nor be requested by the Lord to hold a Court, if he does not do it,  
 Forfeiture of the Office of Recorder. it is a Forfeiture.  
 1 Salk. 435. —Where to  
 a *Scire facias* to repeal the Patent of a Searcher of a Port for Non-attendance, the Officer pleaded  
 that he was sick, and that he was confined in Prison at the King's Suit, *vide Cro. Car. 491, 492.*

2 Inst. 43. The King granted to the Abbot of *St. Alban* to have a Gaol, and to  
 have a Gaol-delivery, and divers Persons were committed to that Gaol  
 for Felony; and because that the Abbot would not be at the Expence  
 of making Deliverance, but had detained Persons in Prison a long  
 Time, it was resolved, that the Abbot had for that Cause forfeited his  
 Franchise, and that the same might be seized into the King's Hands.

*Cro. Car. 491.* If a *Scire facias* be brought to repeal the Patent of a Searcher of the  
*The King ver.* Customs in a Port-Town for Non-attendance; and upon Evidence it ap-  
*Rocks ad-* pears, that such a Ship was imported and unladen, and others also were  
 judged. exported beyond Seas, not being searched, and that when these Ships  
 2 Mod. 146. were so imported or exported, neither the Searcher himself, nor any of  
 S. C. cited. his Deputies were there, tho' it does not appear to be by Negligence  
 or voluntarily, yet this voluntary Absence and Neglect, so as neither  
 himself nor Servants were there to search, is not only *Craffa negligentia*,  
 but a voluntary Permission and Forfeiture.

*Cro. Car. 492.* So if a Gaoler should leave his Prison Doors unlock'd, and the Pri-  
*per Cur.* soners escape, it is not only a negligent but a voluntary Escape.

*Co. Lit. 233. b.* If Conditions in Law, which are annexed to Offices, be not observed  
 8 Co. 44. and fulfilled, the Office is lost for ever, for these Conditions are as  
*Cro. Car. 556.* strong and binding as expresse Conditions; and therefore if the Office  
*Hard. 11.* of Forester, &c. descend to an Infant or Feme Covert, (where by Law  
 they may so descend) and these are not exercised by sufficient Depu-  
 ties, they become forfeited.

9 Co. 50. a. If a Parker or a Forester cut a Tree, not for Browse or Reparations,  
*Cro. Eliz. 385.* this is a Forfeiture in Law of his Office; because he breaks the Condi-  
 1 And. 29. tion in Law annexed to his Office, which is, that he will preserve the  
*Popb. 117.* Game, and not do any Thing that may impair or destroy them; but  
*Cont. Moor* other Books hold, that the cutting down of Trees is no Forfeiture, if he  
 707. leaves sufficient for Browse and Shade for the Deer, and to cover them.  
 2 Mod. 121. Insufficiency is an original Incapacity which creates the Forfeiture of

4 Mod. 29. an Office; so if a Superior puts in a Deputy into an Office, which may  
*arguendo.* be exercised by Deputy, who is ignorant and unskilful, this is a Forfei-  
 ture of the Office.

4 Mod. 30. If the King grants an Office in any of the Courts at *Westminster*, the  
*arguendo.* Judges may remove such an Officer for Insufficiency, and are the proper  
 —Where an Persons to judge of his Abilities.

Officer may be removed, but cannot be abridged of his Fee. 1 R. l. Rep. 82. 3.



A Philizer of *C. B.* being absent two Years, and having farmed out his Office from Year to Year, without the Licence of the Court, was discharged by the Chief Justice, *ex assensu sociorum suorum*, by Words spoken openly in Court; and tho' there was no Record made of the Discharge, nor no legal Summons for him to answer to any Accusation, yet the Discharge was held good.

An Officer was turned out, because that he *spoliavit quoddam recorda contra officii sui debitum*; and it was objected, 1<sup>o</sup>, That it was not certain enough, because not shewn what Records; to which the Court answered, that it would be prolix, and then he having spoiled the Records, they are not may be to be had. 2<sup>d</sup> Objection, That it may be he did it by Chance, and not wilfully; to which the Court said, that the Conclusion *contra officii sui debitum* included that.

cords to the new *Custos Rotulorum*. 4 *Mod.* 31, 32.

If *A.* hath the Custody of a Castle with all Profits, &c. granted to him for Life, of which the Inheritance hath been granted to *B.* and *A.* refuses *B.* to let him inhabit in the House, this is a Forfeiture in *A.*

If Tenant in Tail of an Office commit a Forfeiture, this shall bind the Issue, by Force of the Condition tacitly annexed by Law to such Estate; but if an Officer for Life commit a Forfeiture, this shall not affect him who hath the Inheritance.

2 *H.* 7. 11. 14 *H.* 7. 1. 2 *Rel. Abr.* 155. 7 *Co.* 34. *Poph.* 119. 2 *Lev.* 71. *Raym.* 216. 3 *Lev.* 288. 5 *Mod.* 146. *Skin.* 114. 2 *Vern.* 173. 2 *Vent.* 189, 269. *Bridgm.* 27.

The Arch-bishop of *Canterbury* granted the Office of Guardian and Keeper of *Alyngton Park* to Sir *Edward Nevil*, and to *Henry* one of his Sons, with a certain Fee during their Lives, and the longest Liver of them, which was confirmed by the Prior of *Christ's Church, Canterbury*, to be exercised by them or their sufficient Deputy, for whom they shall answer; Sir *Edward* was attainted; and the Question was, if the King should have the Office by the Attainder; and it was resolved, that being only an Office of Skill and Confidence, the same was not forfeited to the King, but that the Survivor should hold the same with the Profits incident thereto.

But if the King grants an Office which concerns Trust and Diligence to two, and one of them is attainted, the entire Office is forfeited to the King; for he cannot make one to occupy in Common with another.

Where-ever an Officer who holds his Office by Patent commits a Forfeiture, he cannot regularly be turned out without a *Scire facias*, nor can he be said to be compleatly ousted or discharged without a Writ of Discharge; for his Right appearing of Record, the same must be defeated by Matter of as high a Nature.

1 *Sid.* 81, 134. 8 *Co.* 44. b. 1 *Rel. Abr.* 580. 3 *Mod.* 355. 3 *Lev.* 288.

(N) Where for Corruption and oppressive Proceedings Officers are punishable; and therein of Bribery and Extortion.

6 *Mod.* 96. **T**H E R E can be no Doubt but that all Officers, whether such by the Common Law or made pursuant to Statute, are punishable for Corruption and oppressive Proceedings, according to the Nature and Heinousness of the Offence, either by Indictment, Attachment, Action at the Suit of the Party injured, Loss of their Offices, &c.  
That if a Man be made an Officer by Act of Parliament, and misbehave himself in his Office, he is indictable for it at Common Law, as is every Publick Officer, who misbehaves himself in his Office. 6 *Mod.* 96.

Dyer 218. But besides the Punishment by Indictment, Information, &c. all Courts of Record have a discretionary Power over their own Officers, and are to see that no Abuses are committed by them, which may bring Disgrace on the Court themselves; also the Court of King's Bench, by the Plenitude of its Power, exercises a Superintendency over all inferior Courts, and may grant an Attachment against the Judges of such Courts for oppressive, unjust, or irregular Practice, contrary to the obvious Rules of natural Justice.

Co. Lit. 368.b. As to Extortion by Officers, it is so odious, (being more heinous, as my Lord Coke says, than Robbery, as it is usually attended with the aggravating Sin of Perjury,) that it is punishable at Common Law by Fine and Imprisonment, and also by a Removal from the Office in the Execution whereof it was committed; and is defined to be the Taking of Money by any Officer by Colour of his Office, either where none at all is due, or not so much is due, or where it is not yet due.

21 H. 7. 17. But the stated and known Fees allowed by the Courts of Justice to their respective Officers, for their Labour and Trouble, are not restrained by the Common Law, or by the Statute of *Westm.* 1. and therefore such Fees may be legally demanded and insisted upon, without any Danger of Extortion.

2 *Inst.* 210. Also it seems, that an Officer, who takes a Reward which is voluntarily given to him, and which has been usual in certain Cases for the more diligent or expeditious Performance of his Duty, cannot be said to be guilty of Extortion; for without such a *Premium* it would be impossible in many Cases to have the Laws executed with Vigour and Success.

1 *Roll. Abr.* 16. But it has been always held, that a Promise to pay an Officer Money for the doing of a Thing which the Law will not suffer him to take any Thing for, is merely void, however freely and voluntarily it may appear to have been made.

1 *Fon.* 65. *Cro. Eliz.* 654. *Moor* 468. *Cro. Jac.* 103.

1 *Sid.* 91. If an Indictment of Extortion charges J. S. with the Taking of 50 s. as Bailiff of a Hundred *Colore officii*, without (a) shewing for what he took Cover. it, this is good at least after Verdict, for perhaps he might claim it (a) That an Information generally as being due to him as Bailiff, in which Case the Taking could for Extor- not be otherwise expressed.  
tion must set forth the Time on which the Offence was committed. 4 *Mod.* 101, 103.—That the Court of King's Bench will not quash an Indictment for Extortion or Oppression, tho' erroneous, but will oblige the Party to plead or demur to it. 5 *Mod.* 13.

As to Bribery, it is said in a large Sense to be the receiving or offering of any undue Reward by or to any Person whatsoever, whose ordinary Profession or Business relates to the Administration of Publick Justice, in order to incline him to do a Thing against the known Rules of Honesty and Integrity; but that in a strict Sense it signifies the taking of any Thing valuable by one in a Judicial Place, of any one who have to do before him any way, for doing his Office, or by Colour of his Office, but of the King only; also it signifies the Taking or Giving a Reward for Offices of a publick Nature, which manifestly tending to discourage Men, and to introduce all Kinds of Corruption, is highly punishable by the Common Law.

And these several Offences are so odious in the Eye of the Law, that they are punishable not only with the Forfeiture of the Offender's Office of Justice, but also with Fine and Imprisonment; also it is said, that at Common Law Bribery in a Judge, in relation to a Cause depending before him, was looked upon as an Offence of so heinous a Nature, that it was sometimes punished as High Treason before the Statute 25 E. 3.

Also it is said in general, that all wilful Breaches of the Duty of an Office are Forfeitures of it, and also punishable by Fine, &c. for since every Office is intitled, not for the Sake of the Officer, but for the Good of some other, nothing can be more just than that he, who either neglects or refuses to answer the End for which his Office was ordained, should give way to others who are both able and willing to take Care of it, and that he should be punished for his Neglect or oppressive Execution; but the particular Instances wherein a Man may be said to act contrary to the Duty of his Office, tho' various, are yet so generally obvious, that it seems needless to endeavour to enumerate them.

## Outlawry.

**O**UTLAWRY is a Punishment inflicted on a Person for a Contempt and Contumacy, in refusing to be amenable to and abide by the Justice of that Court which hath lawful Authority to call him before them; and as this is a Crime of the highest Nature, being an Act of Rebellion against that State or Community of which he is a Member, so doth it subject the Party to divers Forfeitures and Disabilities; for hereby he loseth his *Liberam legem*, is out of the King's Protection, &c.

And as to Forfeitures for refusing to appear, herein the Law distinguishes between Outlawries in Capital Cases and those of an inferior Nature; for as to Outlawries in Treason and Felony, the Law interprets the Party's Absence a sufficient Evidence of his Guilt, and without requiring further Proof or Satisfaction accounts him guilty of the Fact, on which ensues Corruption of Blood, and Forfeiture of his whole Estate Real and Personal.

Plow. 541.  
9 H. 6. 20. b.  
Show. Parl.  
Ca. 73.

But Outlawry in lesser Crimes, or in personal Actions, does not occasion the Party to be looked upon as guilty of the Fact, nor does it occasion an entire Forfeiture of his real Estate, but yet is very fatal and penal in its Consequences; for hereby he is restrained of his Liberty, if he can be found, forfeits his Goods and Chattels and the Profits of his Lands, while the Outlawry remains in Force.

Co. Lit. 128. b.

Also it is said, that antiently Outlawry was looked upon as so horrid a Crime, that any one might as lawfully kill a Person outlawed as he might a Wolf, or other noxious Animal; but that the Law herein was changed in Ed. III.'s Time, which provides, that a Person outlawed shall be put to Death by the Sheriff only, having lawful Authority for that Purpose.

2 Hist.'s Hist.

P. C. 202.

9 Co. 91.

1 Bulst. 146.

Cro. Eliz. 908.

Moor 606,

668.

Yelv. 28.

Cro. Car. 537. 4 Leon. 41. 2 Jon. 233.

Also from the Heinousness of the Offence the Sheriff may, on a *Capias utlagatum*, break open the House of the Person outlawed; for it would be unreasonable, that this Privilege or Protection, allowed of in other Cases, should be extended to him who is declared a Contemner and Violator of the Law; and therefore the Seising him as an Outlaw, doth imply the Liberty of entering and seising him wheresoever he lies hid.

(a) That no  
Person is to  
be outlawed  
*nisi per legem  
terrae.*

2 Inst. 47.

—That three *Capias's* are required, and the Party to be called in five County-Courts, a Month between every Court. *Bract. Lib. 3. tract. 2. cap. 11.*

And as the Punishment of Outlawry is of a very severe Nature, so the Law hath provided and taken great (a) Care, that no Person should be outlawed without due Notice and apparent Contempt to the Court; as will appear under the following Heads:

- (A) In what Cases Process of Outlawry lies.
- (B) By what Jurisdiction such Processes are to issue.
- (C) Against whom Process of Outlawry may be awarded: And herein,

1. Whether it may be awarded against a Peer.
2. Whether Process of Outlawry may be awarded against an Infant.
3. Of awarding Process of Outlawry against a Feme Sole or Covert, and the Proceedings thereon.
4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.
5. Of awarding Process of Outlawry against Principal and Accessary.

- (D) What Forfeitures and Disabilities an Outlawry subjects the Party to: And herein,

1. Where it is of the same Effect with a Sentence or Judgment.
2. Of the Forfeiture as to Lands, Goods, &c. and therein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: *And herein,*

1. Of the Difference between a Forfeiture in a Criminal and Civil Case.

2. What Things are forfeited by the Outlawry.
3. To what Time the Forfeiture shall relate.
4. Of the King's and Party's Interest at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.

3. Of the Party's Disability to bring any Action.
4. What further Disabilities Outlawry subjects the Party to.

**(E) Of the Regularity of the Proceedings on an Outlawry, and for what Errors it may be reversed : And herein,**

1. Where, for want of such Process as required by Law, the Outlawry may be reversed.
2. Where for want of Form in such Processes the Outlawry may be reversed.
3. Where for Variance in such Processes the Outlawry may be reversed.
4. Where for a defective Execution and Return the Outlawry may be reversed: *And herein,*

1. To whom such Process is to issue and be executed.
2. To what Place the Process is to issue; and therein of the *Quinto exactus*, and Proclamations on an Outlawry.
3. What shall be said a good Execution and Return.

**(F) Of the Manner of reversing an Outlawry; and therein of the Difference between Errors in Fact and in Law.**

**(G) What the Party must do in order to intitle him to a Reversal : And herein,**

1. Of appearing in Person or by Attorney.
2. Of giving Bail.
3. Of suing out a *Scire facias*.

**(H) The Effects and Consequences of a Reversal : And herein,**

1. Where the Proceedings on the Reversal are in the same Plight as if an Outlawry had been.
2. To what the Party shall be restored on Reversal of the Outlawry.

**(A) In**

## (A) In what Cases Process of Outlawry lies.

*Stauf. 192.* **I**T seems, that originally Process of Outlawry only lay in Treason and Felony, and was afterwards extended to Trespasses of an enormous Nature ; and herein it is laid down by Serjeant (a) *Hawkins*, that Process of Outlawry at this Day lies in all Appeals, and in all Indictments of Treason or Felony, and in all Indictments of Trespass *vi & armis*, and on all Returns of Rescous, and as some say, in all Indictments of Conspiracy or Deceit, or other Crimes of a higher Nature than Trespass *vi & armis* ; but it lies not in an Action, nor, as some say, on an Indictment on a (b) Statute, unless it be given by such Statute, either expressly, as in the Case of *Premunire*, or impliedly, as in Cases made Treason or Felony by Statute, or where a Recovery is given by an Action in which such Process lay before, as in the Case of a (c) Forcible Entry.

*21 Ed. 4. 11. b. 2 Hale's Hist. P. C. 194. (c) On a Conviction by Justices on View of a Forcible Entry Process of Outlawry lies. 1 Keb. 563.*

In an Assise a *Capias pro fine* lies, and upon that Process of Outlawry, if the Assise be found with Force, but being a mixed Action, as favouring of the Realty, it is out of the Statute of Additions, 1 H. 5. cap. 5. which extends only to Personal Actions, Appeals and (d) Indictments.

*2 Leon. 200.*

So Process of Outlawry lies in Replevin, and is given by the Statute 25 E. 3. cap. 17. which gives the *Capias* in this Manner ; when on the *Pluries replegiari facias* the Sheriff returns *Averia elongata*, then a *Capias* in *Withernam* issues, and on that's being returned *Nulla bona*, a *Capias* issues, and so to Outlawry ; but it does not lie on the original Writ of Replevin, which is *Vicountiel* and determined ; and therefore as no Addition is required in such original Writ, so neither ought there to be any in the second Writ ; for where a Writ or Process is founded on a former, it must pursue the former, and cannot vary from it.

By the Common Law, in all Actions of Trespass *Quare vi & armis*, and in which there is a Fine to the King, a *Capias* was the Process ; and herein Process of Outlawry lay by the Common Law.

*35 H. 6. 6. b. 22 H. 6. 13. Rast. Ent. 293. 10 Co. 72. 2 Rol. Abr. 805.*

But in Account, Debt, (e) Detinue, Annuity, Covenant, and such Actions as are grounded upon Negligence or Laches merely, no *Capias* lay at Common Law, but only Summons and Distress infinite, and therefore the *Capias* and Outlawry in these Actions were introduced by divers Acts of Parliament.

*1 Keb. 890, 908. 1 Sid. 248, 258. (e) Whether Process of Outlawry lies in a Writ of Detinue of Charters. Dyer 223. a. dubitatur.*

By the Statute of *Marlebridge*, cap. 23. the Writ of *Monstravit de compoto* was given, where before the Process in Account was Summons, Attachment and Distress infinite ; and by *Westm. 2. cap. 11*. Process of Outlawry is given in Account.

By the 25 E. 3. cap. 17. it is accorded, that such Process shall be made in a Writ of Debt and Detinue of Chattels, and taking of Beasts, by Writ of *Capias*, and by Process of Exigent, by the Sheriff's Return, as is used in a Writ of Account.

And by the 19 H. 7. cap. 9. reciting, ' That for as much as before  
' this Time there hath been great Delays in Actions of the Case that  
' have been sued as well before the King in his Bench, as in the Court  
' of his Common Bench, by Reason of which Delays many Persons have  
' been put from their Remedy ; it is therefore ordained, enacted and  
' established, that like Process be had hereafter in Actions upon the  
' Case as well sued and hanging, as to be sued in any of the said Courts,  
' as in Actions of Trespass or Debt.

But it hath been adjudged, that Process of Outlawry lies in no Case <sup>1 Leon. 529.</sup>  
but where a *Capias* lies; and that therefore where the Proceeding is <sup>2 Rol. Abr. 76.</sup>  
by Bill and not by Original, as there can be no *Capias*, so there can be <sup>1 Sid. 159.</sup>  
no Process of Outlawry, as in a Bill of Privilege by or against an At- <sup>1 Keb 577.</sup>  
torney.

## (B) By what Jurisdiction such Processes are to issue.

IT is clear, that the Courts at *Westminster* may issue Process of Out- <sup>2 Hale's Hist.</sup>  
lawry, and that the Court of King's Bench, either upon an Indict- <sup>P. C. 198.</sup>  
ment originally taken there or removed thither by *Certiorari*, may issue  
Process of *Capias* and Exigent into any County of *England*, upon a  
*Non est inventus* returned by the Sheriff of the County where he is in-  
dicted, and a *Tefatum* that he is in some other County.

Also Justices of Oyer and Terminer may issue a *Capias* or Exigent, and <sup>2 Hale's Hist.</sup>  
so proceed to the Outlawry of any Person indicted before them, di- <sup>P. C. 31, 199</sup>  
rected to the Sheriff of the same County where they held their  
Session at Common Law ; and by the Statute of 5 E. 3. cap. 11.  
they may issue Process of *Capias* and Exigent to all the Counties  
of *England*, against Persons indicted or outlawed of Felony before  
them.

But Justices of Gaol-Delivery regularly cannot issue a *Capias* or Exi- <sup>2 Hale's Hist.</sup>  
gent ; because their Commission is to deliver the Gaol *de prisonibus in ea* <sup>P. C. 199.</sup>  
*existentibus*, so that those whom they have to do with are always intend-  
ed in Custody already.

Justices of the Peace may make out Process of Outlawry upon (a) In- <sup>2 Hale's Hist.</sup>  
dictments taken before themselves, or upon Indictments taken before <sup>199.</sup>  
the Sheriff, and returned to the Justices of the Peace, by the Statute <sup>(a) Justices</sup>  
of 1 E. 4. cap. 1. but the Power of the Sheriff, to make any Process <sup>of the Peace</sup>  
upon Indictments taken before him, is taken away by that Statute. <sup>in their Ses-</sup>  
sions may  
proceed to

Outlawry in Cases of Indictments found before them, and that by the Common Law ; and in Cases of  
Popular Actions may proceed to Outlawry by the Statute of 21 Jac. 1. cap. 4. <sup>2 Hale's Hist. P. C. 52.</sup>  
—But they cannot issue a *Capias utlagatum*, but must return the Record of the Outlawry into the  
King's Bench, and there Process of *Capias utlagatum* shall issue. *Dalt.* 406. <sup>2 Hale's Hist. P. C. 52.</sup>

It is made a *Quere* by *Hale*, whether a Coroner can by Law make <sup>2 Hale's Hist.</sup>  
out Process of Outlawry against a Man indicted by Inquisition before <sup>P. C. 199.</sup>  
him. <sup>—Per Hawk-</sup>

—*Per Hawk-*  
*kins*, a Co-  
roner may award Process 'till the Exigent, on a Bill of Appeal before him ; and that by the better  
Opinion, such Process shall be awarded by him only, and not by him and the Sheriff jointly, and  
that he may proceed thereon to Outlawry ; but that since *Magna Charta*, cap. 17. by which it is en-  
acted, *That no Sheriff, Constable, Coroner, or other Bailiff of the King, shall hold Pleas of the Crown*, he  
cannot proceed to the Trial of the Appellee. <sup>2 Hawk. P. C. 51.</sup> and several Authorities there cited.

*Yelv.* 158. It hath been held, that tho' the Procefs in Inferior Courts be a *Capias*,  
*Cro. Jac.* 222, that yet they cannot proceed to outlaw the Party.  
 261.  
*Raym.* 128. 1 *Sid.* 248, 259. 1 *Keb.* 890, 908.

2 *Hale's Hist.* The Procefs to the Outlawry, viz. the *Capias* and Exigent, must be  
*P. C.* 199. in the King's Name, and under the Judicial Seal of the King appointed  
 (a) Where to that Court that issues the Procefs, and with the (a) *Tefte* of the  
 the *Capias* was Chief Justice or Chief Judge of that Court or Sessions.  
*este Edmundo*  
*Anderfon*,  
 without a T, and for this Error of Outlawry was reversed; for the *Tefte* is the Warrant of the Writ,  
 as it is of all Judicial Writs. *Cro. Eliz.* 592. *Grondy ver. Ifham*.

## (C) Against Whom Procefs of Outlawry may be awarded: And herein,

### 1. Whether it may be awarded against a Peer.

2 *Inst.* 49. IF a Nobleman, or Peer of the Realm, be indicted and cannot be found;  
 3 *Inst.* 31. I Procefs of Outlawry shall be awarded against him, and he shall be  
*Staunf.* 130. outlawed *per judicium Coronatorem*.  
 2 *Hawk. P. C.*  
 424.

2 *Hale's Hist.* But in Civil Actions between Party and Party, regularly a *Capias* or  
*P. C.* 199, 200. Exigent lies not against a Lord of Parliament of *England*, whether Se-  
*Cro Eliz.* 170, cular or (b) Ecclesiastical; yet in case of an Indictment for Treason or  
 503. Felony, yea or but for a *Trespafs vi & armis*, as an Assault or Riot, Pro-  
 5 *Co.* 54. cefs of Outlawry shall issue against a Peer of the Realm, for the Suit is  
 1 *Rel. Abr.* for the King, and the Offence is a Contempt against him; and therefore,  
 220. if a Rescue be returned against a Peer, or if a Peer be convict of a Dis-  
 (b) That an if a Rescue be returned against a Peer, or if a Peer be convict of a Dis-  
 Abbot or feisin with Force, or denies his Deed, and it be found against him, a  
 Prior ought *Capias pro fine* and Exigent shall issue, for the King is to have a Fine;  
 not to be out- and the same Reason holds upon an Indictment of *Trespafs* or Riot, and  
 lawed. 3 *E.* 3; much more in the Case of Felony.  
 2 *Rel. Ab.* 805.

### 2. Whether Procefs of Outlawry may be awarded against an Infant.

3 *H. 5 Utlag.* An Infant above the Age of fourteen may be outlawed, and the Out-  
 11. lawry is not erroneous; but an Infant under the Age of fourteen cannot  
*Fitz. Title* be outlawed, for if he be it is erroneous.  
*Utlagry*, 11.  
 2 *Rel. Abr.*  
 805. *Dyer* 104. 2 *Hale's Hist. P. C.* 207, 208.

*Tyer* 239. a. But the Outlawry of such Infant is not void, it being of Record, but  
 2 *Rel. Abr.* it is voidable only by Writ of Error.  
 805.

### 3. Of awarding Procefs of Outlawry against a feme Sole or Covert, and the Proceedings thereon.

*Co. Lit.* 122. b. A Woman is said to be waived and not outlawed; and the Reason,  
*Lit. Sect.* 186. says my Lord Coke, why the Outlawry of a Woman is legally called  
*Waivaria mulieris* is, because Women are not sworn in Leets or Torns,  
 as Men are, who are above the Age of twelve; and therefore, says he,  
 2 Men



Men are called *utlagati*, i. e. *Extra legem positi*, but Women are *Waiviatæ*, i. e. *Derelictæ*, left out or not regarded, because they are not sworn to the Law.

Therefore, where a *Capias* and Exigent were awarded against three Men and two Women, and the Return was *Utlagati existunt*, where, as to the Women, it ought to have been *Waiviatæ existunt*, this was held to be Error.

*Cro. Jac.* 358.  
*Middleton's Case.*  
*1 Rol. Rep.*  
407. S. P.  
*1 Rol. Abr.* 804. S. P.

If in an Action against Husband and Wife the Husband is outlawed, and Wife waived, and she is taken upon the *Capias utlagatæ*, tho' she is to be discharged of the Imprisonment, (because the Plaintiff cannot proceed against her alone) yet she still remains waived, and when her Husband is taken he must bring her in.

For this, *vide*  
*Dyer* 271. b.  
*Cro. Jac.* 445.  
*Cro. El.* 2370.  
*Hutt.* 86.  
*1 Sid.* 21.

In an Action for a Debt due by the Wife before Marriage, the Husband was returned outlawed and the Wife waived, but before the Return of the Exigent an Attorney procured for the Wife a *Superfedeas*, surmising, that the Wife had appeared by him as her Attorney; and on Motion that this Appearance of the Wife should be received, all the Court conceived, that if upon the Exigent the Sheriff had returned *Reddidit se*, or upon *Pluries Capias* had returned *Cepi Corpus* for the Wife, then her Appearance should be entered, but not by Attorney, as it is here; and the Exigent should only issue against the Husband, & *idem dies* should be given to the Wife; but when the Husband upon the Exigent is returned outlawed, then it shall be entered *Aler sans jour* for the Wife, for the Process is determined; and if he will purchase his Pardon, he shall not have any Allowance thereupon in a *Scire facias*, unless he appear for himself and his Wife; but if for the Husband, the Sheriff should return *Cepi Corpus* upon a *Pluries Capias*, and a *Non est inventa* for the Wife, yet an Exigent shall issue against both, because it must be presumed the Husband might bring in his Wife; but if upon the Exigent the Sheriff returned *Reddidit se* for the Husband and for the Wife, and she is waived, the Husband shall go *sine die*; but in this Case, because the Exigent was returned against both to be outlawed, the *Superfedeas* supposing the Appearance of the Wife is merely idle and void; whereupon it was disallowed, and the Exigent appointed to be filed against both

*Cro. Car.* 58.  
59.  
*Smith ver.*  
*Ajb & ux.*  
*Hutt.* 86. S. C.

#### 4. Of awarding Process of Outlawry against several Defendants, and the Proceedings thereon.

If two are sued in a joint Action and neither of them will appear, Process of Outlawry must be taken out against both.

*Cro. Eliz.* 648.  
*Beverly ver.*  
*Beverly.*

If an Exigent be awarded against two, and the Return is *primo exacti fuerunt & non comparuerunt*, without saying, *nec eorum aliquis comparuit*, it is erroneous.

*2 Rol. Abr.*  
802. *Taverner's Case.*  
*2 Hale's Hist.*

P. C. 204 S. C. cited and S. P. said to have been often adjudged. — *Cro. Jac.* 358. S. P. adjudged, and said to be manifest Error. *3 Mod.* 89, 90. S. P. adjudged. *1 Rol. Rep.* 406. *Palm.* 388. S. P. adjudged.

If two in a Writ of Account are adjudged to account, and one is after (a) outlawed in the Suit, and the other appears, he shall account alone.

*41 E.* 3. 3.  
*1 Rol. Abr.*  
127. S. C.  
*1 Brownl.* 25.

S. P. said. (a) But if sued by Bill upon which no Outlawry can be, what Proceedings shall be, *Quære*; & *vide* *1 Sid.* 159. *1 Keb.* 577.

When

41 E. 3. 13. b.  
1 Rol. Abr.  
127. & vide  
Moor 188.  
2 Leon. 76.

Dyer 239. pl.  
203  
Hawtry ver.  
Anger.  
N. Bendl.  
148 pl. 205.  
Moor 74 pl.  
203. and  
1 And. 10.  
S. C. adjudg.  
ed.

1 Sid. 173.  
1 Keb. 642.  
S. C. Guy ver.  
Barnard.

When two are adjudged to account, and one is outlawed and accounts, if he discharges himself upon the Account, this shall be a Discharge to the other, when he sues a *Scire facias* upon a Charter of Pardon; and if he be charged by the Account, this shall be a Charge upon the other, because they were adjudged to account jointly.

If in Debt upon an Obligation against *B. and C. Sons and Heirs of the Obligor*, and against *D. the Daughter and Heir of A. who was another of the Sons and Heirs of the Obligor in Gavelkind*, Process is continued till the Uncles are outlawed and the Niece waived, and after the Uncles are pardoned, and bring a *Scire Facias* against the Plaintiff, who thereupon declares against them *simul cum* the Niece; and the Uncles plead, their Niece is but of the Age of seven, *unde non intendunt quod durante minori etate sua* they ought to answer, &c. yet the Parol shall not demur; for the Niece is out of Court, and *quoad* her the Original is determined, and at her full Age no Re-summons could be sued against her, but the Uncles only, because she never appeared in Court.

An Action of Trespass was brought against two, one was outlawed; after the Entry of the Writ it was entered, *& sciendum est quod prædict' J. S. (one of the Defendants) Utlagat' est*, and then counts against one of them; and on Motion in Arrest of Judgment, the Court held the Declaration naught, and that the Course of pleading in such Cases, after the Entry of the Writ, was to say, *& quod prædict' J. S. utlagat' est in Præc' illo*, and that the last Words are essential, because that he might be outlawed in another Writ, and not in this.

## 5. Of awarding Process of Outlawry against Principal and Accessary.

Herein we must first take Notice, that by the Statute of *Westm. 1. cap. 14.* it is recited, 'That it had been used in some Counties to outlaw Persons being appealed of Commandment, Force, Aid or Receipt, within the same Time that he which is appealed for the Deed is outlawed; and thereupon it is provided, that none be outlawed upon Appeal of Commandment, Force, Aid or Receipt, unless he that is appealed of the Deed be attainted, so that one like Law be used therein thro' the Realm; nevertheless, he that will so appeal, shall not by reason of this intermit or leave off to commence his Appeal at the next County against them, no more than against their Principals which he appealed of the Deed, but their Exigent shall remain until such as he appealed of the Deed be attainted of Outlawry, or otherwise.'

In the Construction of this Statute, the following Particulars are laid down by Serjeant *Hawkins* as most remarkable.

2 Inst. 183.

2 Hawk. P. C.  
306.

1<sup>st</sup>, That it seems agreed, that it extends as well to Indictments as to Appeals, not only because the Word *Appeal* in the Statute may in a large Sense be taken for any Accusation in general; but because Indictments are certainly as much within the Reason of the Statute as Appeals; and the Common Law, for the settling whereof this Statute was made, did not make any Distinction in this Respect between Appeals and Indictments.

2 Hawk. P. C.  
306.  
2 Hale's Hist.  
Pl. C. 200.

2<sup>dly</sup>, That it seems to be agreed, that where-ever some of the Defendants are expressly charged as Principals, and others as Accessaries, before the Award of this Exigent, the Outlawry thereon of those charged as Accessaries cannot but be reverfible, because it appears upon the Record that the Exigent issued contrary to the Direction of the Statute; but if several be outlawed on a Writ of Appeal, which chargeth them all alike without any Distinction, there can be no Advantage taken of the

the Appellant's not having pursued the Statute, since it appears not but that he might have charged them all as Principals.

3dly, That it is strongly holden, that if an Appellant take out the Exigent at the same Time against all the Defendants, he must, when they appear, count against them all as Principals, and shall be concluded from charging any of them as Accessaries, because he has taken out such Process as is erroneous where all are not Principals; but he makes a Doubt, whether this be Law at this Day, since all Errors, as the Law seems now to be holden, are salved by Appearance.

4thly, That it seems the better Opinion, that where there are more than one Principal, the Exigent shall not issue till all of them are arraigned; and herein it is said by *Hale*, that if *A.* and *B.* be indicted as Principals in Felony, and *C.* as Accessary to them both, the Exigent against the Accessary shall stay till both be attainted by Outlawry or Plea; for that it is said, if one be acquitted, the Accessary is discharged, because indicted as Accessary to both, and therefore shall not be put to answer till both be attaint; but hereof he adds a *Dubitatur*, because tho' *C.* be Accessary to both, he might have been indicted as Accessary to one, because the Felonies are in Law several; but if he be indicted as Accessary to both, he must be proved so.

In Treason all are Principals; and therefore Process of Outlawry may go against him that receives, at the same Time as against him that did the Fact.

## (D) What Forfeitures and Disabilities an Outlawry subjects the Party to: And herein,

### 1. Where it is of the same Effect with a Sentence or Judgment.

IF a Man be outlawed of Treason or Felony, tho' there be no other Judgment (*a*) but *Utlagatus est per judicium coronatorem*, yet it is of it self an Attainder, and subjects the Party to such an Award thereupon to be made by the Court where he is brought, as is suitable to the Offence for which he is indicted and outlawed.

Exigent, or by the Coroner's Return of a *Certiorari* to them directed, to certify whether the Party were outlawed or not, the Party is as much attainted, and shall forfeit and lose as much, as if Sentence had been given against him upon Verdict or Confession. 2 *Hawk. P. C.* 446 7, & vide 2 *Hale's Hist.* 205-6. — That those Malefactors, who wilfully fly from Justice, add a new Crime to their former Offence, and therefore ought to have no Benefit of the Law. 3 *Mod.* 72.

But if such Outlawry appear to the Court to be erroneous, whereof any one as *Amicus curiæ* may inform them, the Party shall have Counsel assigned him to take Advantage of the Error; but if he will neither bring a Writ of Error, nor plead in convenient Time, and the Outlawry be voidable only, and not void, the proper Execution shall be awarded against him, but no Sentence pronounced; because the Outlawry is a Judgment, and no Man shall have two Judgments for one Offence.

And herein it is said by *Hale*, that tho' the Court *ex officio* is to prefix the Party a Day to purchase a Writ of Error, and in the mean Time to respite Execution; yet that must be on his alledging Error in Fact, or Error in Law upon the Outlawry; for if the Court be satisfied that

it is merely a Pretence, they may chuse whether they will allow him a Day to sue forth a Writ of Error, but may award Execution presently.

2 Hawk P. C.

543.

1 Hale's Hist.

P. C. 521.

2 Hale's Hist.

350.

But tho' an Outlawry be an Attainder, and equal to a Conviction or Sentence by Verdict or Confession, yet it does not subject the Party to any severer Punishment than the Crime does for which the Outlawry was pronounced; and therefore, if it be in such a Crime for which Clergy is allowable, the Party outlawed shall be allowed his Clergy in the same Manner as he who is convicted by Verdict or Confession.

2 Salk 494.

The King ver.

Tippin.

One was outlawed upon an Information for seducing a young Gentleman to marry a young Woman of a lewd Character, and fined 5000*l.* and it was moved in Behalf of the Defendant, that he could not be fined upon the Outlawry; because in Misdemeanors the Outlawry does not enure as a Conviction for the Offence, as it does in Cases of Treason and Felony, but as a Conviction for the Contempt in not answering, which Contempt is punished by the Forfeiture of his Goods and Chattels; and if he might be fined now, he must be fined again upon the principal Judgment; and the first was held to be irregular; and that the Outlawry in these Cases is not a Conviction, as appears by *Fleta*, *Quamvis quis pro contumacia & fuga utlagetur non propter hoc convictus est de facto principali.*

## 2. Of the Forfeiture as to Lands, Goods, &c. and therein of the Difference between Outlawries in Criminal and Civil Cases, and of the King's and Party's Interest at whose Suit the Outlawry was had: And herein,

### 1. Of the Difference between a Forfeiture in a Criminal and Civil Case.

9 H. 6. 20.

2 Rol. Abr 85

Staunf. Pre.

47.

Co. Lit. 128.

2 Hale's Hist.

205.

Herein we must observe, that an Outlawry of Treason or Felony is a Conviction and Attainder of the Offence wherewith the Party is charged; and such Outlawry corrupts the Blood, and causes an absolute Forfeiture of the Party's Estate both Real and Personal, *viz.* in case of Outlawry of Treason his Lands are forfeited to the King of whomsoever they are held; and in case of Outlawry of Felony, to the Lord by Escheat of whom they are immediately holden.

Plow. 541.

3 Co. 110.

Show. Par.

Ca. 73, &

vide the Au-

thorities fu-

pra.

Also in Civil Cases, the Retiring from the Inquiries of Justice is held so criminal in the Eye of the Law, that it is punished with the Loss of the Offender's Goods and Chattels, and the Issues and Profits of his Real Estate; but in Outlawries in Civil Cases the King has no Estate, but only a Pernancy of the Profits; nor can he manure or sow the Ground; and his Interest continues no longer than the Party hath an Estate, and determines with the Party's Death; and being originally introduced to compel the Defendant to come in the sooner and answer the Plaintiff's Demand, may more easily be superseded or reversed, and thereby the King's Pernancy of the Profits discharged, than an Outlawry in a Capital Case.

Staunf. Pre.

47, 183.

1 Rol. Abr.

793.

Cro. Eliz. 472.

5 Co. 110.

Co. Lit. 259.

Cro. Jac. 464.

Also if a Person make Default till the Award of an Exigent, either upon an Appeal or Indictment of a Capital Offence, he forfeits his Goods, unless he was pardoned before the Exigent was awarded; and it is holden, that the Law is the same, as to such a Default upon an Indictment of Petit Larceny, and that where-ever Goods are so forfeited, they are not saved by an Acquittal at the Trial, but by a Reversal of the Award of the Exigent they are saved, whether such Reversal be for an Error either

in Fact or in Law; as for the Imprisonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Process.

## 2. What Things are forfeited by the Outlawry.

Outlawry in a Capital Case being, as has been said, an Attainder and Conviction, it is clear, that all Lands of Inheritance, as all other the Real and Personal Estate whereof the Party outlawed is seised or possessed in his own Right, are forfeited absolutely. For which, vide Title Forfeiture.

Also the King hath by the Common Law such a Power to require his Subjects to answer all Demands of Law and Justice, that his not appearing on Process in a Civil Action, is such a Contempt, that the Party guilty is put out of the Law, forfeits his Goods and Chattels, his Leases for Years, and his Trust in such Leases, and the Profits of his Lands of Freehold. 1 Salk. 109, 5 Mod. 114.

But Outlawry in Trespas, or any Civil Action, works no Corruption of Blood; and therefore if the Husband be outlawed in any such Action, the Wife shall notwithstanding have Dower, and the Issue shall inherit; for it is a Forfeiture of the Issues and Profits of the Lands only during the Life of the Party outlawed, and so long as the Outlawry remains unreversed; also it seems, that if the Wife herself be outlawed or waived in any such Action, yet her Dower is not forfeited. Bro. Title Outl. 82. Perk. Sect. 388. Co Lit. 31. a.

It is said to have been agreed by the whole Court, that Arrearages of Rent reserved upon an Estate for Life are not forfeited by Outlawry, because they are Real, and no (a) Remedy for them but by Distress; otherwise if upon a Lease for Years. Hutt. 164. (a) For this, vide Tit. Rents.

Also it is held, that there are other Things which the Party outlawed may have, and are not forfeited to the King; and that therefore an Executor or Administrator cannot plead in Excuse of Assets, that his Testator or Intestate was outlawed, because he might have Debts (b) due upon Contract; also Goods taken for Trespas before the Outlawry, for which he may have Trespas, and recover the Value of the Goods, which shall be Assets in his Hands. Cro. Eliz. 851. Hutt. 53, & vide 4 Co 93. a. 2 Rol. Abr. 806. Cro. Eliz. 203. (b) That Debtors may pay Debts to the Executor

or Administrator of a Person outlawed, and their Release shall be a good Discharge to them, tho' the Executors shall be accountable to the King for them. Hutt. 54.

So if the Testator had mortgaged his Land upon Condition, that if the Mortgagee pay not at such a Day to him, his Executors or his Heirs, 100*l.* that then it shall be lawful for him or his Heirs to re-enter, and after, but before the Day, the Testator is outlawed, and makes his Executor, and dies, and at the Day the Mortgagee pays the Money to the Executors; this is Assets, and not forfeited to the King. Hutt. 53.

If Tenant for Term of Years be outlawed, the Term is forfeited to the King, and he may seise it, and use it at his Pleasure. 9 H. 6. 21. 2 Rol. Abr. 806.

So if *A.* being possessed of a Lease for Years grants it over to *B.* in Trust for himself, and afterwards is outlawed in a personal Action, this Trust shall be forfeited to the King. 2 Rol. Abr. 807.

If Tenant at (c) Will sows the Land, and afterwards is outlawed, the King shall have the Corn. 9 H. 6. 21. 2 Rol. Abr. 806.

(c) If a Man lease at Will, and the Lessee sows the Land, and the Lessor is outlawed, the King shall not have the Corn, and can have only the Rent, for he is intitled to no more than the Lessor himself. 5 Co. 116.

If the Conuzee of a Statute-Staple take the Conuzor into Execution upon the Statute, and afterwards is outlawed in a personal Action, the Debt shall be forfeited to the King, and the King may discharge the Conuzor out of Execution. 2 Rol. Abr. 807. North ver. Fines.

So

2 *Roll. Abr.*  
808.

So if there are two Conuzees of a Statute, and they take the Body of the Conuzor into Execution, and one of the Conuzees is outlawed in a personal Action, it is said to be a Forfeiture of the Debt against both.

22 *Aff.* 33.  
2 *Roll. Abr.*  
708 *S. C.*

If a Man be outlawed in a Personal Action, the King shall present to his Churches, altho' he hath a Freehold or Inheritance in them.

2 *Roll. Abr.*  
807.

(c) If after the Outlawry the Party

So if a Person outlawed hath an Advowson, that happens to become void (a) during the Time the Outlawry is in Force, such Avoidance is forfeited to the King, whether the Outlawry were in a Capital Case, an Action of Trespass, or other Personal Action.

purchaseth any more Goods, the Property is immediately vested in the King. *Carth* 442.

*Beverley ver.*  
*Cornwall,*  
*Cro. Eliz.* 44.  
1 *And.* 148.  
*Moor* 269.  
*Saoul* 89.  
*Gouldf* 103.  
*Owen* 3. *S. C.*

If pending a *Quare impedit* brought by A. he is outlawed, und Judgment is given for him in the *Quare impedit*, and thereupon the Incumbent resigns, and takes a new Presentation from the Queen by Virtue of the Outlawry, and accordingly he is instituted and inducted, and afterwards A. reverseth the Outlawry, and brings a *Scire facias* to have Execution of the Judgment; tho' the Presentation was vested in the Queen, and executed before the Outlawry reversed, yet A. shall have Execution of his Judgment; for upon a Recovery in a *Quare impedit*, any Incumbent that cometh in *Pendente placito* shall be removed.

*Hob.* 214.  
*Cro. Jac.* 512.

Things Personal, settled by way of Trust on the Offender, are as much forfeited as if he had the legal Interest, or were in Possession of them; as if a Bond be taken in another's Name, in Trust for a Person who is afterwards outlawed, this is forfeited in the same (b) Manner as if taken in his own Name.

(b) And shall be executed by an Informa-

tion in the Exchequer Chamber, or in Chancery. 1 *Hale's Hist. P. C.* 248.

*Lane* 54, 113.  
1 *Mod.* 16,  
38.  
2 *Keb.* 564,  
608, 644,  
763, 772.  
1 *Lev.* 279.  
*Hard.* 496.  
1 *And.* 294.  
*Raym.* 120.  
2 *Roll. Abr.* 34.

So the Trust of a Term granted by a Man for the Use of himself, his Wife and Children, &c. is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a subsequent Forfeiture; but it shall be forfeited so far only as is reserved for the Benefit of the Party himself, if made *bona fide*, whether before or after Marriage for good Consideration, without Fraud, which is to be left to a Jury on the whole Circumstances of the Case, and shall never be presumed by the Court, where it is not expressly found.

1 *Roll. Abr.* 343. *March* 45, 88. 1 *Sid.* 260. 1 *Keb.* 909.

3 *Co.* 82.  
*Pawnc'oot*  
*ver. Blunt,*  
*cited in*  
*Twine's Case;*  
*&c. vide Dyer*  
295 a.

So where upon an Indictment of Recusancy the Party, intending to go beyond Sea, made a Deed of Gift of all his Goods and Chattels upon some feigned Consideration, and then he went out of the Realm, and was afterwards outlawed on the same Indictment; and it was adjudged, that the Deed of Gift was void to defeat the Queen of the Forfeiture of the Goods, and this by the Statute of 13 *Eliz. cap. 5.* and that the Queen was intitled to his Leases and Goods by the Forfeiture.

11 *H.* 6. 17.  
37.  
*Cro. Eliz.* 575,  
851.  
2 *Roll. Abr.*  
806.

The Forfeiture, as has been said, must be of Goods which the Party has in his (c) own Right, and not in Right of another; and therefore an Executor or Administrator outlawed forfeit nothing which they have in Right of their Testator or Intestate.

*Cro. Car.* 566.

(c) So a Term limited to Executors, and not vested in the Party himself, is not forfeitable. 2 *Levin.* 5, 6. 1 *And.* 19. *Moor* 100. *Dyer* 309.

20. *H.* 6 *S. b.*  
2 *Roll. Abr.*  
806.

So if an Executor recovers in Account against the Receiver of the Testator, and afterwards is outlawed, yet he shall not forfeit this Debt; for it continues the Debt of the Testator, and is only put in Certainty by the Judgment.

Debts and Duties upon Simple Contract are forfeited to the King by the Outlawry of the Party, tho' the Debtor might have waged his Law on such Contract to an Action brought by the Creditor; of which Privilege he is deprived by the Outlawry.

It hath been adjudged, that the Cattle of a Stranger (*a*) *Levant* and *Couchant* on Lands extended on an Outlawry, may be taken for the King upon a *Levari facias* as the Issues and Profits of the Lands; for that otherwise there might be no Issues at all, or the Person outlawed may take in other Mens Cattle to agist, and so defeat the Outlawry.

aver that the Cattle were *Levant* and *Couchant*.

So if the Person outlawed should after the Inquisition make a Feoffment of his Lands, the Cattle of the Feoffee may be taken for the Issues of those Lands, for the Land is (*b*) Debtor to the King.

Life is outlawed, and dies, *Q*. whether the Issues can be extended on the Reversioner.

But if the Owner of the Soil is outlawed, the Cattle of a Commoner cannot be taken as Issues; but if they should be taken, he must plead his Title in the Exchequer, unless his Right of Common is found by Inquisition on the Outlawry.

### 3. To what Time the Forfeiture shall relate.

If a Man be outlawed upon an Indictment of Felony and Treason, and pending the Process he alien the Land, yet the King or Lord shall have the Land which he held at the Time of the Treason or Felony committed; for the Indictment contains the Year and Day when it was done, unto which the Attainder by Outlawry relates: But if a Man sue an Appeal by Writ of Felony or Murder, and pending it the Party aliens, and then is outlawed before Appearance, the Lord's Escheat is lost, because it relates only to the Time of the Outlawry pronounced; in as much as the Writ of Appeal is general, and contains no certain Time of the Offence committed.

appeared, and the Plaintiff had declared upon his Writ, and the Defendant had been convicted and attainted by Verdict or Confession, or if the Appeal had been by Bill, and thereupon the Party had been outlawed, tho' before Appearance, the Escheat had related to the Time of the Fact committed to avoid mesne Incumbrances; for in the Declaration in the one Case, and in the Bill in the other, the Year and Day of the Felony is set forth.

As to Goods and Chattels, the very Issuing of the Writ of Exigent in case of Treason or Felony gives to the King, or the Lord of a Franchise to whom that Liberty is granted, the Forfeiture of all the Goods of the Party so put in Exigent, from the Time of the *Teste* of the Writ of Exigent.

And as the Award of the *Exigent* gives the Forfeiture, so if that be well awarded, the Forfeiture shall continue, tho' the Outlawry be reversed for Error in Law or in Fact, subsequent to the Award of the Exigent; for the King's Title being by the Exigent, and that being of Record must be awarded by Matter of as high a Nature; therefore it is necessary for a Party outlawed in Treason to bring his Writ of Error specially, *tam in adjudicatione brevis de Exigi facias quam in promulgatione utlagariæ*: Also a Writ of Error lies to reverse the very Award of the Exigent; and tho' no subsequent Error to the Award of the Exigent will avoid it, yet if there be Error in the Exigent, or in the Appeal or Indictment upon which it issues, both Outlawry and Exigent shall be reversed.

*Co. Lit.* 197. And as the Award of the Exigent gives the Forfeiture of the Goods, so the Outlawry gives the Forfeiture or Loss of the Lands of the Party outlawed; but the bare Judgment of Outlawry by the Coroners, without the Return thereof of Record, is no Attainder, nor gives any Escheat, but it must be returned by the Sheriff with the Writ of *Exigi facias*, and the Return indorsed.

*Reg.* 284. And therefore, if there be a *Quinto exactus*, and thereupon *utlagatus*  
*Dyer* 223. *a.* *est per judicium coronatorum*, but no Return thereof is made, there lies a  
 317. *a.* Writ of *Certiorari* to the Coroners, or to the Sheriff and Coroners, to certify the Outlawry into the King's Bench; but this is only either to ground a Charter of Pardon on it, or to amerce the Sheriff where he returned only a *Quarto exactus*; but as to the Effect it has otherwise, my Lord Chief Justice *Hale* thinks as follows,

*Dyer* 317. *a.* 1<sup>st</sup>, That it doth not disable the Party to bring an Action, because in relation to Party and Party it stands as nothing, 'till returned by the Sheriff.

2 *Hale's Hist.* 2<sup>dly</sup>, That consequently, barely upon such a Return of an Outlawry  
*P. C.* 206. upon a *Certiorari*, without the Writ of Exigent indorsed and returned together with the *Certiorari*, it seems no Escheat lies for the Lord; but this he makes a *Quære*.

2 *Hale's Hist.* 3<sup>dly</sup>, But if the Writ of *Certiorari* be directed to the Sheriff and Coroners,  
*P. C.* 206 7. and the Writ of Exigent be extant in Court, and they return this Outlawry; possibly this may be a sufficient Warrant to enter it of Record, as a Return upon the *Exigent* for the King's Advantage, and to issue upon it a *Capias utlagatum* to have the Forfeiture of his Goods.

2 *Hale's Hist.* 4<sup>thly</sup>, But unless the Writ is some Way returned or extant, it gives the  
*P. C.* 207. King no Title to Land or Goods; for the Writ of *Exigi facias* is the Warrant of the Outlawry, and that which gives the Coroners their Authority in such a Case to give Judgment of Outlawry; and it is not like the Case where there was once a Writ and Return of Outlawry, and the Record since lost, for that upon Circumstances a Jury, upon the General Issue, may find a Record, tho' not shewn in Evidence; but here the Writ was never in Truth indorsed nor returned.

2 *Hale's Hist.* 5<sup>thly</sup>, But if the Writ of *Certiorari* were directed to the Coroners  
*P. C.* 207. alone, tho' it may be a Ground to cause the Sheriff to mend his Return, and make it according to the Truth; yet the Certificate of the Coroners will not make a Record to intitle the King or Lord to any Thing without the Writ of Exigent extant, and the Return upon it amended by the Sheriff; for without the *Exigi facias*, and the Return of the Outlawry upon it, there is neither Disability, Forfeiture nor Escheat; and therefore a *Certiorari* shall not be so much as granted to the Coroners to remove an Outlawry after the Party's Death.

*Hard.* 101. *A.* was outlawed, and afterwards made a Lease of his Lands, and afterwards these Lands amongst others were found by Inquisition; and this  
*Attorney General* ver. *Sir Ralph Freeman.* Lease was pleaded in Bar to bind the King, being before the Inquisition; and the Court held, that a Lease or other Estate made by the Party after Outlawry, and before an Inquisition taken, will prevent the King's Title, if it be made *bona fide* and upon good Consideration; but if it be in Trust for the Party only, it will not be a Bar; but that no Conveyance whatsoever made after the Inquisition will take away or discharge the King's Title.

*Hard.* 176. *A.* was outlawed at the Suit of *B.* and his Lands extended; afterwards  
*Hammond's Case.* *C.* claiming Title to them brought his Ejectment, and pleaded to the Inquisition; and upon a Bill in the Exchequer, an Injunction was prayed for the King to stay the Proceedings at Law, but denied; for tho' a Person outlawed cannot after an Extent prevent the King's Title by any

(*a*) Any one Alienation whatsoever; yet such Outlawry gives no (*a*) Privilege to the Possession

Right may grant the same over, if his Title be precedent to the Outlawry. *Hard* 422.—*A.* owes Money to *B.* on a Judgment, and to *C.* on a Bond, *A.* is outlawed at the Suit of the Obligee, and his Lands

seised



Possession of a Disseisor, but that the Disseisee may enter and bring his Ejectment; for by the Outlawry the King had no Interest in the Land it self, but only a Title to recover the Profits.

seised on the Outlawry, and the Question was,

whether the Conusee of a Judgment could extend those Lands; and it was held, the Outlawry should be preferred, and that the King's Hands should not be removed, unless the Conuzor could shew Co-vin and Practice between the Obligor and Obligee. 2 Salk. 495. Attorney General ver. Baden.

It was found by Special Verdict in Ejectment, that A. being outlawed in a personal Action levied a Fine, and the King seised the Lands in the Hands of the Conuzee; and it was resolved, that if the Seizure was before the Fine levied, the King may well retain against the Conuzee; but if the Fine was levied before the Seizure, the Conuzee may well take.

Raym. 17.  
1 Lev. 33.  
1 Keb. 57,  
74, 76. Wind-  
for ver. Sey-  
well.

From these Cases the Law seems to be now settled, as laid down in Salk. viz. That by a bare Outlawry the Party immediately forfeits his personal Goods, and they are vested in the King, but that he does not forfeit the Profits of his Lands, nor Chattels Real, 'till Inquisition taken; and that therefore an Alienation after Outlawry, and before Inquisition, is good to bar the King of the Pernancy; but if he makes a Feoffment after Inquisition, the Feoffee has the Estate, and the King shall have the Profits for the King, which he may lawfully do, yet the Alienee must plead off the Extent in the Exchequer, by shewing his Title precedent.

1 Salk. 395.  
Carth. 442.  
S. C. And  
that if a Per-  
son outlawed  
do alien his  
Lands before  
any Inquisi-  
tion taken

#### 4. Of the King's and Party's Interest, at whose Suit the Outlawry was had, in the Estate and Effects of the Party outlawed, and their Remedies for the same.

When the Outlawry is returned on the *Exigi facias* by the Sheriff, and recorded in Court, Execution may be taken out against the Party outlawed, either general, to arrest the Body, or special, to arrest the Body and extend the Goods and Lands, as also Debts and *Choses in Action* belonging to the Party outlawed; and when such Inquisition is returned by the Sheriff, a Transcript of the Outlawry and Inquisition is transmitted into the Exchequer; and thereupon, if any Debt be returned due from any one to the outlawed, on Application to the Exchequer a *Scire facias* issues to such Person, to shew Cause why the King should not have such Sum so found due on the Inquisition to the Outlawed; and the Reason of returning the Transcript of the Record into the Exchequer is, *ad ulterior' Execution' prædicto Domino Reg' per eand' Cur' de Scacc' superinde fiend'*; for when the Inquisition has returned the Outlawed to be possessed of any Goods or Lands, the Property of these Goods belong to the King, since the Outlawed being out of the King's Protection cannot enjoy any Thing, and the Profits of the Land are to be seised into the King's Hands; but the Lands themselves are not forfeited, unless it be in Capital Cases; but in other Cases the Profits are seised whilst the Party continues outlawed; and therefore the Transcript of this Record is sent into the Exchequer, that the Court of ordinary Revenue may have it in Charge; but the Court of Exchequer (a) usually grants a *Custodiam* to such Person as sued out the Outlawry.

Hard. 422.  
Carth. 441.

(a) That the King is to satisfy the Par-

ty at whose Suit the Outlawry was taken out; but this *per Popham Ch. J.* is *de gratia*, and not *de jure*. Telv. 19, & vide 2 Vern. 314. Show. Parl. Ca 72. The King ver. Baden, a good Case on this Head.

The King by his Prerogative is to have *Bona felonum & fugitivorum*; 46 E. 3. 16. and (b) tho' the Lord of a Manor or other private Person may claim (b) Outlawry in Northumberland for a Debt in Durham, whether the King or Bishop of Durham, he having a Grant of *bona fugit'* in Durham, should have the Goods, vide Lane 90, 91. 2 Rol. Abr. 808 them

5 Co. 109.  
Co. Lit. 288.

them, yet that cannot be by Prescription, but must be by way of Grant ; for every Prescription must be immemorial ; and the Goods of Felons and Fugitives cannot be forfeited without Matter of Record, which presupposes the Memory of that Continuance.

There is a Difference said to be between an Outlawry on mesne Process and after Judgment ; that as to the first the Party hath no Interest, but that the whole Benefit of the Forfeiture accrues to the King. *Co. Lit.* 288. b. *Cro. Eliz.* 707. But in 2 *Lev* 50. it is held, that there is no Difference between Outlawries before and after Judgment.

If a *Capias ad satisfaciendum* issues upon a Judgment in an Action of Debt, and the Sheriff returns *Non est inventus*, and after a *Capias utlagatum* issues, upon which he is taken and imprisoned, and after he is let to go at large, the Party that recovered may have an Action of Debt for this Escape against the Sheriff, because of the Prejudice to him, (a) he being in Execution as well for his Benefit as for the King's. 1 *Roll. Abr.* 810. (b) *Leighton* ver. *Walwin*. *Cro. Jac.* 619. *Moor* and Sir *George Reynolds*, S. P. but by *Bridg.* 67. it appears to have been an Action upon the Case. (a) But if after the Year (admitting) he could not be in Execution for him without Prayer, yet Case lies; for the Plaintiff was prejudiced by the Escape, for he ought not to be discharged, 'till he found Surerries to satisfy the Plaintiff. 5 *Co.* 89. b. and *vide* 5 *E.* 3. c. 13. (b) 5 *Co.* 88. *Garnon's* Case, S. C. the *Capias utlagatum* being taken out and executed within the Year. *Cro. Eliz.* 706, 707. S. C. adjudged. *Moor* 566. pl. 772. S. C. 1 *Roll. Abr.* 895. S. C. *Yelv.* 20. S. C. cited. *Comb.* 201. and 5 *Mod.* 201. S. C. cited.

So if a *Capias utlagatum* issues upon an Outlawry upon mesne Process, and the Defendant is taken and suffered to escape, an Action upon the Case lies; because the Plaintiff is thereby delayed of his Debt. *Cro. Eliz.* 652. *Bonner* ver. *Stokely* adjudged. *Moor* 641. pl. 882. S. P. adjudged, & *vide* 1 *Lutw.* 110, 111.

If within the Year a *Capias ad satisfaciendum* issues on a Judgment, and the Defendant is thereupon outlawed, and two Years after taken upon a *Capias utlagatum*, and the Sheriff suffers him to escape, Debt will lie against him; for the Defendant was in Execution at the Suit of the Plaintiff, without Prayer, in as much as the Plaintiff was at the End of his Process, and no Continuance nor *Scire facias* lay after the *Capias utlagatum*, which being sued at the Charge of the Plaintiff imported an Election of the Body. *Salk.* 318. (c) *Wolf* ver. *Davison* adjudged. (c) 5 *Mod.* 200. S. C. adjudged. *Comb.* 373. S. C. adjourned; and *Holt* Ch. J. said, he never understood the Diversity taken in the Case where within the Year and where after.

If A. hath Judgment in Debt against B. for 50*l.* and thereupon he takes out a special *Capias utlagatum* against him, and J. S. promises, that in Consideration of his staying any further Proceeding on that Writ, he the said J. S. would satisfy him the Debt, unless B. did it before such a Day; an *Assumpsit* lies on this Promise, for the Plaintiff is at the Charge of suing out the Writ, and hath the Carriage of it; and the Party shall be in Execution at his Suit, and the King is to satisfy him out of the Goods of the Party outlawed; altho' it was objected, that the Consideration was against Law, being in Delay of Justice, and that the whole Benefit accrued to the King. *Yelv.* 19. *Fennings* ver. *Hatley* adjudged, by three Judges cont. *Popham*.

But it hath been adjudged, that an Action on the Case will not lie against the Sheriff for neglecting to extend or seise the Goods and Lands of a Person outlawed upon a *Capias utlagatum*, because it is the King's Loss; and tho' it was urged, the Sheriff's Extending and Seising would be a Means to enforce the Defendant to appear to the Plaintiff's Action; this the Court said was so remote, as not to be considered as a Ground to support an Action; but if it had been shewn, that the Sheriff might have taken his Body, and had neglected to do it, there might have been more Reason to support the Action. *2 Vent.* 89, 90. *Dawson* ver. *The Sheriff, of London*.

When after the Extent the Lands are leased out, or a *Custodiam* granted to him at whose Suit the Outlawry was had, the Lessee shall account only according to the extended Value; and if they happen to be extended too low, the Party hath no Remedy but by taking out a *Melius inquirend'*, and thereby have them extended at a greater Value.

Hard. 106.  
Marters ver.  
Whitefeld.

If by the Inquisition the Lands of the Person outlawed are found in the particular Occupation of such and such Persons, but the Value of every particular Parcel is not found, but by the Lump that *in toto* the Lands are of such a Value; this is a good Finding.

Hard. 6, 7.  
Cresset's Case;  
& vide Hard.  
58. where it  
is said, that  
such Inquisi-  
tion ought to be as certain as an Indictment or Declaration.

It was found by Inquisition upon an Outlawry, that the Party outlawed was seised in Fee *de sex clausis prati & pasture*; and it was objected, that the Inquisition was void for Uncertainty; & per Hale Chief Baron, an Inquisition found *de uno messuagio sive tenemento* has been held good; because it is not an Office of Intitling, but of Instruction or Information, which does not require such precise Certainty as an Office of Intitling does; so in an Inquisition upon an Extent upon a Statute or Judgment, or in Dower, such Certainties suffice, else all such Inquisitions were liable to be quashed, which would annul all such Proceedings; which would be mischievous; and such Inquisitions have not used to be quashed for Want of such precise Certainty.

Hard. 191.  
Wilford ver.  
Greaves.

A Bill was exhibited by the Attorney General against a Person outlawed, to discover his Real and Personal Estate, and what secret and fraudulent Gifts and Conveyances he had made, because by the Outlawry his Goods and the Profits of his Land were forfeited; to which the Defendant demurred; *quia nemo tenetur prodere seipsum*, and to discover his Estate upon a Forfeiture; but the Court held, that he ought to answer the Bill; because the King is intitled to his Estate by Course of Law, and the Outlawry is in the Nature of a Gift to the King, or a Judgment for him; and a common Person may have a Bill of Discovery in the like Case to intitle him to take out Execution.

Hard 22.  
The Protector  
ver. Lord  
Lumley.

Also in Case of Outlawry, it is said to be the Course of the Exchequer to prefer an Information in Nature of Trover and Conversion against him who hath the Goods of a Person outlawed.

1 Mod. 90.

### 3. Of the Party's Disability to bring any Action.

A Person outlawed cannot regularly maintain any Action, for by his Contumacy he is out of the King's Protection, and shall have no Privilege or (a) Benefit from that Law of which he is a Violator, and to which he refuses to be amenable himself.

Lit. Sect. 197.  
Co. Lit. 128.  
(a) But a Per-  
son outlawed  
may be sued,

being to his Prejudice. Noy 1. 1 Sid. 60. *Legatus Legem Terræ amittit. Glanvil, Lib. 2. cap. 3. Responsdra a Tous mes nul respondra a luy. Cro. Jac. 426. cited from Britton and Bracton.*

This Disability may be taken Advantage of by pleading the same in Bar or Abatement, with this Diversity, that it may be pleaded in Abatement in all Cases, but it cannot be pleaded in Bar, unless the Ground or (b) Cause of the Action be forfeited; as in Felony, where it may be pleaded in Bar to all Actions concerning Lands and Tenements, as well as Goods and Chattels, because all are forfeited by the Felony.

28 E. 3. 92.  
22 Aff. 47.  
63.  
5 Co. 109.  
7 Co. 29.  
Co. Lit. 29.  
(b) If the  
Demandant

in a *Cessavit* be outlawed in a personal Action, this Outlawry may be pleaded in Bar of the Action, because the Arrearages are due to the King. 2 Inst. 298.

But tho' it cannot be pleaded in Bar, unless the Ground or Cause of Action be forfeited, nor in Actions where the Damages are incertain; yet it is now held, that in Actions on the Case, where the Debt to avoid

Dyer 227. in  
Margine.  
3 Leon. 197,  
105.  
the Over 22.

*Cro Eliz.* 203. the avoid the Law-Wager is turned into Damages, there Outlawry may  
*2 Vent.* 282. be pleaded in Bar; for it was vested in the King by the Forfeiture as a  
*3 Lev.* 29. Debt certain due to the Outlaw; and the turning it into Damages, where-  
 by it becomes uncertain, shall not devert the King of what he was once  
 lawfully possessed of.

*1 Jon.* 239. It hath also been held, that Outlawry may be pleaded in Bar after it is  
*Latw.* 1604. pleaded in Abatement; because the Thing is forfeited, and the Plaintiff  
 has no Right to recover.

*1 And.* 36. The Disability cannot be taken Advantage of until the Exigent be re-  
*Co. Lit.* 128. turned; for the Inquiring after him in the County is in order that he  
*Eyer* 317. a. may appear; and therefore if he does appear at the Return of the Exi-  
*Pl.* 6. gent, the Law is satisfied, and the Outlawry must not be recorded  
*2 Rol. Abr.* against him.  
*Sos.*

*Co Lit.* 128. a. Also this Disability is only pleadable when the Plaintiff sues in his own  
*Dist. Pl.* 390. Right; for if he sues in *Auter droit* as Executor, Administrator, or as  
 Mayor with his Commonalty, Outlawry shall not disable him, because  
 the Person whom he represents has the Privilege of the Law, and Out-  
 lawry being no Objection to his Representation, it is no Objection but  
 he should be answered.

*2 Mod.* 267. But it hath been held, that to an Action *qui tam* Outlawry in the  
*& vide* 11 Informer is a good Plea, tho' objected that he sues in Right of the King;  
*Co.* 65. for as to a Moiety he recovers to his own Use, which he cannot do by  
*Hob.* 327. Reason of this Disability.

*Preced. Chan.* So where a Relator in his Information set forth, that he and the De-  
*13. Attorney* fendants were Part-owners of several Coal-Mines in *Derbyshire*, that the  
*General of* King had a Duty of Lot and Cope out of all the Lead-Mines there;  
*the Duchy, at* that by the Custom, if one Owner were at the Expence for the Impro-  
*the Relation* ving and Working a Mine, all the Owners ought to contribute and bear  
*of Mr. Ver-* their Part of the Charge; that the Relator had been at great Charges in  
*nuden ver.* making Soughs and other Things for Working and Improving the Mines,  
*Sr John* without which they could not be wrought, and so the King would lose  
*Heath & al'* his Duty; and that the Defendant would not contribute, nor pay any  
*in the Duchy* Part of the Charge; therefore to make him account with the Relator,  
*Chamber co-* and pay his Part of the Charge, was (amongst other Things) the Scope  
*ram Ch. B.* of the Information. To which the Defendant pleaded an Outlawry in  
*Atkins and* the Relator; and after much Debate the Plea was held good; for tho'  
*Just. Ventris* Mr. Attorney be Plaintiff, yet the Relator is to have the whole Benefit  
*& vide* or Loss of the Suit, and is himself Party to it; for it would abate by his  
*2 Bull.* 134. Death, &c. and the King's Name is only made use of by the Form of the  
*which seems* Court, and he is not directly concerned at all, and very little by Con-  
*cont. & vide* sequence, and the Suit is not for the King's Duty, but the Relator's In-  
*1 And.* 30. terest.

*1 Sid.* 49. If there be two Tenants in Common of a Rectory for Years, and one  
 of them is outlawed, yet the other, on setting forth this Matter, may  
 have an Action of Debt for a Moiety.

*Co Lit.* 128. If the Party outlawed bring a Writ of Error to reverse the Outlawry,  
*Raym* 46. the Outlawry in that Suit, or any Stranger's, shall not disable him; for  
 if he were outlawed at several Men's Suits, and one should be a Bar to  
 another, he could never reverse any of them; and if it be for Error in the  
 same Outlawry, the Outlawry it self is no Objection, for that would be *Ex-*  
*ceptio ejusdem rei cujus petitur dissolutio*; nor is another Outlawry pleadable  
 in Bar to such Writ of Error, for then two erroneous Outlawries would  
 be irreverfible, which would amount to *exceptio ejusdem rei*, &c. So if  
 there be an Attaint brought on a Verdict, Outlawry grounded on that  
 Verdict shall not be pleaded in Bar, for the above Reasons.

*19 Aff.* 10. As this is a dilatory Plea, when it is pleaded in another Court than  
*Dist. Pl.* 396 where the Outlawry issued, the Defendant must bring it in imme-  
*6 Co.* 53. diately; for this being in Delay, if the Court should give Time, and it  
*5 Co.* 88. should not be brought in, Delay of Justice would be from the Court;  
*8 Co.* 142. and

and since there is a Way of having it immediately, by producing it under the Great Seal, no Time shall be given to bring it (a) *sub pede sigilli*; (a) That Outlawry must be pleaded ready in Court. *sub pede sigilli*, otherwise the Plaintiff may refuse it, he shall not afterwards demur for that Cause. 1 Salk. 217.

In pleading Outlawry in Disability in another Court, the antient Way was to have the Record of the Outlawry it self *sub pede sigilli* by *Certiorari* and *Mittimus*; but this being very expensive, it is now held to be sufficient, to plead the *Capias utlagatum* under the Seal of the Court from whence it issues; for the Issuing of the Execution could not be without the Judgment, and therefore such Execution is a Proof to the Court that there is such a Judgment; which is a Proof, that the Defendant's Plea of a Matter of Record is proved by a Matter of Record, and therefore appears to the Court not to be a meer Dilatory; and therefore on shewing such Execution, if the Plaintiff will plead *Nul tiel record*, the Court will give the Defendant a Day to bring it in.

Outlawry in a County Palatine cannot be pleaded in any of the Courts at *Westminster*, for he is only ousted of his Law within that Jurisdiction; and it shall not extend to disable a Man in another County where they have no Power; for the County Palatine being a Royal Jurisdiction within Bounds, the Losing the Privileges of the Law within that Jurisdiction can be no Disadvantage to him in another County; and if he does not live within the Palatine Jurisdiction, he is not obliged to attend there; but it seems, that Outlawry in the County Palatine of *Launcester* may be pleaded in the Courts of *Westminster*; because that County was erected by Act of Parliament in *Ed. III.*'s Time, but *Durham* and *Chester* are by Prescription.

If Outlawry be pleaded either in Bar or Abatement, and the Plaintiff replies *Nul tiel record*, and the Defendant has a Day given him to bring in the Record, and in the Interim the Plaintiff removes the Record by Writ of Error, and reverses it; tho' the Defendant fails in bringing in the Record, yet this shall not be fatal and peremptory on him; for in the first Case he shall have Liberty to plead a new Bar, and in the second, the Judgment shall only be a *Respondeas ouster*; because his Plea was a true Plea at the Time of pleading it, and the Plaintiff was actually disabled from suing, not having then his *Liberam legem*.

So that Outlawry does not abate the Writ, but is only a Temporary Impediment that disables a Plaintiff from proceeding; for upon obtaining a Charter of Pardon, or reversing the Outlawry, he is restored to his Law, and shall oblige the Defendant to plead to the same Writ.

*Audita querela* to avoid a Statute upon the Statute of Usury; to which the Defendant pleaded Outlawry in the Plaintiff at the Suit of *J. S.* and on Demurrer it was insisted, that Outlawry could not be pleaded in this Case, the Suit being only by way of Discharge, and not to recover any Thing; but it was held, that a Person outlawed is not receivable to sue in any Court, unless it be to reverse his own Outlawry; and the Chief Justice said, that where the Action is *ad lucrandum*, there ought to be Ability in the Person, and that it is all one to gain by way of Discharge, as by way of Perquisition.

But where Error was brought by six to reverse a Judgment in Ejectment, and the Defendant in Error pleaded Outlawry in one of the Plaintiffs; the Plea was held ill on Demurrer, because this was only a Commission which went in (b) Discharge, and in which all the Plaintiffs were obliged to join; it was also said in this Case, that it would be very mischievous upon an Outlawry in case of (c) Error, Attaint or Au-

That if two Plaintiffs in Debt be barred, and bring Error, the Outlawry against one is a good Bar against the other, because they are to recover. *Cro. Jac. 616.* (c) But for this, *vide Cro. Eliz. 648.* 6 Co. 25. *Cro. Jac. 117.*

dita

*dita querela*, which are only by way of Discharge, if this should be any Bar.

1 Sid. 43.  
Tafon ver.  
Kete.

A Person is outlawed in Debt, and taken upon a *Capias* and committed to the *Fleet*, the Keeper of the *Fleet* lets him escape voluntarily, and afterwards the Executor of the Plaintiff in Debt takes him in Execution again upon a new Writ, and upon this second Taking he brings an *Audita querela*; to which Outlawry in the Plaintiff in the *Audita querela* was pleaded; upon which Plea he demurred; and it was resolved, that Outlawry was a good Plea in this Case in Disability of the Plaintiff; because that this Writ is not directly to reverse the Outlawry, (as a Writ of Error is) but is founded upon a Wrong, *viz.* upon the Escape, and not upon the Record only.

1 Salk. 178.  
Moor ver.  
Green.  
5 Mod. 11.  
S. C.

In Debt upon a Judgment brought in *Trinity* Term, the Defendant imparled till *Michaelmas* Term, and then pleaded in Bar, that the Plaintiff *die lune prox' post test' Sancti Martini* was outlawed; to which the Plaintiff demurred; it was urged, that the Outlawry was mesne between the Action brought and the Plea pleaded, and that all Matters in Discharge of the Action, which happen after the Action brought, ought to be pleaded *puis darrein continuance*; but the Court compared this to the common Case of a Judgment confessed by an Executor after an Action brought; which is never pleaded after *Puis darrein continuance*, but as this Case is; and in these Cases the Time of the Outlawry, and the Time of the Judgment, and when it was, appear in themselves.

3 Lev. 29.

In pleading Outlawry, it hath been adjudged, that the Defendant must conclude his Plea with a *prout patet per recordum*, and not *hoc paratus est verificare*.

Cro. Car. 566.  
Dawson ver.  
Lee.

If the Defendant after Imparlance pleads Outlawry in Bar, and the Plaintiff replies *Nul tiel record*, and the Defendant hath a Day to bring in the Record, and fails therein, Judgment shall be given absolutely against him, and not a *Respondeas ouster*.

Carth. 8, 9.  
Trewelian ver.  
Seccomb.  
1 Show. 80.  
S. C.

If ten Outlawries on mesne Process be pleaded in Disability of the Plaintiff this is naught for Duplicitly; for tho' there be a Difference as to pleading double between Pleas in Bar and Abatement, there is likewise a Difference between a Plea of an Outlawry in Disability and other Pleas in Abatement; and the Court held this Plea ill for Duplicitly, because the Plaintiff is disabled as well by one Outlawry as by all the other nine, to which several Answers are required.

That this  
Plea must be  
on Oath.  
2 Vern. 37.

Outlawry may be pleaded to a Bill in Equity, as well as to an Action at Common Law; and in this Case the Defendant need not set down the Plea, as he must other Pleas and Demurrers, in eight Days, or they must stand over-ruled; but the Plaintiff must set it down, if there be any Insufficiency in Point of Form in pleading; for being *sub pede sigilli* it appears, upon shewing of it, to be a good Plea, and therefore not presumed to be necessary to be argued before the Court; also if an Outlawry be not pleaded, yet it may be shewed at the Hearing as a peremptory Matter against the Plaintiff's Demand, if it be personal; because it shews the Right of the Thing in Demand to be in the King. If a Plea of Outlawry stand allowed, whereby the Suit is put *sine die*, and after the Outlawry is reversed, the Plaintiff must bring his Bill of Revivor; because that Suit being abated, the Defendant has no Day in Court, and therefore must be brought into Court by a new Process.

(a) That to  
avoid Pleas  
of Outlawry,  
the Plaintiff  
may make  
all that have  
Outlawries  
against him  
Defendants.

But if the Bill be for Relief against an Action at Law, and an Outlawry be pleaded by the Defendant in the same Action, it will not be allowed; (a) because the Outlawry is Part of the Grievance, and it is *exceptio ejusdem rei cujus petitur dissolutio*; also, as at Law, an Outlawry in an Executor, Administrator or Guardian, is no good Plea, because they do not claim in their own Right; and the real Actor being the Testator or Infant, the Outlawry in any third Person is no Exception against him why he should not share *in judicio*.

2 Vern. 199. per Hutkins Lord Commissioner.

#### 4. What farther Disabilities Outlawry subjects the Party to.

Persons outlawed are under several other Disabilities, besides that of *Co. Lit. 6. l.* bringing an Action; such a one cannot be a Juror, because he is not *Liber & legalis homo*, as the Law requires. *Lib. & vide Title Juries.*

But one outlawed in a personal Action may be a Witness, tho' he cannot be a Juror. *Vide Title Evidence.*

A Person outlawed cannot be an (a) Auditor to take Accounts. *Co. Lit. 6. l.*

Person outlawed may be a private Attorney. *Co. Lit. 52. a.*— May be Executors or Administrators, *vide Title Executors and Administrators.*— Incapable of executing an Office in a Corporation. *Carth. 199. Shew. 288.*

One outlawed in a personal Action cannot be an Approver; because *2 Hawk. P. C.* by his Outlawry he is out of the Law, and his Accusation shall not be of such Credit as to put any Person on his Trial. *205.*

If a Man pledge Goods and then is outlawed, he cannot redeem them; *1 Bulst. 29.* because then the absolute Property of them is in the King; but if the Outlawry be reversed, then the outlawed Person is re-instated in his Property as if there had been no Outlawry, and therefore may redeem them.

Persons outlawed in Debt, Trespas or other Civil Action, may be Heirs. *Co. Lit. 8. b.*

If a Husband be outlawed in Trespas, or any Civil Action, the Wife shall have Dower, for this works no Corruption of Blood, or Forfeiture of Lands; so likewise it seems if the Wife be outlawed or waived in such Actions, yet her (b) Dower is not forfeited. *Brock 82. Perk. 588. Co. Lit. 31. a.*

Tenant by the Curtesy, tho' he be outlawed in a Civil Action. *5 Co. 110. Co. Lit. 92. b. 391. a.*

A being outlawed, the Queen granted him a Lease for Years, rendering Rent, he was again outlawed after the Grant, but before any Seizure there was a Pardon of all Goods and Chattels forfeited; and it was adjudged, that a Person outlawed was capable of receiving a Lease, and that by the Pardon, the Term which was forfeited revived, and was restored again. *Owen 116. Knowles ver. Powell. Moor 237. S. C.*

It is held, that where Clergy is allowable, it shall be as much allowed to one who is outlawed by Common Law for Felony, as to one who is convicted by Verdict or Confession; also a Statute taking away the Benefit of Clergy, from those who shall be found guilty, doth not thereby take it from Persons who are outlawed; neither doth the Statute of *25 H. 8. cap. 1. sect. 3.* which takes away Clergy from those who are found guilty after the Laws of this Realm, extend to Persons outlawed. *11 Co. 29, 31. 2 Hawk P. C. 343, 350.*

By the Statute of *Westm. 1. cap. 15.* it is enacted, that if a Person be attaint by Outlawry of any Felony, he is notailable; but it is held, that the Court of King's Bench may in their Discretion, in some special Cases, bail a Person upon an Outlawry of Felony; as where he pleads, that he is not of the same Name with the Person that was outlawed, or alleges any other Error in the Proceedings. *2 Inst. 187. 2 Hawk. P. C. 97.*



(E) Of the Regularity of the Proceedings on an Outlawry, and (a) for what Errors it may be reversed : And herein,

(a) By Statute of Recusancy the Outlawry of a Recusant not to be reversed for Want of Form.

5 *Mod.* 141.

3 *H.* 6. 9.

1 *Roll. Abr.* 793.

*Finch of Law*

351, 355

*Raft Ent* 188

pl. 18.

*Co. Lit.* 259.

1. Where, for want of such Process as required by Law, the Outlawry may be reversed.

THE Forfeitures and Penalties in an Outlawry being so severe, great Care hath been taken and Caution used, that no Person should be outlawed without sufficient Notice, and great Contumacy to the Process of the Court; and therefore the Law requires, that in all Civil Causes and in every Indictment or Appeal for any Crime under the Degree of Capital, there should be three *Capias's* to the Sheriff of the County where the Action or Prosecution is commenced, before the Exigent is awarded; and if any such Process is omitted, the Outlawry is erroneous.

40 *E.* 3. 25.

pl. 28.

*Finch* 476.

(b) So after

Judgment

there need

not be any

Proclama-

tions to the

County where he resided.

*Cro. Jac.* 577.—If one is outlawed in *Middlesex* a *Capias utlagat'* may be sued out against him in any other County without a *Testatum*.

1 *Vent.* 33. 2 *Hale's Hist.* 198.

But (b) after Judgment upon a *Capias ad satisfaciendum*, an Exigent may be awarded, without an *Alias* and *Pluries*, and thereupon the Defendant be outlawed; because he having been already in Court before Judgment, and having Confessance of the Debt, ought to pay the Debt on the first suing out of the *Capias*; otherwise it is a Contumacy in not performing the Judgment of the Court, for which Disobedience he is put out of the King's Protection.

2 *Hawk. P. C.*

303.

It is said to be agreed, that one *Capias* before the Award of the Exigent hath alway been sufficient in an Indictment or Appeal of Death, or High Treason; but that it seems doubtful whether two *Capias's* were not required by the Common Law in all Indictments and Appeals of any other Felony; however, says *Hawkins*, it is (c) certain, that they are required in all Indictments of any other Felony by 25 *E.* 3. 14. by which it is recorded, 'That if after any Man be indicted of Felony before the Justices in their Sessions, to hear and determine, it shall be commanded to the Sheriff to attach his Body by Writ or Precept, which is called a *Capias*; and if the Sheriff return that the Body is not found, another shall be incontinently made, returnable at three Weeks after, wherein it shall be comprised, that the Sheriff shall cause to be seised his Chattels, and safely to keep them 'till the Day of the Writ or Precept returned; and if the Sheriff return, that the Body is not found, and the Indicttee cometh not, the Exigent shall be awarded, and the Chattels shall be forfeit, as the Law of the Crown ordaineth; but if he come and yield himself, or be taken by the Sheriff or by other Minister, before the Return of the second *Capias*, then the Goods and Chattels shall be saved.

2 *Hawk. P. C.*

303.

It is said to have been the general Opinion, that this Statute extends to Appeals, as well as to Indictments, tho' it mention only the latter; but that it extends not to any Indictment or Appeal of Death, tho' it speak of Felony in general.

2 *Hawk. P. C.*

303.

It is left a *Quere*, if three *Capias's* be still necessary in an Appeal of Rape, as they were at the Common Law, notwithstanding it be made Felony by Statute.



## 2. Where for want of form in such Processes the Outlawry may be reversed.

If any Process required in an Outlawry be erroneous, the Outlawry for this may be reversed; for a Person shall not be subject to any Disadvantage in respect of having such Process awarded against him, nor shall he be condemned barely for not appearing, where that which should have compelled him to have appeared is (a) defective.

Writ of Proclamation, and for improper Abbreviations, the Outlawry was reversed. *Stile* 182. —So where in the Exigent it was *Uilest* for *Utlagat*, the Outlawry was reversed. *Stile* 227. So where it was *Utlegat* instead of *Utlagat*. 1 *Lev.* 162. —But it is said, that a Defect in Process in an Outlawry may be salved by the Defendant's Purchasing a Pardon, and shewing it to the Court; for that supposes that there was such an Outlawry against him as needed a Pardon, which if it were erroneous it would not do. 2 *Hawk. P. C.* 302.

As where the *Capias* was *este Edmundo Anderson*, without a *T*, for this Error the Outlawry was reversed; for the *Capias* and Exigent must be in the King's Name, and under the Judicial Seal of the King appointed to that Court that issues the Process, and with the *Teste* of the Chief Justice or Chief Judge of that Court or Sessions.

Every *Capias* ought to be returnable the ensuing Term, for the Mischief that might otherwise befall the Prisoner in being kept always in Prison.

The *Capias utlagatum* can issue only in Term-time, being a Judicial Writ; yet in pleading an Outlawry the Party need not alledge that it issued in Term-time; for that it shall be so intended, unless the contrary appears.

If the Process be against a Feme, and the Words are, *Quas recuperavit versus Eum*, instead of *Eam*; this is (b) such an Error for which the Outlawry may be reversed.

upon a Writ of Error, for that in the Exigent it was fourteen in Figures, and not in Words. 2 *Keb.* 128. So where the Year of the Lord was in Figures, and not in Words. *Stile* 334. —So where it was *ex insinuatione* for *ex insinuatione*, for want of *i*, the Outlawry was held to be erroneous. *Cro. Jac.* 577.

If the Writ be *Præcipimus vobis* instead of *Præcipimus vobis*, this is erroneous; for without a Command to the Sheriff the Writ is not good, and here there is none; the Word *Præcipimus* being senseless is of no greater Force than if omitted.

## 3. Where for Variance in such Processes the Outlawry may be reversed.

If there be a Variance between the Original and Extent or other Processes, for this the Outlawry may be reversed.

As a Variance between the original Writ and Filazer's Rule. 2 *Leon.* 120. So where in Error to reverse an Outlawry in Trespass, in the Original the Plaintiff was named *Barnes*, and in the Exigent *Bernes*; this was held Error; so where in the Original it was *Blaba sua*, and the Exigent was *Blada*; this was held a plain Variance, and the Outlawry was reversed.

So where in the Original the Party was named *Agnes Gargrave* of *King'sley in Com' Ebor'*, and in the Exigent she is named *Nuper de King'sley*; this was held Error.

## 4. Where

#### 4. Where for a defective Execution and Return the Outlawry may be reversed: And herein,

##### 1. To whom such Process is to issue and be executed.

The Exigent and several Processes in Order to an Outlawry, are to be directed to the Sheriff of the proper County; and such Care hath been taken that there might be no Surprize in the Affair, that in Civil Cases there are three several Offices concerned in the Issuing of such Process: the first is the Chancery, out of which the Original issues; the second, the Philazer, who makes out the *Capias*, *Alias* and *Pluries*; and the third, the Exigenter, who makes out the Exigents; which several Processes must be legally executed before the Party can be said to be outlawed; therefore if the Sheriff returns a *Cepi*, if he have not the Body at the Day, the Court will not award an Exigent on the Suggestion of an Escape, unless the Sheriff will return one.

2 Hale's P. C. 525.

Cro. Jac. 576.

If the Exigent be directed to the Sheriffs of the City of *Lincoln*, and the Direction is *Quod Capias Corpus ejus ita quod Habeas Corpus ejus*, where (as it was objected) it ought to have been *Capiatis & habeatis*; yet this is no Error, for they are both but one Officer to the Court, and tho' in the End of the Writ it was *Ita quod habeatis ibi hoc breve*; this was likewise held to be good, and no way repugnant, being good both Ways.

Fetley 95.  
1st Rep. 150.  
S. C.

But if in the Direction of Process of Outlawry to the Sheriffs of *London*, it be *Præcipimus tibi* instead of *vobis*; this is such an Error for which the Outlawry will be reversed, because that the Court will *ex officio* take Notice that there are two Sheriffs in *London*.

Dyer 225. pl. 24.  
Bro. Ceram. 166.  
3 Inst. 212.

Judgment of Outlawry is given by the Coroner at the fifth County-Court, upon the Party's not appearing to the Exigent, (which is a Writ, commanding the Sheriff to cause the Defendant to be demanded from County-Court to County-Court until he be outlawed, &c.) and such Judgment is entered thus, *Ideo, &c. per judicium Coronatoris Domini Regis Comitatus prædicti utlagatus est.*

Co. Lit. 288.  
Dyer 317. pl. 6.  
S. Co. 126.  
Cro. Eliz. 648.  
Palm. 43.

If the Judgment appear not by the Return of the Exigent to have been given by the Coroner, it is erroneous, except in *London*, where the Mayor by Custom is Coroner, and the Judgment given by the Recorder.

2 Hale's Hist. P. C. 204.

If there be two Coroners in a County, the Calling upon the Exigent may be by one of them, and likewise one alone may give the Judgment of Outlawry; but it seems, the Return must be by two in Ministerial Acts; the Name of the Coroner must be subscribed to the Judgment of Outlawry at the *Quinto exactus* upon an Outlawry of Felony; and it must be subscribed also by the Name of their Office, *A. B. & C. D. Coronatores*, unless in *London*, where the Mayor is Coroner; the Sheriff's Name and Office must also be subscribed to the Return of the Exigent, *e. g. A. B. Armiger vicecomes.*

Ny 113.  
An Attachment granted against the Coroners of York.

If after the *Quinto exactus* the Coroners refuse to give Judgment of Outlawry, the Court will grant an Attachment against them; and it is said, that the Coroners of *Stafford* for such an Offence were fined 10*l.* but after the Judgment of the Outlawry pronounced, they may (a) stay the Return of the Exigent for to be advised, if the Case requires it.

(a) That a Certiorari lies to return the Outlawry, which must be returned by the Sheriff on the *Exigi facias*, and such Return recorded in the Court above. Dyer 225. a.

2 Hale's Hist. P. C. 36.

By the Statute of 34 H. 8. cap. 14. The Clerks of the Crown, Clerks of Assize, and Clerks of the Peace, are to certify into the King's Bench the

the Names of all Persons outlawed, attainted or convicted; and upon Letter from the Justices aforefaid, Certificates shall be made of such Persons outlawed, attain or convict, to the Justices of Gaol-Delivery.

2. To what Place the Process is to issue; and therein of the *Quinto exactus*, and Proclamations on an Outlawry.

The Exigent must be sued to the County where the Party really resides, for there all Actions were originally laid; and because that Outlawries were at first only for Treason, Felony, or very enormous Trespases, the Process was to be executed at the Tourn, which is the Sheriff's Criminal Court; and this held not only before the Sheriff but before the Coroners, who were ancient Conservators of the Peace, being the best Men in each County, to preside with the Sheriff in his Court, and who pronounced the Outlawry in the County-Court on the Party's being *Quinto exactus*; and therefore anciently there was no Occasion for any Process to any other County than that in which the Party actually resided; but this Matter being since altered, and the Learning thereof depending on several Acts of Parliament, it will be necessary to take Notice of the Statutes themselves.

And first, it is enacted by the 6 H. 6. cap. 1. ' That before any Exigents be awarded against Persons indicted in the King's Bench of Treason or Felony, Writs of *Capias* shall be directed as well to the Sheriff or Sheriffs of the County wherein they be indicted, as to the Sheriff or Sheriffs of the County whereof they be named in the Indictments; the same *Capias* having the Space of six Weeks at the least, or longer Time, by the Discretion of the said Justices, if the Case require it, before the Return of the same; which Writs so returned, the Justices shall proceed in the Manner as they had done before the Statute; and if any Exigent be awarded, or any Outlawry pronounced against such Persons, before the Return of the said Writs, the same Exigent so awarded, with the Outlawry thereof pronounced, shall be void and holden for none.

And it is farther Enacted by 8 H. 6. cap. 10. ' That upon every Indictment or Appeal, by the which any Subject dwelling in other Counties than where such Indictment or Appeal shall be taken of Treason, Felony and Trespases, before the Justices of the Peace, or before any other having Power to take such Indictments or Appeals, or other Commissioners or Justices in any County, Franchise or Liberty of England, before any Exigent awarded, presently after the first Writ of *Capias* returned another Writ of *Capias* shall be awarded, directed to the Sheriff of the County whereof he who is indicted is or was supposed to be conversant, by the same Indictment, returnable before the same Justices, before whom he is indicted or appealed, at a certain Day, containing the Space of three Months from the Date of the said last Writ, where the Counties be holden from Month to Month, and where the Counties be holden from six Weeks to six Weeks, the Space of four Months, until the Day of the Return of the said Writ, by which Writ of second *Capias* the Sheriff shall be commanded to take him which is so indicted or appealed by his Body, if he can be found within his Bailiwick; and if he cannot be found within his Bailiwick, to make Proclamation in two Counties before the Return of the same Writ, that he which is so indicted or appealed shall appear before the said Justices, &c. at the Day contained in the said Writ, to answer, &c. after which Writ so served and returned, if he which is so indicted or appealed come not at the Day of such Writ returned, the Exigent shall

*Fitz. Exigent,*

26.

*Lyer* 295.

‘ shall be awarded; and that every Exigent and Outlawry otherwise awarded or pronounced shall be holden for none and void.

But it is expressly provided, ‘ That the above recited Statute concerning Procefs to be made before the King in his Bench stand in Force, and that this present Statute shall not extend to Indictments or Appeals taken within the County of *Chester*; and that if any Persons shall be indicted or appealed of Felony or Treason, and at the Time of the same Felony or Treason supposed was conversant within the County whereof the Indictment or Appeal makes mention, the like Procefs to be made against them as was used before.

And it is farther enacted by 10 *H. 6. cap. 6.* ‘ That such second *Capias* as is required by 8 *H. 6. cap. 10.* shall be awarded upon Indictments or Appeals removed into the King’s Bench, or elsewhere, by *Certiorari* or otherwise.

And by the 31 *Eliz. cap. 3.* it is enacted, ‘ That in every Action personal, wherein any Writ of Exigent shall be awarded out of any Court, one Writ of Proclamation shall be awarded and made out of the same Court having Day of *Teste* and Return, as the said Writ of Exigent shall have directed, and delivered of Record to the Sheriff of the County where the Defendant, at the Time of the Exigent so awarded, shall be dwelling; which Writ of Proclamation shall contain the Effect of the same Action: And that the Sheriff of the County, unto whom any such Writ of Proclamation shall be directed, shall make three Proclamations in this Form following, and not otherwise; that is to say, one of the same Proclamations in the open County-Court, and one other of the same Proclamations to be made at the General Quarter-Sessions of the Peace in those Parts where the Party Defendant, at the Time of the Exigent awarded, shall be dwelling, and one other of the same Proclamations to be made one Month at the least before the *Quinto exactus* by Virtue of the said Writ of Exigent, at or near the most usual Door of the Church or Chapel of that Town or Parish where the Defendant shall be dwelling at the Time of the Exigent so awarded; and if the Defendant shall be dwelling out of any Parish, then in such Place, as aforesaid, of the Parish in the same County, and next adjoining to the Place of the Defendant’s Dwelling, and upon a Sunday immediately after Divine Service and Sermon, if any Sermon there be; and if no Sermon there be, then forthwith after Divine Service; and that all Outlawries had and pronounced, and no Writs of Proclamations awarded and returned according to the Form of this Statute, shall be utterly void and of none Effect.

In the Construction of these Statutes the following Opinions have been holden:

*Cro. Eliz.* 179.  
3 *Co.* 59.  
*Plow.* 137.  
*Heb.* 166.

‘ That tho’ the Words are express, that any Outlawry pronounced contrary to the Directions of the Statute shall be void; yet it is not to be taken, as if such Outlawries were absolutely void, but only voidable by Writ of Error.

2 *Hawk P. C.*  
304-5.  
2 *Hale’s Hist.*  
*P. C.* 195-6.

‘ If a Defendant be expressly named of the same County wherein he is indicted or appealed, and be also named under an *Alias dictus* of another, it hath been adjudged, that there is no need of any *Capias*, with a Command for Proclamation according to 8 *H. 6.* because that which comes under the *Alias dictus* is no Way traversable nor material: Also if a Defendant be named of *B.* and late of *C.* there is no need of any *Capias* to the Sheriff of the County wherein *C.* lies; because that it appears, that the Defendant is at present conversant at *B.* but if a Defendant be named of no certain Place at present, but only late of *B.* and late of *C.* and late of *D.* &c. being all of them in Counties different from that in which the Prosecution is commenced, a *Capias* shall go to the Sheriff of every one of those Counties.

On a Writ of Error to reverse an Outlawry upon the Statute of 5 *Eliz.* Cro. Jac. 167. Lesche's Case. of Perjury, the first Error assigned was, that he was indicted by the Name of *N. L. de parochia de Aldgate*, and not shew in what County *Aldgate* is. 2dly, For that a County-Court was held 23 *Feb.* and the next County-Court was held 23 *March* following, so as there were not twenty-eight Days between these two County-Courts, as there ought to be by the Law, exclusive and not inclusive. And for the first Cause it was reversed; altho' it was objected to be well enough, because *Middlesex* was in the Margin, so the Parish should be intended to refer thereto; but because an Indictment shall not be taken by Intendment, and because the County in the Margin shall be referred to the Place where the Offence was committed, and not to the Indictment of the Party; and by the Statute of 8 *H.* 6. there ought to be the Addition of the Place and County where the Party indicted inhabits; therefore it was held to be ill, and reversed for the second Cause; also it was held to be erroneous; but *Tanfield* said, that ought to be assigned as an Error in *Fait*, for it might be Leap-Year, and then it is good, and that Matter issuable.

If an *Exigi facias* be delivered to the Sheriff, and there are but two County-Courts before the Return, and the Sheriff return the first and second *Exactus*, & non comparuit, and that there were no more County-Days between the Delivery of the Writ to him and the Day of the Return, there may issue a special *Exigi facias* with an *Allocato comitatu*, if it be prayed after the Return, and before any new County-Day be past; but if any County-Day be past between the last of the former County-Days and the Return, no *Exigi facias* shall issue with an *Allocato comitatu*, but an *Exigi facias de novo*; for the Demand of the Party must be at five County-Courts successively held one after another without any County-Court intervening; so if after the second *Exactus* the Offender render himself, and find Mainprize, and at the Day of the Return make Default, no *Exigi facias* with an *Allocato Comitatu* shall issue, because three County-Days intervened, but a new Exigent and a *Capias* against the Bail.

And therefore it hath been holden, that in *London*, where the Holding of the *Hustings* is uncertain, no *Exigi facias* shall issue with an *allocato Hustings*, because the Court cannot take Notice of the set Times of holding it, as they may of the Times of holding the County-Courts; but it is now agreed, that if an Exigent issues in *London*, and they begin *Husting de placito terre* (as they may) they shall proceed along at that *Hustings* to the Outlawry, without mingling their *Hustings de communibus placitis*; but if an *allocato Husting* comes, they shall proceed without omitting any *Husting*.

### 3. What shall be said a good Execution and Return.

Before a Person is pronounced outlawed he is to be *Quinquies exactus*, for he hath three Days for Appearance, one for Grace, and if he stands in Contempt at all these Days, at the fifth County-Court he is pronounced outlawed by the Coroners; and therefore (a) if a Person be outlawed the Day of the *Quinto exactus*, this is Error, because he hath all that Day to appear.

But if an Exigent be awarded against *A.* and after he is *Quinto exactus*, and before the Return of the Exigent, he dies, yet the Outlawry shall stand in its Force, and shall not be reversed; for Judgment was by the Coroners upon the *Quinto exactus*, and they may certify the Outlawry; but otherwise (b) if *A.* had died before the *Quinto exactus*.

ment of Murder an Exigent be awarded, but before the Return the Party dies, his Executors may by Writ of Error, setting forth the special Matter, reverse the Proceedings. 5 *Co.* 111. *a.* *Eaton's Case* cited in *Foxley's Case*.—That an Executor may reverse an Outlawry. 2 *Keb.* 507.—That an Heir or Executor may. 2 *Hawk.* P. C. 461.—But a Gaoler or Sheriff cannot take any Advantage of an Error in an Outlawry. *Dyer* 67. *a.* 3 *Keb.* 286.

(a) *Cro Jac.*  
660.  
*Palm.* 280.  
*S. C.*

*Noy* 49.  
*Hartland ver.*  
*Rates.*

(b) If upon  
an Indict-

If

If, on an Outlawry against two, it be returned, that *Exacti non comparuerunt*, without saying *nec aliquis eorum comparuit*, this is erroneous; *Clark's Case*. for peradventure one of them did appear.  
 1 *Rel. Abr.* 802.  
 2 *Rel. Rep.* 440. S. C. adjudged. 3 *M.d.* 89. S. P. adjudged.

So where a *Capias*, and thereupon an Exigent, was awarded against five, *viz.* three Men and two Women, and the Return was, *Quod ad quartum comitatum, &c. non comparuerunt*, without saying *nec eorum aliquis comparuit*; and this was held to be manifest Error; and it being likewise returned *utlagati existunt*, where for the Women it ought to have been *Warrante*, this was likewise held to be Error.

The Return must shew where the County-Court was held, and in what County, and this must be shewn on every *Exactus*; and therefore  
 2 *Hale's Hist.* P. C. 203. (a) an Outlawry was reversed, because the Place where the County-Court was held was not shewn on the *secundus Exactus*; so (b) where not shewn on the *tertio Exactus*.  
 (a) *Stile* 451. (b) 1 *Keb.* 50.

Also the Party must be named of such a Place (c) in *Com' Midd'*, and not *de Midd'*.  
 Cro. Jac. 616. (c) An Outlawry in *London* was reversed upon a Writ of Error, because the *Hustings* were set out to be held in, but not for the City. *Trin.* 6 *Geo.* 2. *Martin* ver. *Duckett*.

If the Sheriff returns, that *ad Comitatum meum S. tent' apud C.* and says not *in Com' præs'*, or *in Com' S.* this is erroneous.  
 11 *H.* 7. 10. a. 2 *Rel. Abr.* 802.  
 2 *Hale's Hist.* P. C. 203.

So if it be *ad Comitatum meum tentum apud S. in Com' Somers'*, and says not *ad Comitatum meum Somers'*, or *ad Comitatum Somers'*, without saying *ad Comitatum meum Somers'*; this is erroneous.  
 2 *Rel. Abr.* 802.  
*Palm.* 480. *Latch* 210.

So an Outlawry was reversed, for that the Proclamations were returned to be *ad Comitatum meum tent' apud* such a Place *in Com' præs'*, and not said *pro Com'*; for antiently one Sheriff had two or three Counties, and might hold the Court in one County for another.  
 1 *Vent.* 108. 1 *Shew.* 319.  
 3 *Mod.* 89. 2 *Keb.* 141. *Corb.* 19.  
 2 *Shew.* 63, 68. 1 *Lev.* 164.

The Sheriff must return the Day and Year of the King to every *Exactus*; and therefore if the Day and Year of the King be inserted in the 1<sup>st</sup>, 2<sup>d</sup>, 3<sup>d</sup>, and 5<sup>th</sup> *Exactus*, but omitted in the 4<sup>th</sup>, it is erroneous, and shall not be supplied by Intendment.  
 2 *Rel. Abr.* 802.  
 2 *Hale's Hist.* P. C. 203.

So if it be *Anno Regni Dominae Reginae*, without saying *Elizabethæ*, without saying *Reginae*, or *Anno Regni Domini Regis Jacobi*, without saying *Regni suæ Angliæ*, for the Year of *England* and *Scotland* differ; so if there be less than a Month between the first and second *Exactus*; in these Cases the Outlawry is erroneous.  
 2 *Rel. Abr.* 803.  
 2 *Hale's Hist.* P. C. 203.

So if the Return be *ad Husting tent' apud Guild-hall Civitatis London*, without saying *de communibus Placitis*, it is erroneous; because they have two Hustings, one *de Communibus Placitis*, another *de placitis terre*.  
 2 *Rel. Abr.* 803. *Chapman's Case*.

If an Outlawry be returned, that the Party was *exact'* at three several Times, 10 *Jac.* and that he was *Quarto exact'* 25<sup>th</sup> Day of *Feb'* & *Quinto exact'* such a Day in *March*, 10 *Jac'*, altho' it may be intended, that he was *Quarto exact'* in 10 *Jac.* yet the Outlawry shall not be good by Intendment; for perhaps the Clerk would have made it *Quarto Exact'* 8 *Jac.* which would have been clearly bad.

(F) Of the Manner of reverſing an Outlawry; and therein of the Difference between Errors in Fact and in Law.

Outlawries are regularly to be reverſed by Plea by Writ of *Identitate nominis*, or by Writ of Error, for any Errors, be they Errors in Fact or in Law. <sup>2 Hale's H. p. P. C. 207.</sup>

As to Errors in Fact; as that in Felony, the Party was an Infant under the Age of fourteen, was in Priſon or beyond Sea; theſe can regularly be only taken Advantage of by Writ of Error; but it is agreed, that by the Common Law *in favorem vite* an Outlawry of Treafon or Felony might be avoided by Plea, that the Defendant was in Priſon, or in the King's Service beyond Sea, &c. at the Time of the Outlawry pronounced againſt him; but that no Outlawry for any other Crime (againſt a Party rightly deſcribed) can be avoided by Plea of any Matter of Fact whatſoever. <sup>Co. Lit. 259. 2 Hawk. P. C. 460.</sup>

As to avoiding of an Outlawry of Felony, becauſe the Party was beyond the Sea, theſe Differences are laid down by Rolle and Hale, as agreed to by the Court. 1<sup>ſt</sup>, That if a Man, having committed a Felony, goes beyond the Sea voluntarily, or upon his own Occaſions, and not in the King's Service, before any Exigent awarded, tho' after the Indictment, and then an Exigent is awarded, and the Offender beyond the Sea is outlawed for the Felony, he may aſſign it for Error. 2<sup>dly</sup>, But if after the Exigent awarded upon the Indictment of Felony, then he goes beyond the Sea voluntarily, or upon his own Occaſions, and being ſo beyond Sea is outlawed, he ſhall not avoid it by ſuch being beyond Sea; becauſe by the Exigent awarded he has Notice of the Proſecution, and by ſuch a Means he may avoid his Conviction, by ſtaying till all the Witneſſes are dead. 3<sup>dly</sup>, But yet *prima facie* the Error in that Caſe is well aſſigned, by alledging he was *ultra mare tempore promulgationis utlagariæ*; and if he were in the Realm after the Exigent iſſued, it ſhall come in by the Plea of the King's Attorney to ſhew it. 4<sup>thly</sup>, But if he were within the Realm at the Time of the Exigent iſſued, and went beyond the Sea upon the Service of the King or Kingdom, and then is outlawed, being beyond the Sea, this Outlawry ſhall be reverſed; if the Party alledge generally, that he was *ultra mare tempore promulgationis utlagariæ*, and the King's Attorney reply, that he was in *England tempore emanationis brevis de Exigi facias*, it is a good Replication for the Plaintiff in the Writ of Error to alledge, that he went out after the Exigent, and before the Outlawry pronounced, upon the King's Command or Service, and ſhew it ſpecially, and ſo confeſs and avoid the Plea. <sup>2 Rol. Abr. 804. 2 Hale's Hiſt. P. C. 208.</sup>

As to the Avoiding an Outlawry in Treafon, on the Party's being beyond Sea, it is enacted by the 26 H. 8. cap. 13. and 5 & 6 E. 6. cap. 11. That all Proceſs of Outlawry to be had or made within this Realm againſt any Offenders in Treafon, being reſiant or inhabiting out of the Limits of this Realm, or in any of the Parts beyond the Seas, at the Time of the Outlawry pronounced againſt them, ſhall be as good and effectual in Law, to all Intents and Purpoſes, as if ſuch Offenders had been reſident and dwelling within this Realm at the Time of ſuch Proceſs awarded, and Outlawry pronounced; (a) provided that the Party ſo to be outlawed ſhall, within one Year next after the ſaid Outlawry pronounced, yield himſelf to the Chief Juſtice of England for the Time being, and offer to traverse the Indictment or Appeal whereon the ſaid Outlawry ſhall be pronounced, as is aforeſaid, that then he ſhall be received to the ſame Traverse; and being thereupon found

(a) For this, vide Dyer 287. pl. 48. 2 Fon. 180. 4 Med. 47. 4 Med. 366.

‘ Not guilty by the Verdict of twelve Men, he shall be clearly acquitted and discharged of the said Outlawry, &c.

2 Hawk. P. C.  
458-9.  
and several  
Authorities  
there cited.

It is the allowed Practice of the Court of Common Pleas to suffer a Defendant, coming in by *Capias utlagatum* the same Term on which an Exigent is returnable, to avoid the Outlawry without Writ of Error, by shewing, that he purchased a *Superfedeas* out of the same Court, and delivered it to the Sheriff before the *Quinto exactus*, &c. or by shewing any other Matter apparent on Record which makes the Outlawry erroneous; as the Want of an Original, or the Omission of Process, or Want of Form in a Writ of Proclamation, &c. or a Return by a Person appearing not to be Sheriff, or a Variance between the Original and Exigent, or other Process, or the Want of such Addition as required by 1 H. 5. yet it is said in many Books to be the constant Course of the Court of King's Bench never to reverse an Outlawry on the Crown-side, either in the same or a different Term, for these or other Errors of a like Nature, without a Writ of Error.

2 Hawk. P. C.  
460, 461.

It is agreed, that any Outlawry whatsoever may be avoided by a Defendant's coming in upon the *Capias utlagatum*, and pleading a Misnomer either of the Name or Addition in the Writ, &c. as by shewing, that whereas he is called by such a Name of Baptism or Surname, he hath been always known by a different one, and not by that in the Writ, &c. or whereas he is named of such Estate, Degree or Mystery, that he hath some other Addition, and not that in the Writ, &c. also it is said in many Books, that he may plead, that there is no such Town as that whereof he is named; and it seems clearly agreed, that he may plead, that at the Time of the Writ purchased, and ever since, he hath made his Abode at some other Town, and not at that in the Writ, &c. and it is said, that by such Plea the Outlawry shall only be avoided as to the Person who pleads it, (who shall not be intended to be the Person meant) and shall stand in Force against the Person of the Name and Addition in the Record; but it is said, that a Person of the same Name and Addition as are mentioned in a Record of Outlawry cannot avoid it, by averring, that there are two Persons of such Name and Addition, and that the Person intended is the Elder, and he himself is the Younger, but shall be put to his Writ *De identitate nominis*; which is said by some to be the only Remedy in such Case, after an Outlawry returned; and it seems, that notwithstanding in Civil Cases, before an Outlawry is returned, one of the same Name may come into Court, and shew that he is not the Person intended; whereupon if the Plaintiff confesses it, the Diversity of the Names shall be entered on the Roll, and a new Exigent shall issue, with a fuller Description of the Person intended; yet this cannot be done upon an Indictment without a Writ of *Identitate nominis*, because it would make the Process variant from the Indictment, which cannot be altered without the Consent of the Jurors.

8 Co. 141,  
142 Doctor  
Dunry's Case.  
Vaugh. 158.  
S. C. cited.

If *A.* brings an *Audita querela* against *B.* and declares, that whereas *B.* had recovered against *A.* 200*l.* Debt, &c. and thereupon the said *A.* was outlawed, and upon a *Capias utlagatum* taken, and in Execution at the Suit of the said *B.* and after from the said Execution was delivered and suffered to go at large, &c. and yet *B.* hath taken out Execution upon the said Judgment, and endeavours, &c. the Defendant may plead and shew how, that after the said Enlargement, and before the Purchase of the *Audita querela*, the Outlawry was set aside and made void; and so conclude *Quod (i) non habetur tale recordum.*

(a) For this,  
vide Ro. Ent.

157. 3 Keb. 291. 1 Mod. 111. Fern. Ent. 49. Aylt. Etn. 143.

2 Vent. 46.

2 Fon. 211.

1 Comb. 19.

2 Salk. 495.

S. P. where an Outlawry was reversed, on Motion, at the Charge of him who procured it, on Affidavit, that the Defendant was actually in the Fleet in Execution for the Plaintiff in another Suit, and that



Person who procures the Outlawry to reverse the same at his own Costs; but if it appears, that the Party outlawed had lurked backward and forward between two Counties, and that the Person procuring the Outlawry had dealt openly, and had been regular in sending down the Proclamations to the Sheriff of the County where he sometimes resided; the Court will not interpose in this summary Manner, but will leave the Party to his ordinary Remedies by Plea or Writ of Error.

that he knew it. — But in the same Page in *Salk.* it is said, that tho' such Motions are frequently granted in

B R. because it is a great Charge to reverse an Outlawry there, yet that it is otherwise in C. B. the Charge there being but 16s. 8d.

## (G) What the Party must do in order to intitle him to a Reversal: And herein,

### 1. Of appearing in Person or by Attorney.

**R**egularly in all Outlawries, as well Personal as Criminal, the Party in order to reverse the same was to appear in Person, and could not appear by Attorney.

<sup>2 Leon. 22.</sup> — Where the Husband and Wife be-

ing outlawed, and the Wife refusing to appear, the Outlawry could not be reversed. *Cro. Eliz.* 611. — One outlawed prayed to appear by Attorney, and upon an Affidavit made of his Sickness, the Court *ex speciali gratia* allowed him to appear by Attorney; but the Clerk was commanded to enter it, *Quod venit in propria persona*, the Law being clear, that upon an Outlawry he ought to appear in Person. *Cro. Jac.* 462. — Having once appeared in Person, the Residue of the Proceedings may be by Attorney. *2 Keb.* 507. — Said that there was a Difference where the Error appeared on the Face of the Record; that in such Case Error may be assigned *per Attorn.*, without a special Rule of Court for that Purpose. *Carth.* 7.

But now by the 4 & 5 W. & M. cap. 18. For the more easy and speedy Reversing of Outlawries in the Court of King's Bench, it is enacted, 'That from and after the first Day of *Easter* Term thence ensuing, no Person or Persons whatsoever, who are or shall be outlawed in the said Court for any Cause, Matter or Thing whatsoever, (Treason and Felony only excepted,) shall be compelled to come in Person into or appear in Person in the said Court to reverse such Outlawry, but shall or may appear by Attorney and reverse the same without Bail in all Cases, (except where special Bail shall be ordered by the said Court.)

And it is farther enacted by the said Statute, 'That if any Person or Persons outlawed, or hereafter to be outlawed, in the said Court, (other than for Treason or Felony,) shall from and after the said first Day of *Easter* Term be taken and arrested upon any *Capias utlagatum* out of the said Court, it shall and may be lawful to and for the Sheriff or Sheriffs, who hath or shall have taken and arrested such Person and Persons, (in all Cases where special Bail is not required by the said Court,) to take an Attorney's Engagement under his Hand to appear for the said Defendant or Defendants, and to reverse the said Outlawries, and thereupon to discharge the said Defendant and Defendants from such Arrests; and in those Cases, where special Bail is required by the said Court, the said Sheriff and Sheriffs shall and may take Security of the said Defendant or Defendants by Bond, with one or more sufficient Surety or Sureties, in the Penalty of double the Sum for which special Bail is required, and no more, for his, her or their Appearance by Attorney in the said Court at the Return of the said Writ, and to do and perform such Things as shall be required by the said Court; and after such Bond taken to discharge the said Defendant and Defendants from the said Arrests.

And

And it is farther enacted by the said Statute, ' That if any Person or Persons outlawed as aforesaid, and taken and arrested upon a *Capias utlagatum*, shall not be able within the Return of the said Writ to give Security, as aforesaid, in Cases where special Bail is required, so as he or they are committed to Gaol for Default thereof, that whensoever the said Prisoner or Prisoners shall find sufficient Security to the Sheriff or Sheriffs, in whose Custody he or they shall be, for his or their Appearance by Attorney in the said Court at some Return in the Term then next following, to reverse the said Outlawry or Outlawries, and and to do and perform such other Thing and Things as shall be required by the said Court, it shall and may be lawful to and for the said Sheriff and Sheriffs, after such Security taken, to discharge and set at Liberty the said Prisoner and Prisoners for the same; any Law or Usage contrary notwithstanding.

2 Salk. 496. It hath been held, that if the Party outlawed comes in by *Cepi Corpus*, he shall not be admitted to reverse the Outlawry without appearing in Person, as in such Case he was obliged to do at Common Law; or putting in Bail with the Sheriff for his Appearance upon the Return of the *Cepi Corpus*, and for doing what the Court shall order.

## 2. Of giving Bail.

2 Hawk. P.C. 98. By *Westm. 1. cap. 9.* it is expressly provided, that those who are outlawed, have abjured the Realm, &c. should be excluded the Benefit of Replevin; yet it hath been always held, that the Court of King's Bench may in their Discretion, in special Cases, bail a Person upon an Outlawry of Felony; as where he pleads, that he is not of the same Name, and therefore not the same Person with him that was outlawed, or alleges any other Error in the Proceedings.

Vide Title  
Bail in Criminal Causes,  
Letter (D).

By the 3 *Eliz. cap. 3. Sect. 3.* it is enacted, ' That before any Allowance of any Writ of Error, or Reversing of any Outlawry be had by Plea, or otherwise, through or by want of any Proclamation to be had or made according to the Form of this Statute, the Defendant and Defendants in the original Action shall put in Bail, not only to appear and answer to the Plaintiff in the former Suit in a new Action to be commenced by the said Plaintiff for the Cause mentioned in the first Action, but also to satisfy the Condemnation, if the Plaintiff shall begin his Suit before the End of two Terms next after the Allowing the Writ of Error, or otherwise Avoiding of the said Outlawry.

Carth. 459.  
Matthews  
ver. Erbo.

*A.* who was a foreign Merchant and never in *England*, was outlawed at the Suit of *B.* in an Action on several Promises for Goods sold and delivered; and upon a special *Capias utlagatum* a Ship and other Effects belonging to *A.* were seised, as forfeited upon this Outlawry; and it was moved, that this Outlawry may be vacated, and Restitution awarded, upon Affidavits produced and read, that the Defendant was never *Infra legem*, i. e. that he never was in *England*, and therefore could not be outlawed, because that was putting him *extra Legem*. *Sed per Cur'*: This Outlawry shall not be vacated upon such Affidavits, but the Defendant may bring a Writ of Error, which he was compelled to do, and thereupon to put in Bail to the Action in which he was outlawed according to the new Statute of 4 & 5 *H. 8 M.* and then the Plaintiff consented to the Reversal of the Outlawry.

2 Salk 496. *H.* was outlawed in two Actions, one was for 10*l.* the other for 40*s.* and upon reversing the Outlawry the Court took special Bail for the first, and an Appearance for the other, upon the Statute 4 & 5 *H. 8 M.* and the Recognizance was taken pursuant to 31 *Eliz.*

3. Of suing out a Scire facias.

It is clearly agreed, that an Attainder of Felony of a Person who had any Lands shall never be reversed by Writ of Error, without a *Scire facias* against all the Ter-tenants and Lords mediate and immediate; but it is (a) settled, that such *Scire facias* is not necessary in the Case of High Treason.

3 Mod. 42, 47. 4 Mod. 366. 2 Hale's Hist. P. C. S. P. and that such Writ is to issue returnable at fifteen Days; and if any Lords do appear, they may plead to the Errors; and if the Sheriff return there are no Lands, &c. then the Court proceeds to examine the Errors. (a) So ruled Mich 12 Anna, The Queen ver. Strafford, upon Examination of all the Precedents. 2 Hawk. P. C. 461. Ca. Law & Eq. 138.

Also it is said, that it is not necessary in the Case of Felony, when it is suggested on the Roll that the Party had no Lands, and the Attorney General confesses it.

(H) The Effects and Consequences of a Reversal: And herein,

1. Where the Proceedings on the Reversal are in the same Plight as if no Outlawry had been.

IT is agreed, that after an Outlawry of Treason or Felony is reversed, the Party shall be put to plead to the Indictment, for that still remains good, and (b) he may be tried at the King's Bench Bar; or the Record may be remitted into the Country, if it were removed into the King's Bench by *Certiorari*, with a Command to the Justices below to proceed by the Statute of 6 H. 6. cap. 6.

So if a Man be outlawed by Process in an Information, and comes in and reverses the Outlawry, he must plead *instante* to the Information.

The Law is the same in Civil Cases; and therefore if an Outlawry in a personal Action be reversed, the Original remains.

Trespass for taking and detaining his Beasts till he made a Fine, the Action was laid in *Suffex*; the Defendant pleads, that the Cause of Action did not accrue within six Years before Suing of the Writ. The Plaintiff replies, that at another Time he brought an Original in Battery in *London*, intending when the Defendant had appeared to have declared for this Trespass; and that the Defendant was outlawed in *London*; and that within such a Time after the Reversal of the Outlawry he declared here; the Defendant demurred; and for the Defendant it was insisted, that the Original being laid in *London*, he could not in this Action declare in another County, tho' the Cause of Action be transitory; but upon Information by the Prothonotaries that the Course of the Court is, that altho' the Original be laid in *London* for expediting the Outlawry, yet when the Defendant comes in, the Plaintiff may declare against him in any other County, be the Action local or transitory; and the Statute 21 Jac. 1. cap. 16. gives to Plaintiffs generally a Power to commence a new Suit within the Year after the Outlawry reversed; and that so he may do in this Case to warrant his Declaration within the Course of the Court; and Judgment was given for the Plaintiff.

## 2. To what the Party shall be restored on Reversal of the Outlawry.

1 And. 188. It hath been adjudged, that if the King grant over the Lands of a Person outlawed for Treason or Felony, and afterwards the Outlawry be (a) Shall, after Outlawry reversed, be restored to his Law, and to be of Ability to sue. Co. Lit. 288 b.

5 Co. 90. Hoe's Case. 1 Rol. Abr. 778. S. C. cited. Cro. Eliz. 278. S. P. adjudged; where a Termor being outlawed upon the Statute of Recusancy, the Lord Treasurer and Barons of the Exchequer sold the Term; & vide 2 Jon. 101. 2 Show. 68. and 3 Keb. 871. that there shall be Restitution of Profits actually paid into the Exchequer.

Moor 269. Beverly ver. Cronwal. If an Advowson comes to the King by Forfeiture upon an Outlawry, and, the Church becoming void, the King presents, and then the Outlawry is reversed; yet the King shall enjoy that Presentment, because the Presentment there came to the King as the Profit of the Advowson.

Moor 269. agreed per Curiam. But if the Church be void at the Time of the Outlawry, and the Presentation is thereby forfeited as a Chattel principally and distinct of itself, there, upon the Reversal of the Outlawry, the Party shall be restored to the Presentation.

Cro. Eliz. 170. Ognel's Case, & 13 Co. 20, 22. If a Termor being outlawed for Felony grants over his Term, and after the Outlawry is reversed, the Grantee may have Trespass for the Profits taken between the Reversal of the Outlawry and the Assignment; for by the Reversal it is as if no Outlawry had been, and there is no Record of it.

5 Mod. 61. It is said, that if a Man be outlawed in the King's Bench, and the Party's Goods are seized into the King's Hands, and then the Outlawry is reversed, there can be no Restitution; the Reason whereof is, for that the Court of King's Bench cannot send a Writ to the Treasurer; and the Court of Exchequer have no Record before them to issue out a Warrant for Restitution.

2 Vern. 312. Peyton ver. Ayliffe; & 2 Lev 49. the Case of Pinfold ver. Northey. It hath been adjudged in Chancery, that if A. being possessed of several Houses for a long Term for Years, mortgages the same, and is outlawed for High Treason, upon which those Houses are seized into the King's Hands, and the same granted for valuable Consideration to J. S. who likewise gets an Assignment of the Mortgage; that yet the Representative of A. may redeem the Mortgage upon Reversal of the Outlawry; and herein the Lord Keeper said, that the Judgment upon the Reversal is, that the Party shall be restored to all that has not been answered to the King; which in all Cases has been understood of the mesne Profits answered to the King, and not as to the principal Thing itself, tho' seized into the King's Hands; and that it was undoubtedly so as to a Freehold or Inheritance, and he saw no substantial Difference in the Case of a Leasehold.

# Papists and Popish Recusants.

**T**HE Laws for restraining the Growth of Popery, and by which Papists are subjected to divers Penalties, Forfeitures, Disabilities and Inconveniencies, may be considered in general, as relating to Popish (a) Recusants, such who refuse to make the Declaration against Popery, and such who promote, encourage or profess the Popish Religion; and these Laws, tho' made for the Advancement of Religion and the Publick Good, yet being considered as Penal Laws have, like all other Penal Laws, been construed strictly. (a) i. e. Those who refuse to come to Church, and being Persons professing the Popish Religion, and convicted of such Refusal or Recusancy, are termed Popish Recusants; but the 23 Eliz. cap. 1. extends to all Recusants; and the Courts cannot take Notice of the Grounds of their Recusancy, but must punish them for not coming to Church, without examining into the Cause why they did not. Skin. 99. per Sanders Ch. J. but for this, vide Title Heresy, and Offences against Religion.—And what shall be Evidence to prove a Person a Popish Recusant convicted, vide 1 Keb. 7.

For the better Understanding of these Penalties, &c. the Laws herein are ranked under the following Heads: 1 Hawk. P.C. cap. 12, 13, 14.

## (A) The Disabilities, Restraints, Forfeitures and Inconveniencies which Popish Recusants are subject to: And herein,

1. Of their Disability to bring any Action.
  2. Of bearing any Publick Office or Charge.
  3. Of claiming any Part of a Husband's personal Estate.
  4. Of claiming an Estate by Curtesy or by way of Dower, after a Marriage against Law.
2. Of the Restraints they are put under: *And herein,*
1. From going five Miles from Home.
  2. From coming to Court.
  3. From keeping Arms.
  4. From coming within ten Miles of London.
3. Of the Forfeitures they are liable to: *And herein,*
1. That of two Parts of a Jointure or Dower.
  2. That of 20*l.* for not receiving the Sacrament yearly after Conformity.
  3. That of 10*l.* for an unlawful Marriage.
  4. That of 100*l.* for an Omission of lawful Baptism.
  5. That of 20*l.* for an unlawful Burial.

4. Of

4. Of the Inconveniencies they are subject to: *And herein,*

1. That their Houses may be searched for Reliques, whether they be Men or Women.
2. If they be Women, and married, that they may be committed.

(B) **Of the Offence of not making a Declaration against Popery, and the Restraints it subjects them to: And herein,**

1. From sitting in Parliament.
2. Holding a Place at Court.
3. From living within ten Miles of *London*.
4. From keeping Arms.

(C) **Of the Offence in Promoting or Professing the Popish Religion: And herein,**

1. Of the Offence of saying or hearing Mass or other Popish Service.
2. Of giving or receiving Popish Education.
3. Of buying or selling Popish Books.
4. Of keeping School.
5. Of with-holding a competent Maintenance from a Protestant Child.
6. Of the Disability of those professing the Popish Religion to present to a Church.
7. Of their Disability to purchase.

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(A) **The Disabilities, Restraints, Forfeitures and Inconveniencies which Popish Recusants are subject to: And herein,**

1. **Of their Disability to bring any Action.**

**B**Y the 3 *Jac. 1. cap. 5. sect. 11.* it is enacted, ‘ That every Popish Recusant convict shall stand to all Intents and Purposes disabled as a Person lawfully excommunicated, and as if such Person had been so denounced and excommunicated according to the Laws of this Realm, until he or she shall conform, &c. and that every Person sued by such Person so disabled, may plead the same in disabling of such Plaintiff as if he or she were excommunicated by Sentence in the Ecclesiastical Court, except the Action of such Recusant do concern some Hereditament or Lease, which is not to be seized into the King’s Hands by Force of some Law concerning Recusancy.

In the Construction of this Branch of the Statute it hath been holden, *Noy 89.*  
That the Plea of such a Conviction, like all other Pleas in Difability, *Latch 176.*  
ought to be pleaded before (a) Imparlance, and also to conclude with a *Hett. 18.*  
(b) Demand if the Plaintiff shall be answered. *1 Hawk. P.C.*

25.  
(a) Cannot  
be pleaded after a general Imparlance, but may be pleaded *Puis darrein continuance*, because being  
in Difability of the Person, may accrue after a Continuance. *1 Mod. Ca. in Law and Eq. 43, 381.*  
(b) In Debt for Rent by the Plaintiffs as Executors of J. S. Defendant pleads in Abatement by *Pet'*  
*judicium de brevi, &c.* for that one of the Plaintiffs is a Popish Recusant convict, and *Quasi excom'*  
by this Statute; but it was held, that this, as here, ought not to be pleaded in Abatement, because  
the Writ is not abated thereby, but only suspended; and the Pleading ought to be *Respondere non de-*  
*bent.* *3 Lev. 208.*—So where Judgment was demanded generally. *1 Mod. Ca. in Law and Eq. 43, 381.*

That such Plea ought also to shew before what Justices the Conviction *Noy 89.*  
was, that the Court may know where to send for a Certificate thereof, *Latch 176.*  
if it be denied; and also that the Record it self, or at least a Certificate *3 Lev. 333-4.*  
thereof, ought to be immediately produced, according to the general  
Rule of Law, as to all dilatory Pleas grounded on Records.

That if after such a Plea it be certified, that the Plaintiff hath con- *Hett. 176.*  
formed, and thereupon the Defendant be ordered to plead in chief, and  
then the Plaintiff relapse, and be convict again, the Defendant cannot  
plead the same in Difability a second Time.

That it must appear, either from the Conviction it self, or by proper *3 Lev. 11, 12,*  
Averments, that the Plaintiff is convicted of Popish Recusancy, because *332 3.*  
no Recusants, except popish ones, are within the said Clause; but this *2 Lutw. 1117.*  
is sufficiently set forth, by alledging, that the Plaintiff being *Papalis Re-*  
*cusans* was indicted and convicted *secundum formam Statuti, &c.*

It seems to be the better Opinion, that this being a Penal Law, and *2 Bulst. 155.*  
therefore to be construed strictly, the Words *As Persons lawfully excom-*  
*municate, &c.* mean no more than to disable the Party, in the same *Cawley 216.*  
Manner as an excommunicated Person, to bring an Action, but do not *1 Hawk. P.C.*  
subject the Party to the other Consequences of an Excommunication. *23-4.*

## 2. Of bearing any Publick Office or Charge.

By the *3 Jac. 1. cap. 5. sect. 8.* it is enacted, ' That no Recusant  
' convict shall at any Time practise the Common Law of this Realm as  
' a Counsellor, Clerk, Attorney or Solicitor in the same; nor shall  
' practise the Civil Law as Advocate or Proctor; nor practise Physick,  
' nor use or exercise the Trade or Art of an Apothecary; nor shall be  
' Judge, Minister, Clerk or Steward of or in any Court, or keep any  
' Court; nor shall be Register or Town-Clerk, or other Minister or Of-  
' ficer in any Court; nor shall bear any Office or Charge as Captain,  
' Lieutenant, Corporal, Sergeant, Antient Bearer, or other Office in  
' Camp, Troop, Band or Company of Soldiers; nor shall be Captain,  
' Master, Governor, or bear any Office of Charge of or in any Ship,  
' Castle or Fortrefs of the King's Majesty's, his Heirs and Successors, but  
' be utterly disabled for the same; and every Person offending herein  
' shall also forfeit for every such Offence 100*l.* the one Moiety whereof  
' shall be to the King's Majesty, his Heirs and Successors, and the other  
' Moiety to him that will sue for the same by Action of Debt, Bill,  
' Plaint or Information, in any of the King's Majesty's Courts of Re-  
' cord; wherein no Effoin, Protection, or Wager of Law shall be ad-  
' mitted or allowed.

And by *Seet. 9.* of the said Statute it is farther enacted, ' That no  
' Popish Recusant convict, nor any having a Wife being a Popish Re-  
' cusant convict, shall exercise any Publick Office or Charge in the  
' Commonwealth, but shall be utterly disabled to exercise the same by  
' himself or by his Deputy, (except such Husband himself, and his  
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‘ Children which shall be above the Age of nine Years abiding with him,  
 ‘ and his Servants in Household, shall once every Month at the least, not  
 ‘ having any reasonable Excuse to the contrary, repair to some Church  
 ‘ or Chapel usual for Divine Service, and there hear Divine Service; and  
 ‘ the said Husband, and such his Children and Servants as are of meet  
 ‘ Age, receive the Sacrament of the Lord’s Supper at such Times as  
 ‘ are limited by the Laws of this Realm, and do bring up his said Chil-  
 ‘ dren in true Religion.)

1 Hawk. P. C.  
 24.

On these Sections it hath been observed, 1<sup>st</sup>, That the latter extends to all Publick Offices and Charges in general, whereas the former extends only to those which are particularly enumerated. 2<sup>dly</sup>, That this latter expressly disables a Popish Recusant to exercise such an Office by himself or his Deputy, but the other says nothing at all of the Exercise of an Office by a Deputy.

### 3. Of claiming any Part of a Husband’s Personal Estate.

By the 3 Jac. 1. cap. 5. sect. 10. it is enacted, ‘ That every Woman  
 ‘ being a Popish Recusant convict, (her Husband not standing convicted  
 ‘ of Popish Recusancy) which shall not conform herself and remain con-  
 ‘ formed, but shall forbear to repair to some Church or usual Place of  
 ‘ Common Prayer, and there hear Divine Service and Sermon, if any  
 ‘ then be, and receive the Sacrament of the Lord’s Supper, according to  
 ‘ the Laws of this Realm, by the Space of one whole Year next before  
 ‘ the Death of her said Husband, shall not only be disabled to be Execu-  
 ‘ trix or Administratrix of her said Husband, but also to have or demand  
 ‘ any Part of her said Husband’s Goods or Chattels by any Law, Cu-  
 ‘ stom or Usage whatsoever; and by 3 Jac. 1. cap. 5. sect. 13. every  
 Woman is put under the like Disability, being a Popish Recusant, who  
 shall be married otherwise than according to the Church of *England*.

### 4. Of claiming an Estate by Curtesy, or by Way of Dower, after a Marriage against Law.

By the 3 Jac. 1. cap. 5. sect. 13. it is enacted, ‘ That every Man who,  
 ‘ being a Popish Recusant convict, shall be married otherwise than in  
 ‘ some open Church or Chapel, and otherwise than according to the  
 ‘ Orders of the Church of *England*, by a Minister lawfully authorised,  
 ‘ shall be disabled to have any Estate as Tenant by the Curtesy; and  
 ‘ that every Woman, being a Popish Recusant convict, who shall be  
 ‘ married in other Form than as aforesaid, shall be disabled to claim  
 ‘ her Dower, or Jointure, or Widow’s Estate.

## 2. Of the Restraints they are put under: And herein,

### 1. From going five Miles from Home.

To this Purpose it is enacted by 35 Eliz. cap. 2. and 3 Jac. 1. cap. 5. sect. 6, 7. ‘ That every Popish Recusant convict shall repair to his  
 ‘ Place of Dwelling, &c. and not remove above five Miles from thence,  
 ‘ unless he be urged by Proccs, &c. or have a Licence from the Privy  
 ‘ Council, &c. or under the Hands and Seals of four Justices of the Peace,  
 ‘ with the Assent in Writing of the Lieutenant of the County, or of the  
 ‘ Bishop, &c. (every Licence of which Kind by Justices of Peace must  
 ‘ express both the particular Cause and the Time for which it was given,  
 ‘ and



‘ and ought not to be granted without a previous Oath of some reasonable Cause,) under Pain of forfeiting all his Goods and Hereditaments, (whether Freehold or Copyhold,) for his Life, or of abjuring the Realm, if he be not worth twenty Marks a Year, or forty Pounds in Goods, unless he recant before Conviction, and also continue conformable.

In the Construction hereof it hath been holden, that the Privy Council may grant such Licence without any such special Cause or Oath, <sup>1 Hawk. P.C. 25.</sup> &c. but that Justices of Peace cannot. Also it hath been holden, that in pleading a Licence of Justices of Peace, it must be expressly shewn that it was made under their Hands and Seals; also the Cause in particular for which it was granted must be set forth, and the Time for which it was limited, and that the Party was sworn to the Truth of such Cause. <sup>Cro. Jac. 352.  
1 Rel. Rep. 108.  
Moor 836.</sup>

It is said, that if the same Person be both a Justice of Peace and a Lieutenant, he cannot both join in a Licence as Justice of Peace, and also give his Assent as Lieutenant, but can only act in one Capacity. <sup>1 Hawk. P.C. 25.</sup>

It seems, that the Miles shall be computed according to the *English* Manner, allowing 5280 Foot, or 1760 Yards, to each Mile; and that the same shall be reckoned not by straight Lines, as a Bird or Arrow may fly, but according to the nearest and most usual Way. <sup>Cawley 130.  
Cro. Eliz. 212.</sup>

## 2. From coming to Court.

By the 3 Jac. 1. cap. 5. sect. 2. it is enacted, ‘ That no Popish Recusant convict shall come into the Court or House where the King or his Heir apparent shall be, unless he be commanded so to do by the King, upon Pain of 100*l.* &c. And it is farther enacted by 3 Car. 2. Stat. 2. sect. 5 & 6. that every Popish Recusant convict, who shall come advisedly into or remain in the Presence of the King or Queen, or shall come into the Court or House where they or any of them reside, shall be disabled to hold or execute any Office or Place of Trust Civil or Military, or to sue in Law or Equity, or to be an Executor, &c. or capable of any Legacy or Deed of Gift, and shall forfeit for every Offence 500*l.* unless such Person do, within the Term next after such his Coming or Remaining, take the Oaths of Allegiance and Supremacy, and make the Declaration against Transubstantiation and the Invocation of Saints, &c. in the Court of Chancery.

## 3. From keeping Arms.

By the 3 Jac. 1. cap. 5. sect. 27, 28, 29. it is enacted, ‘ That all such Armour, Gun-powder, and Munition of whatsoever Kinds, as any Popish Recusant convict shall have in his own House, or elsewhere, or in the Possession of any other, at his Disposition, shall be taken from him by Warrant of four Justices of Peace at their General or Quarter-Sessions, (except such necessary Weapons as shall be allowed him by the said four Justices for the Defence of his Person or House, and that the said Armour, &c. so taken, shall be kept at the Costs of such Recusants in such Place as the said four Justices at their said Sessions shall appoint; and that if any such Recusant, having such Armour, &c. or if any other Person who shall have any such Armour, &c. to the Use of such Recusant, shall refuse to discover to the said Justices, or any of them, what Armour he hath, or shall let or hinder the Delivery thereof to any of the said Justices, or to any other Person authorised by their Warrant to take the same, that then every Person so offend-  
‘ ing

‘ ing shall forfeit his said Armour, &c. and also be imprisoned for three  
 ‘ Months without Bail, by Warrant from any Justice of Peace of such  
 ‘ County; and it is farther enacted, that notwithstanding the taking  
 ‘ away such Armour, &c. yet such Recusant shall be charged with the  
 ‘ Maintaining of the same, and with the Providing of a Horse, &c. in  
 ‘ such Sort as others of his Majesty’s Subjects.

#### 4. From coming within ten Miles of London.

By the 3 *Jac. 1. cap. 5. sect. 4, 5.* it is enacted, ‘ That no Popish Re-  
 ‘ cusant, &c. shall remain within the Compass of ten Miles of *London*,  
 ‘ under Pain of 100 *l.* except such Persons as at the Time of the said  
 ‘ Act did use some Trade, Mystery or manual Occupation in *London*, &c.  
 ‘ and such as shall have their only Dwelling in *London*, &c.

#### 3. Of the Forfeitures they are liable to: And herein,

##### 1. That of two Parts of a Jointure or Dower.

By the 3 *Jac. 1. cap. 5. sect. 10.* it is enacted, ‘ That every married  
 ‘ Woman, being a Popish Recusant convict, (her Husband not standing  
 ‘ convicted of Popish Recusancy,) who shall not conform herself and re-  
 ‘ main conformed, but shall forbear to repair to some Church or usual  
 ‘ Place of Common Prayer, and there to hear Divine Service and Ser-  
 ‘ mon, if any then be, and receive the Sacrament of the Lord’s Sup-  
 ‘ per, according to the Laws of this Realm, within one Year next be-  
 ‘ fore the Death of her said Husband, shall forfeit to the King the Pro-  
 ‘ fits of two Parts of her Jointure and Dower of any Hereditaments of  
 ‘ her said Husband, &c.

##### 2. That of 20 *l.* for not receiving the Sacrament yearly after Conformity.

By the 3 *Jac. 1. cap. 5. sect. 1, 2, 3.* it is enacted, ‘ That if any Po-  
 ‘ pish Recusant convict who hath conformed himself to the Church,  
 ‘ &c. shall not receive the Sacrament in his own Parish-Church, &c.  
 ‘ within one Year after his Conformity, he shall forfeit 20 *l.* and for  
 ‘ the second Year 40 *l.* and for every Year after 60 *l.* &c.

##### 3. That of 100 *l.* for an unlawful Marriage.

By the 3 *Jac. 1. cap. 5. sect. 13.* it is enacted, ‘ That every Popish  
 ‘ Recusant convict, who shall be married to a Woman who is no Inhe-  
 ‘ ritrix, otherwise than according to the Church of *England*, shall for-  
 ‘ feit 100 *l.*

##### 4. That of 100 *l.* for an Omission of lawful Baptism.

By the 3 *Jac. 1. cap. 5. sect. 14.* it is enacted, ‘ That every Popish Re-  
 ‘ cusant shall, within one Month after the Birth of his Child, cause the  
 ‘ same to be baptized by a lawful Minister according to the Laws of this  
 ‘ Realm, in the open Church of the same Parish where the Child  
 ‘ shall

‘ shall be born, or in some other Church near adjoining, or Chapel  
 ‘ where Baptism is usually administered; or if by Infirmity of the Child  
 ‘ it cannot be brought to such Place, then the same shall within the  
 ‘ Time aforesaid be baptized by the lawful Minister of any of the said  
 ‘ Parishes or Places aforesaid, upon Pain that the Father of such Child,  
 ‘ if he be living, by the Space of one Month next after the Birth of  
 ‘ such Child, or if he be dead within the said Month, then the Mother  
 ‘ of such Child, shall for every such Offence forfeit 100*l.* &c.

**5. That of 20*l.* for an unlawful Burial.**

By the 5 *Jac.* 1. *cap.* 5. *sect.* 15. it is enacted, ‘ That if any Popish  
 ‘ Recusant, not being excommunicate, shall be buried in any other Place  
 ‘ than in the Church or Church-yard, or not according to the Laws of  
 ‘ this Realm, the Executors, &c. of such Recusant knowing the same,  
 ‘ or the Party that causeth him to be so buried, shall forfeit 20*l.* &c.

**4. Of the Inconveniences they are subject to: And herein;**

**1. That their Houses may be searched for Reliques, whether they be Men or Women.**

To this Purpose it is enacted by the 3 *Jac.* 1. *cap.* 5. *sect.* 26. ‘ That  
 ‘ any two Justices of Peace, and all Mayors, Bailiffs and Chief Officers  
 ‘ of Cities and Towns Corporate in their respective Jurisdictions, may  
 ‘ search the House and Lodgings of every Popish Recusant convict for  
 ‘ Popish Books and Reliques, and that if any Altar, Pix, Beads, Pic-  
 ‘ tures, or such like Popish Relique, or any Popish Book be found in the  
 ‘ Custody of such Person, as in the Opinion of the said Justices, &c.  
 ‘ shall be unmeet for him or her to have or use, it shall be defaced and  
 ‘ burnt, if it be meet to be burnt; and if it be a Crucifix, or other Re-  
 ‘ lique of any Price, the same shall be defaced at the General Quarter-  
 ‘ Sessions in the County where it shall be found, and then restored to  
 ‘ the Owner.

**2. If they be Women, and married, that they may be committed.**

To this Purpose it is enacted by the 7 *Jac.* 1. *cap.* 6. *sect.* 28. ‘ That  
 ‘ if any married Woman, being a Popish Recusant convict, shall not  
 ‘ within three Months after her Conviction conform herself, and repair  
 ‘ to Church and receive the Sacrament, &c. she may be committed to  
 ‘ Prison by one of the Privy Council, or by the Bishop, if she be a  
 ‘ Baroness; or if under that Degree, by Justices of Peace, whereof one  
 ‘ to be of the *Quorum*, there to remain till she perform, &c. unless the  
 ‘ Husband will pay to the King ten Pounds a Month for her Offence, or  
 ‘ else the third Part of all his Lands, &c. at the Choice of the Hus-  
 ‘ band, &c.

(B) Of the Offence of not making a Declaration against Popery, and the Restraints it subjects them to: And herein,

1. From sitting in Parliament.

BY the 30 *Car. 2. Stat. 2. cap. 1.* it is enacted, ‘ That no Peer shall  
 ‘ vote or make his Proxy in the House of Peers, or sit there during  
 ‘ any Debate; and that no Member of the House of Commons shall vote  
 ‘ or sit there during any Debate after the Speaker is chosen, until such  
 ‘ Peer or Member shall take the Oaths of Allegiance and Supremacy, and  
 ‘ make a Declaration of his Belief that there is no Transubstantiation in  
 ‘ the Sacrament of the Lord’s Supper, and that the Invocation or Ado-  
 ‘ ration of the Virgin *Mary*, or any other Saint, and the Sacrifice of the  
 ‘ Mass, as they are now used in the Church of *Rome*, are superstitious  
 ‘ and idolatrous, &c. on Pain that every such Offender shall be adjudged  
 ‘ a Popish Recusant convict, and disabled to hold or execute any Office,  
 ‘ &c. or from thenceforth to sit or vote in either House of Parliament,  
 ‘ to sue in Law or Equity, or to be Guardian, Executor or Administra-  
 ‘ tor, or capable of any Legacy or Deed of Gift, and shall forfeit for  
 ‘ every Offence 500 *l.*

2. Holding a Place at Court.

By the 30 *Car. 2. Stat. 2. sect. 9, 12, 13.* it is enacted, ‘ That every  
 ‘ Person who shall be a sworn Servant to the King shall take the said  
 ‘ Oaths, and subscribe the said Declaration in Chancery the next Term  
 ‘ after he shall be so sworn a Servant, &c. and that if any such Person  
 ‘ neglecting so to do shall advisedly come into or remain in the Presence  
 ‘ of the King or Queen, or shall come into the Court or House where they  
 ‘ are, or any of them reside, he shall suffer all the Penalties expressed in the  
 ‘ foregoing Section; unless such Person coming into the King’s Presence,  
 ‘ &c. shall first have Licence so to do by Warrant under the Hands and  
 ‘ Seals of six Privy Counsellors, by Order of the Privy Council, upon  
 ‘ some urgent Occasion therein to be expressed; which Licence shall  
 ‘ not exceed ten Days, and shall be first filed, &c. in the Petty-Bag-  
 ‘ Office, for any Body to view without Fee, &c. and no Person to be li-  
 ‘ censed for above thirty Days in one Year.

3. From living within ten Miles of London.

By the 1 *W. & M. cap. 9.* it is enacted, ‘ That every Justice of Peace  
 ‘ in *London* and *Westminster*, and within ten Miles thereof, shall cause  
 ‘ to be arrested and brought before him all reputed Papists, (except Fo-  
 ‘ reigners, being Merchants or menial Servants to some Ambassador or  
 ‘ Publick Agent, and except all such as used some Trade, Mystery, or  
 ‘ some Manual Occupation at the Time of the said Act, in *London*, &c.  
 ‘ and also except all such Persons as had their Dwelling in *London*, &c.  
 ‘ within six Months before the thirteenth of *February* 1688. and no Dwel-  
 ‘ ling elsewhere, and certified their Names to the Sessions before the first  
 ‘ of *August* 1689 ) and that every such Justice shall tender the said De-  
 ‘ claration to every such Person; and that every such Person refusing  
 ‘ the

‘ the time, and afterwards remaining in *London, &c.* or within ten Miles thereof, or being certified to the King’s Bench or Quarter-Sessions at the next Term or Sessions as having refused to make the said Declaration, and neglecting to make the same in such Court, shall suffer as a Popish Recusant convict, &c.

#### 4. From keeping Arms.

By the 1 *H. & M. cap. 15.* it is enacted, ‘ That any two Justices of Peace may and ought to tender the said Declaration to any Person whom they shall know or suspect, or have Information of as being a Papist, or suspected to be such; and that no such Person so required, and not making and subscribing the said Declaration, or not appearing before the said Justices upon Notice to him given or left at his usual Abode, by one authorised by Warrant under the Hands and Seals of the said Justices, shall keep any Arms or Ammunition or Horse above the Value of 5 *l.* in his own Possession, or in the Possession of any other Person to his Use, (other than such necessary Weapons as shall be allowed him by the Quarter-Sessions for the Defence of his House or Person,) and that any two Justices of Peace, by Warrant under their Hands and Seals, may authorise any Persons in the Day-time, with the Assistance of the Constable or his Deputy, or Tithingman, to search for all such Arms, &c. and Horses, and seize them to the King’s Use, and that the said Justices shall deliver the said Arms and Ammunition at the next Quarter-Sessions in open Court, and that whoever shall conceal, &c. or shall be aiding to the Concealing any such Arms or Horses, shall be committed to the common Gaol by Warrant under the Hands and Seals of any two Justices of Peace, and also forfeit treble the Value; and that those who discover any such Arms or Ammunition, so as the same may be seized, shall have the full Value thereof, to be awarded to them by the Sessions, &c. and that such Refusers of the said Declaration, &c. shall be discharged when-ever they make the same.

### (C) Of the Offence in Promoting or Professing the Popish Religion: And herein,

#### 1. Of the Offence of saying or hearing Mass or other Popish Service.

BY the 23 *Eliz. cap. 1. sect. 4.* it is enacted, ‘ That every Person who shall say or sing Mass, being thereof lawfully convicted, shall forfeit two hundred Marks, and be committed to Prison in the next Gaol, there to remain by the Space of one Year, and from thence-<sup>2</sup> *Shew 2103* forth till he have paid the said Sum of two hundred Marks; and that every Person who shall willingly hear Mass shall forfeit the Sum of one hundred Marks, and suffer a Year’s Imprisonment.

Also it is enacted by the 11 & 12 *H. 3.* ‘ That every Person who shall apprehend any Popish Bishop, Priest or Jesuit, and prosecute him to Conviction for saying Mass, or exercising any other Part of the Function of a Popish Bishop or Priest, shall receive 100 *l.* of the Sheriff; and that every such Popish Bishop, &c. (except, being a Foreigner, he be entered in the Secretary’s Office, and officiate only in the House of a Foreign Minister,) shall be adjudged to perpetual Imprisonment.

2. Of

## 2. Of giving or receiving Popish Education.

To this Purpose there are several Statutes, and first by the 1 *Jac.* 1. *cap.* 4. *sect.* 6, 7. it is enacted, ‘ That if any Person or Persons under the King’s Obedience shall go or send, or cause to be sent any Child, or any other Person under their or any of their Government, beyond the Seas out of the King’s Obedience, to the Intent to enter into, or reside in, or repair to any College, &c. of any Popish Order, Profession or Calling, to be instructed, perswaded or strengthened in the Popish Religion, or in any Sort to profess the same, every such Person so sending such Child, &c. shall forfeit 100*l.* and every such Person so passing or being sent, &c. shall in respect of him or herself only, and not in respect of any of his Heirs or Posterity, be disabled to inherit, purchase, take, have or enjoy any Profits, Hereditaments, Chattels, Debts, Legacies, or Sums of Money, &c. whatsoever, and that all Estates, Terms and other Interests whatsoever to be made, suffered or done, to the Use or Behoof of any such Person, or upon any Trust or Confidence mediately or immediately to or for the Benefit or Relief of any such Person, shall be utterly void.

1 *Keb.* 263.

And it is farther enacted by 3 *Jac.* 1. *cap.* 5. *sect.* 16. ‘ That if the Children of any Subject within the Realm, (the said Children not being Soldiers, Mariners, Merchants or their Apprentices or Factors,) shall be sent or go beyond Sea to prevent their good Education in *England*, or for any other Cause, without the Licence of the King or six of his Privy Council, (whereof the Principal Secretary to one,) under their Hands and Seals, that then every such Child shall take no Benefit by any Gift, Conveyance, Descent, Devise, or otherwise, of or to any Hereditament or Chattel, till such Child being of the Age of eighteen Years, or above, take the Oath of Obedience before some Justice of Peace of the County, Liberty, Limit, where the Parent of such Child did and shall inhabit; and that in the mean Time the next of Kin to such Child, who shall be no Popish Recusant, shall have the said Hereditaments, &c. so given, &c. until such Child shall conform, &c. and take the said Oath and receive the Sacrament, and after such Conformity, &c. he who hath received the Profits of the said Hereditaments, shall account for the same, and in reasonable Time make Payment thereof, and restore the Value of the said Goods, &c. and that whoever shall send such Child over Seas, shall forfeit 100*l.* which by 11 *Ed.* 12 *W.* 3. *cap.* 4. *sect.* 6. shall be to the sole Use and Benefit of the Person who shall discover the Offence.

Also it is enacted by 3 *Car.* 1. *cap.* 2. ‘ That if any Person under the Obedience of the King shall go, or shall convey or send, or cause to be sent or conveyed, any Person out of the King’s Dominions into any Parts beyond the Seas, out of the King’s Obedience, to the Intent to enter into or be resident, or trained up in any Priory, Abbey, Nunnery, Popish University, College or School, or House of Jesuits, Priests, or in a private Popish Family, and shall be there by any Popish Person instructed, perswaded or strengthened in the Popish Religion, in any Sort to profess the same, or shall convey or send, or cause to be conveyed or sent, any Thing towards the Maintenance of any Person so going or sent, and trained and instructed as is aforesaid, or under the Colour of any Charity towards the Relief of any Priory, &c. or religious House whatsoever, every Person so sending, &c. any such Person or Thing, and every Person passing or sent, being thereof convicted, &c. shall be disabled to prosecute any Suit in Law or Equity, or to be Executor or Administrator to any Person, or capable of any Legacy or Deed of Gift.

- Gift, or to bear any Office within the Realm; and shall forfeit all his
- Goods and Chattels, and shall forfeit all his Hereditaments, Offices and
- Estates of Freehold, during his Life.

In the Construction of the 3 *Jac.* 1. it hath been holden, that if *E. T.* being the King's Ward of Lands holden of the King by Knights Service in Chief, die the King's Ward, and it is found that *A. & B.* are his Sisters and Heirs, both of full Age, and that *A.* in the Life-time of her Brother departed this Realm contrary to this Statute, and is a Nun profess'd; the King may retain *A.*'s Moiety in his own Hands till she, according to the 1 *Eliz.* take the Oath of Supremacy required on suing out Livery; for the Words of the Statute 3 *Jac.* 1. are, *shall take no Benefit by Descent, &c.* not that the Party should not take by Descent; and therefore the Estate does not vest absolutely in *B.* the Sister and next Heir, but her Right is to the Rents and Profits during the Non-conformity of her Sister, for which in case of Common Lands she might enter; but in this Case the King is interested, and is not obliged to give Livery to the Heir, till such Time as the Oath of Supremacy be taken.

So if such an Heir, being beyond Sea, should bargain and sell his Lands to a Stranger, the Bargain in such case will prevent the next of Kin, and the Bargainee may take the Lands out of the Hands of the next of Kin, in case he had entered; for the Estate never vested absolutely in such next of Kin; but in such Case the King may refuse to give Livery sued out on such Bargain in the Name of the Heir, except the Heir himself appears and takes the Oath of Supremacy in his proper Person.

*C. Lord Gerrard* in the Year 1660. settled the Estate in Question to the Use of himself and the Heirs Male of his Body, Remainder to the Heirs Male of the Body of *Thomas* first Lord *Gerard*, Remainder to his own right Heirs; *Charles* Lord *Gerard*, upon the Death of *Digby* Lord *Gerard* (only Son of the said *C.*) without Issue Male, entred, claiming the Estate as Heir Male of the Body of *Thomas* first Lord *Gerard*, by Virtue of the said Limitation in the Settlement; and by Virtue of this Title enjoyed that Estate above twenty-two Years, and during the Time of his Enjoyment suffered several Recoveries, and settled the Estate upon his Marriage in 1689. and died without Issue in the Year 1707. leaving *Philip* his only Brother then surviving, who was Heir Male of the Body of *Thomas* first Lord *Gerard*; upon the Death of Lord *Charles*, the Duchess of *Hamilton* claimed the Estate as right Heir of *C. Lord Gerard*, notwithstanding the Estate-tail limited to the Heirs Male of the Body of *Thomas* Lord *Gerard* subsisted in *Philip*, alledging, that Lord *Charles* and his Brother *Philip*, being sent abroad and educated in a Popish Seminary, were made so utterly incapable of taking any Estate, that she had the Right of Entry in her. It was insisted for her, that the 1 *Jac.* 1. cap. 4. sect. 6. had so far disabled Lord *Charles* to take the Estate by Descent, that the Recovery suffered by him was void, and that the same Disability being still upon *Philip*, and there being no Person in Being who could take the Estate-tail, the Duchess as Heir at Law must be intitled to take at present, as if the Estate were actually spent. But it was resolved, that the Words of the Act being, that the Offender shall be disabled as in respect of himself only, and not in respect of any of his Heirs or Posterity, to inherit, purchase, &c. this qualifies and restrains the Disability; so that the Act does not extend beyond the Person offending, nor beyond the Time of his Non-conformity; so that the Act hath preserved in the Offender an Ability to inherit, &c. for the Benefit of Posterity; and this Act having made no Application of the Profits during the Disability, and this being a Penalty inflicted for a Publick Offence, the King is intitled to the Penalty; and to create in the Offender a total Disability would be very inconvenient; for in the Case of an Inheritance, it would be difficult to know when or in what Manner the Heir should take; it could not be in the Life of the Ancestor, for no Man can be Heir of a

Person living; and if there be a Son under no Disability who cannot take, it would be merely by Construction to carry the Estate over his Head for the Benefit of a Remainder-Man, who was not intended to take as long as there was any Issue of a prior Tenant in Tail; and an Heir can intitle himself only through his Ancestors and such as are inheritable; that this is not like the Case of a Monk, for in Times of Popery he was civilly dead; the 3 *Jac.* 1. gives the Pernancy of the Profits in Cases of Disabilities to the next of Kin, that is not a Popish Recusant; and *R. Ow.* was the next Protestant of Kin; the 3 *Car.* 1. does not repeal the 1 *Jac.* 1. but was made to explain, amend and inforce it; the 1 *Jac.* 1. was silent how the Penalties of that Act were to arise; the 3 *Car.* 1. has provided, that it shall be upon Conviction, and expressly makes a Forfeiture for Life, and a Restitution in case of Conformity, in which the former Act was silent; so that if the former Act were to be put in Execution, under the Explanation of 3 *Car.* 1. there being no Conviction in the Case, the Ducheſs could have no Title, but the Land on Conviction would be forfeited for Life, which must be to the King.

### 3. Of buying or selling Popish Books.

By the 3 *Jac.* 1. *cap.* 5. *sect.* 25. it is enacted, ‘ That no Person shall bring from beyond the Seas, nor shall print, buy or sell any Popish Primers, Ladies Pfalters, Manuals, Rosaries, Popish Catechisms, Missals, Breviaries, Portals, Legends and Lives of Saints, containing superstitious Matter, printed or written in any Language whatsoever, nor any other superstitious Books printed or written in the *English* Tongue, on Pain of forfeiting forty Shillings for every Book, &c. and the Books to be burnt.

### 4. Of keeping School.

By the 11 & 12 *W.* 3. *cap.* 4. *sect.* 3. it is enacted, ‘ That if any Papist, or Person making Profession of the Popish Religion, shall be convicted of keeping School, or taking upon themselves the Education or Government, or Boarding of Youth, in any Place within the Realm or the Dominions thereunto belonging, they shall be adjudged to perpetual Imprisonment.

### 5. Of withholding a competent Maintenance from a Protestant Child.

By the 11 & 12 *W.* 3. *cap.* 4. it is enacted, ‘ That if any Popish Parent, in order to compel a Protestant Child to a Change of Religion, shall refuse to allow such Child a sufficient Maintenance, suitable to the Degree and Ability of such Parent, and to the Age and Education of such Child, the Lord Chancellor upon Complaint may make such Order therein as shall be agreeable to the Intent of the said Act.

### 6. Of the Disability of those professing the Popish Religion to present to a Church.

Precedents of a Title made under these Statutes. 2 *Lutw.* 1101. & vide 3 *Lev.* 332. 2 *Lutw.* 1117.

By the 3 *Jac.* 1. *cap.* 5. *sect.* 18, 19, 20, 21. Popish Recusants convicted are disabled to present to a Church; and by the 1 *W. & M.* *cap.* 26. this Disability is extended to Persons refusing to make the Declaration



against Popery, mentioned in 30 Car. 2. and by the said Statute 1 W. & M. cap. 26. sect. 4. it is enacted, ' That if the Trustee, Mortgagee or Grantee of any Avoidance, whereof the Trust shall be for any Popish Recusant convict, shall present without giving Notice in Writing of the Avoidance to the University, &c. within three Months after the Avoidance, he forfeits 500*l*.

And by the 12 Ann. cap. 14. this Disability is extended to all Persons making Profession of the Popish Religion, to which Purpose it is enacted, ' That every Papist or Person making Profession of the Popish Religion, &c. and every Mortgagee, Trustee or Person any Ways intrusted by or for such Papist, &c. with or without Writing, shall be disabled to present to any Benefice, School or Hospital, &c. or to grant any Avoidance of any Benefice, Prebend or Ecclesiastical Living; and that in all such Cases the Universities shall present.

Also by Force of the said Statute, ' The Ordinary may tender the Declaration against Transubstantiation to any reputed Papist making a Presentation, and upon a Refusal to take the same the Presentation shall be void; also the Ordinary may examine every Presentee upon Oath, whether the Person who presented him be the true Patron, or only a Trustee; and the Court, wherein a *Quare impedit* shall be brought, may in like Manner examine the Parties, and a Bill may be brought in any Court of Equity to discover such secret Trusts, &c. and the Answer of such Persons, upon any such Examination or Bill, shall be good Evidence against such Patron, in respect of such a Presentation, but not as to any other Purpose.

In the Construction of the 3 Jac. 1. the following Points, which are 1 Hawk. P. C. said to be likewise applicable to the 1 W. & M. and 12 Ann. have been 32. holden,

That where a Presentment is *pro hac vice* vested in the University, by 10 Co. 57. b. reason of the Patron's being a Popish Recusant at the Time when the Church became void, it shall not be divested again by his Conforming himself to the Church.

That such a Patron is only disabled to present, and that he continues 1 Cawley 230. Patron as to all other Purposes, and therefore that he shall confirm the Leases of the Incumbent, &c.

That such a Person, by being disabled to grant an Avoidance, is no 1 Jen. 19, 20. Way hindered from granting the Advowson it self in Fee, or for Life or Years, *bona fide* and for good Consideration.

That if an Advowson or Avoidance belonging to such a Person come 1 Hob. 126. into the King's Hands by reason of an Outlawry or Conviction of Recusancy, &c. the King, and not the University, shall present. 1 Winch 7, 12. Moor 372. 1 Jon. 20.

On the Statute 12 Ann. it was resolved by my Lord Chancellor Talbot, in the Case of Mr. Brett, who was presented by the University of Oxford to a Living belonging to Mr. Fitzherbert of Swinerton in Staffordshire, that a Bill founded on this Statute cannot be for Relief, but only for a Discovery.

By the 11 Geo. 2. reciting the 3 Jac. 1. and 1 W. & M. and that whereas for the better Discovery of all secret Trusts and fraudulent Conveyances made by Papists, or Persons making Profession of the Popish Religion, of their Advowsons and Right of Presentation, Nomination and Donation to any Benefices or Ecclesiastical Livings, several Provisions were made by the Act 12 Ann. which have been fraudulently evaded by Persons obtaining from such Papists, without a full and valuable Consideration, Grants of such Advowsons, and Right of Presentation, Nomination and Donation, upon Confidence only that such Grantees will, at the Request of such Papists, present to such Benefices or Ecclesiastical Livings Clerks nominated by such Papists, who have been presented accordingly, contrary to the true Intent and Meaning of the said Acts, and to the

the great Hurt of the Protestant Interest of this Kingdom, it is therefore enacted, ' That every Grant to be made from and after the sixth Day of May 1738. of any Advowson or Right of Presentation, Collation, Nomination or Donation of or to any Benefice, Prebend or Ecclesiastical Living, School, Hospital or Donative, and every Grant of any Avoidance thereof by any Papist, or Person making Profession of the Popish Religion, or any Mortgagee, Trustee, or Person any Ways intrusted directly or indirectly, mediately or immediately, by or for any such Papist, or Person making Profession of the Popish Religion, whether such Trust be declared in Writing or not, shall be null and void; unless such Grant shall be made *bona fide*, and for a full and valuable Consideration to and for a Protestant Purchaser, and merely and only for the Benefit of a Protestant; and that every such Grantee, or Person claiming under any such Grant, shall be deemed to be a Trustee for a Papist, or Person professing the Popish Religion, as aforesaid, within the true Intent and Meaning of the said Act; and that all such Grantees, or Persons claiming under such Grants, and their Presentees, shall be compelled to make such Discovery relating to such Grants and Presentations made thereupon, and by such Methods as in and by the said Act 12 Ann. are directed, in the Case of Trustees of Papists, or Persons professing the Popish Religion, and that every Devise to be made from and after the said sixth of May by any Papist, or Person professing the Popish Religion, of any such Advowson or Right of Presentation, Collation, Nomination or Donation, or any such Avoidance, with Intent to secure the Benefit thereof to the Heirs or Family of such Papist or Person professing the Popish Religion, shall be null and void, and that all such Devisees and their Presentees shall in like Manner, and by such Methods, be compelled to discover whether, to the best of their Knowledge and Belief, such Devises were not made with the said Intent.

### 7. Of their Disability to purchase.

The Statutes relating to Estates conveyed by or to Papists, and the Disabilities they are under to take by Purchase, &c. are the 11 & 12 W. 3. 3 Geo. 1. and 11 Geo. 2.

11 & 12 W. 3.  
cap. 4.

By the 11 & 12 W. 3. cap. 4. it is enacted, ' That from and after the 29th Day of September, which shall be in the Year of our Lord 1700. if any Person educated in the Popish Religion, or professing the same, shall not, within six Months after he or she shall attain the Age of eighteen Years, take the Oaths of Allegiance and Supremacy, and also subscribe the Declaration set down and expressed in an Act of Parliament made 30 Car. 2. intitled, *An Act for the more effectual preserving the King's Person and Government, by disabling Papists from sitting in either House of Parliament*, to be by him or her made, repeated or subscribed in the Courts of Chancery or King's Bench, or Quarter-Sessions of the County where such Person shall reside; every such Person shall in respect of him or herself only, and not to or in respect of any of his or her Heirs or Posterity, be disabled or made incapable to inherit or take by Descent, Devise or Limitation in Possession, Reversion or Remainder, any Lands, Tenements or Hereditaments within the Kingdom of England, Dominion of Wales, or Town of Berwick upon Tweed, and that during the Life of such Person, or until he or she do take the said Oaths, and make, repeat and subscribe the said Declaration in Manner as aforesaid, the next of his or her Kindred, which shall be a Protestant, shall have and enjoy the said Lands, Tenements and Hereditaments, without being accountable for the Profits by him

or her received during such Enjoyment thereof, as aforesaid; but in case of any wilful Waste committed on the said Lands, Tenements or Hereditaments by the Person so having or enjoying the same, or any other, by his or her Licence or Authority, the Party disabled, his or her Executors and Administrators, shall and may recover treble Damages for the same against the Person committing such Waste, his or her Executors or Administrators, by Action of Debt in any of his Majesty's Courts of Record at *Westminster*; and that from and after the 10th Day of *April* 1700. every Papist, or Person making Profession of the Popish Religion, shall be disabled and is here by made incapable to purchase, either in his or her own Name, or in the Name of any other Person or Persons to his or her Use, or in Trust for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, within the Kingdom of *England*, Dominion of *Wales* and Town of *Berwick upon Tweed*; and that all and singular Estates, Terms, and any other Interests or Profits whatsoever out of Lands, from and after the said 10th Day of *April*, to be made, suffered or done, to or for the Use or Behoof of any such Person or Persons, or upon any Trust or Confidence mediately or immediately, to or for the Benefit or Relief of any such Person or Persons, shall be utterly void and of none Effect, to all Intents, Constructions and Purposes whatsoever.

By the 3 *Geo. 1. cap. 18.* reciting, that some Doubts have arisen upon the (a) Act therein recited, as also upon one other Act made and passed in the Parliament held in the 11 & 12 *W. 3.* intituled, *An Act for the further preventing the Growth of Popery*, and upon another Act made in the 1 *Jac. 1.* for the due Execution of the Statutes against Jesuits, Seminary Priests, Recusants, and other Acts made against Papists and Popish Recusants touching the Sale of the Real Estates of Persons professing the Popish Religion, or incurring the Disabilities and Incapacities in the said Acts mentioned, it is enacted, ' That no Sale for a full and valuable Consideration of any Manors, Messuages, Lands, Tenements or Hereditaments, or of any Interest therein by any Person or Persons, being reputed Owner or Owners, or in the Possession or Receipt of the Rents or Profits thereof heretofore made, or hereafter to be made, to or for any Protestant Purchaser and Purchasers, and meerly and only for the Benefit of Protestants, shall be avoided or impeached for or by Reason or upon Pretence of any of the Disabilities or Incapacities in the said Acts or any of them contained, incurred, or supposed to be incurred, by any of the Persons making or joining in such Sale, or by any other Person or Persons, from or through whom the Title to such Manors, &c. is or shall be derived, or supposed to be derived; unless before such Sale the Person intituled to take Advantage of such Disability or Incapacity shall have recovered such Manors, Messuages, Lands, Tenements and Hereditaments, by Reason of such Disability or Incapacity, and have entered such Claim in open Court at the General Sessions of the Peace for the County, City, Riding or Division, wherein such Manors, Messuages, Lands, Tenements or Hereditaments lie or arise, and *bona fide*, and with due Diligence, pursued his Remedy in a proper Course of Justice for the Recovery thereof.

' Provided nevertheless, that whereas it was amongst other Things enacted by the said 11 & 12 *W. 3.* that from and after the tenth Day of *April*, which should be in the Year 1700. every Papist, or Person making Profession of the Popish Religion, should be disabled, and was thereby made incapable to purchase, either in his or her own Name, or in the Name of any other Person or Persons to his or her Use, or in Trust for him or her, any Manors, Lands, Profits out of Lands, Tenements, Rents, Terms or Hereditaments, within the Kingdom of *England*, Dominion of *Wales* and Town of *Berwick upon Tweed*; and that all and singular Estates, Terms, and any other In-

3 *Geo. 1. cap. 18.*  
(a) viz. An Act pass in the Sessions before, intituled, *An Act to oblige Papists to register their Names and Real Estates.*

terests

‘ erefts or Profits whatsoever out of Lands, from and after the said 10th  
 ‘ Day of *April* to be made, suffered or done, to or for the Use or Be-  
 ‘ hoof of any such Person or Persons, or upon any Trust or Confidence  
 ‘ mediately or immediately, to or for the Benefit or Relief of any such  
 ‘ Person or Persons, should be utterly void and of no Effect, to all In-  
 ‘ tents, Constructions and Purposes whatsoever: It is hereby declared  
 ‘ and enacted, that the said recited Part of the said Act of Parliament  
 ‘ shall not be hereby altered or repealed, but the same shall be and re-  
 ‘ main in full Force as if this Act had never been made.

And it is farther enacted by the Authority aforesaid, ‘ That from and  
 ‘ after the 29th of *September* 1717. no Manner of Lands, Tenements,  
 ‘ Hereditaments or any Interest therein, or Rent or Profit thereout, shall  
 ‘ pass, alter or change from any Papist, or Person professing the Popish  
 ‘ Religion, by any Deed or Will, except such Deed within six Months  
 ‘ after the Date, and such Will within six Months after the Death of  
 ‘ the Testator, be inrolled in one of the King’s Courts of Record at  
 ‘ *Westminster*, or else within the same County or Counties wherein the  
 ‘ Manors, Lands and Tenements lie, by the *Custos Rotulorum* and two  
 ‘ Justices of the Peace, and the Clerk of the Peace of the same County  
 ‘ or Counties, or two of them at the least, whereof the Clerk of the  
 ‘ Peace to be one.

The 11 *Geo.* 2. ‘ Whereas Persons professing or educated in the Popish  
 ‘ Religion are by divers Acts of Parliament subjected to several Disabi-  
 ‘ lities and Incapacities, which may affect Persons conforming from the  
 ‘ Popish to the Protestant Religion, and whereas many Persons have al-  
 ‘ ready conformed to the Protestant Religion, and are willing to submit  
 ‘ to his Majesty’s Government in as full and ample Manner as any other  
 ‘ of his Majesty’s Subjects, and others are likely so to do, it is enacted,  
 ‘ that all and every Person or Persons, being reputed Owner or Owners,  
 ‘ or in Possession or Receipt of the Rents and Profits of any Manors,  
 ‘ Messuages, Lands, Tenements or Hereditaments, or of any Interest  
 ‘ therein, who having been or reputed to be a Papist or Papists, or edu-  
 ‘ cated in the Popish Religion, hath or have conformed to, or hereafter  
 ‘ shall conform to and profess the Protestant Religion, and hath or have  
 ‘ taken or shall take the Oaths of Allegiance, Supremacy and Abjuration,  
 ‘ and also subscribed or shall subscribe the Declaration set down and ex-  
 ‘ pressed in an Act of Parliament made the 30 *Car.* 2. intituled, *An Act*  
 ‘ *for the more effectual preserving the King’s Person and Government, by*  
 ‘ *disabling Papists from sitting in either House of Parliament*, to be by him  
 ‘ her or them, repeated and subscribed in the Courts of Chancery or  
 ‘ King’s Bench, or Quarter-Sessions of the County where such Person  
 ‘ or Persons shall reside, (all which shall be recorded in one of his Ma-  
 ‘ jesty’s Courts of Record at *Westminster*, or such Quarter-Sessions as  
 ‘ aforesaid,) and all and every Person and Persons, being Protestants  
 ‘ claiming under such Person or Persons conforming and performing the  
 ‘ Requisites as aforesaid, for their own Benefit, or for the Benefit of any  
 ‘ other Protestant or Protestants, and not for the Benefit of any Papist  
 ‘ or Papists, shall hold, possess and enjoy all such Manors, Messuages,  
 ‘ Lands, Tenements and Hereditaments, freed and discharged of and  
 ‘ from the Disabilities and Incapacities in the said Acts or any of them  
 ‘ contained, incurred or supposed to be incurred by such Person or Persons  
 ‘ so reputed Owner or Owners, or in Possession or Receipt of the Rents and  
 ‘ Profits as aforesaid, or by any other Person or Persons by, from or thro’  
 ‘ whom the Title to such Manors, Messuages, Lands, Tenements or He-  
 ‘ reditaments, or any Interest therein, was or shall be derived or supposed  
 ‘ to be derived for such Estate, Right, Title or Interest, as he, she or they  
 ‘ had or would have, if no such Disability or Incapacity had been in-  
 ‘ curred; unless the Person or Persons intituled to take Advantage of  
 ‘ such Disability, Incapacity or Defect of Title, hath or have actually

‘ and *bona fide* recovered, or shall hereafter recover such Manors, Messuages, Lands, Tenements and Hereditaments, by Judgment or Decree in some Action or Suit already commenced, or hereafter to be commenced, six Kalendar Months at least before the making of such Record, and to be prosecuted with due Diligence.

‘ Provided nevertheless that this Act, or any Thing herein contained, shall not take away or prejudice the Right of any Person or Persons intitled to take Advantage of such Disability or Incapacity, who now is or are in the actual Possession of, or shall have, precedent to the making of such Record, been in quiet Possession of any such Manors, Messuages, Lands, Tenements or Hereditaments, by the Space of two Kalendar Months.

Provided always, and it is farther enacted, that if any such Person or Persons, so conforming, as aforesaid, shall after such Conformity return to or again profess the Popish Religion, every such Person and Persons shall for ever afterwards be disabled from, and be incapable of, having or enjoying any Benefit, Privilege or Advantage of this Act, and shall from thenceforth be liable to the same Disabilities, Incapacities and Forfeitures, as if he, she or they had not taken the said Oaths and subscribed the Declaration as aforesaid.

‘ Provided always, that nothing in this Act contained shall extend to take away or prejudice the Right of any Person intitled to any Remainder or Reversion in any such Manors, Messuages, Lands, Tenements or Hereditaments, in case such Person shall pursue his or her said Right by some Action or Suit, to be commenced within the Space of twelve Kalendar Months next after the precedent Estate or Estates, on which such Remainder or Reversion depends and is expectant, shall be determined; or within twelve Kalendar Months from and after the 29th of *September* 1738. if such precedent Estate or Estates be already determined by the Death or Deaths of any Person or Persons whose Deaths have been concealed from or not known to the Person intitled to such Remainder or Reversion, by reason of their having been buried beyond the Seas, or in a private and clandestine Manner at Home, and shall prosecute such Action or Suit with due Diligence.

On the first of these Statutes there have been the following Cases and Resolutions.

*John Roper* Esq; being seised in Fee of several Manors, Lands, &c. by Indentures of Lease and Release, bearing Date respectively the 17th and 18th of *January* 1708. granted and conveyed the same to *William Constable*, *Richard Snow* and *Daniel Hickman*, and their Heirs, in Trust to sell the same, and out of the Purchase-money and Rents till Sale to pay a Debt of 4000*l.* due to *E. and H. W.* by Mortgage of the Premises, with Interest, and after Satisfaction thereof, then in Trust for Payment of the Debts mentioned in a Schedule annexed to the Indenture of Release, and the Overplus of the Money so to be raised, to be paid as the said *John Roper* by any attested Writing or by his Will should appoint, and for Want of such Appointment, in Trust for the Benefit of the said *John Roper* and his Heirs. The 5th of *March* 1708. the said *John Roper* made his Will, and after reciting the said Lease and Release, and the Power reserved to him over the Surplus of the said Estate, he bequeathed several pecuniary Legacies to his Relations, and the Residue of all his Real and Personal Estate he gave to *William Constable* and *Thomas Radclyffe*, and to *Robert Hewett* and *Daniel Hickman*, and to their Heirs and Assigns for ever, and appointed them joint Executors; the 1st of *April* 1709. he added a Codicil to his Will, and thereby gave the further several Legacies therein mentioned, and all the Remainder, whether in Lands or Personal Estate, he gave to his Executors *Mr. Radclyffe* and *Mr. Constable*. The said *John Roper* died soon after; and *Mr. Radclyffe* and *Mr. Constable* brought their Bill in Chancery against *Edward Roper* Esquire,

*Rot. ver.*  
*Rad. lyffe,*  
*Hill. 1713.*  
*in Can.*

squire, the Heir at Law of the said *John Roper*, and also against *Hickman*, *Hewett*, *Snow* and others, to have the Trust-Estate sold, and for an Account of the Profits, and after the Debts and Legacies paid, to have the Surplus Money arising by Sale equally divided between the Plaintiffs, according to the said Codicil. The said *Edward Roper* by his Answer insisted, that as Heir at Law to the Testator he was intitled to all such Real Estate as was undisposed of by him, and that Mr. *Radclyffe* and Mr. *Constable* were then and at the Testator's Decease Papists, and as such, by 11 & 12 W. 3. were incapable of purchasing any Manors, Lands, Profits out of Lands, &c. The said *Hewett* and *Hickman* by their Answer insisted, that the Real Estate devised by the said Will ought to be considered as the remaining Part of the Testator's Lands, (after a sufficient Part sold for Payment of Debts and Legacies,) and not as a Personal Estate, and that so much only ought to be sold as would be sufficient to pay the Debts; and that in case Mr. *Radclyffe* and Mr. *Constable* were incapable of taking them, they as Protestants claimed the said Real Estate, as being the only Devisees capable to take the same; they also insisted, that the Codicil, with Reference to the Devise of the Remainder of the Testator's Lands, did not controul the Devise thereof mentioned in the Will; for that if the Plaintiffs were incapable to take the Lands as Purchasers by the Devise, they were to be esteemed as Persons not *in esse*, and that the Codicil as to the Lands was void; but if the Plaintiffs were capable, yet such Devise did not give the Remainder of the Premises to them but for their Lives, and that the Reversion in Fee belonged to them the said *Hewett* and *Hickman*; and they brought a Cross-Bill insisting thereby on the same Matters; and the Legatees brought a Bill for Payment of their Legacies. The 27th of June 1712. the said Causes came on to be heard before the Lord Chancellor *Harcourt*, who desired to have the Assistance of the Judges; and a Case was made and argued before my Lord Chancellor *Parker*, *Trevor* Chief Justice of C. B. Justice *Powel* and the Master of the Rolls, and after Time taken to consider of the Case, my Lord Chancellor, *Trevor* Ch. J. the Master of the Rolls and Justice *Powel*, were of Opinion, that the Devise of the Surplus of the Purchase-Money, (after Debts and Legacies paid,) to Mr. *Radclyffe* and Mr. *Constable* was good, notwithstanding the said disabling Act; the Surplus Money being a personal Interest in them, and not made void either by the Words or Intention of that Statute; and as to *Hewett* and *Hickman*, my Lord Chancellor was of Opinion, that the first Codicil was a Revocation of the Will, as to the Residue of the Real and Personal Estate. Mr. *Roper* appealed to the House of Lords, and it was there ordered, before the Appeal was determined, that the Estate should be sold and all Debts and Legacies paid, which was accordingly done; where afterwards the Lords reversed the Decree, principally for this Reason, that (a) if the Devise of the Residue to the Plaintiffs was good, they would in Equity be intitled to pay off the antecedent Debts and Legacies, and when that was done, keep the Estate, which would be a Means of evading the Statute, and enabling a Papist to take an Estate contrary to the Intention of it. It was also resolved in this Case, that a Devise is a Purchase within the Meaning of this Act.

(a) But it seems, that where Lands are devised to or vested in Trustees, to be sold for Payment of

particular Sums to several People, some of whom happen to be Papists, that this Act does not prevent such Papists from taking the particular Sums or Legacies intended for them; because they cannot insist upon paying off the other Incumbrances and holding the Estate, as a Person can do to whom the Residue of the Purchase-Money is devised.

The Earl of *Derwentwater* was Tenant in Tail, with Remainder in Fee to himself, and intending to marry Sir *John Webb's* Daughter, he by Advice of Counsel suffered a Common Recovery without declaring an Appeal to the Lords Delegates from the Judgment of the Commissioners for forfeited Estates. *Hill 6 Geo. 1.*

any Uses, it being intended, that he should thereby become Tenant in Fee, and be enabled to make a proper Settlement; accordingly by Indentures of Lease and Release he settled his Estate to the Use of himself for Life; Remainder to Trustees for preserving contingent Uses; Remainder in Tail successively to the first and other Sons of the intended Marriage, with Remainders over; the Marriage took Effect, and there was Issue a Son and a Daughter; the said Earl was attainted of High Treason on Account of the *Preston* Rebellion, and was executed; and by an Act made thereupon, all the forfeiting Persons Lands were vested in Commissioners for the Use of the Publick; and it was expressly provided, that where the forfeiting Person was seised of an Estate-tail at the Time of the Forfeitures, the same should be vested in the Commissioners as an absolute Fee, discharged of all Remainders and Reversions. The Commissioners of Forfeitures, on a Claim exhibited before them in the Name of the said Earl's Son, determined that the whole Estate was in them on this Foundation, that the Earl continued Tenant in Tail notwithstanding the Recovery, and consequently nothing more than an Estate for his own Life past by the Lease and Release; and the Reason they went upon was, that if by suffering a Common Recovery he could turn his Estate-Tail into a Fee, then he would gain a new Estate by Purchase, which they apprehended he, being a Papist, was disabled to do by the Statute 11 & 12 *W. 3.* but the Majority of the Judges, upon an Appeal from the Decree of the Commissioners, were of a contrary Opinion, and held, that this was only a new Modelling of the Estate, and not a Purchase or Acquisition within the Act; and that the Earl was capable of taking a new Fee at least for the Benefit of his Heirs and Posterity, and that he was capable of settling the same by Lease and Release; and therefore allowed of the Son's Claim.

It was likewise resolved, by the Delegates appointed to hear Appeals from the Determinations of the Commissioners for the Estates forfeited in the Year 1716. that a Papist may be a Trustee for a Protestant, notwithstanding the Statute 11 & 12 *W. 3.*

*Anne Stephenson* had two Grandchildren, one the Plaintiff *Hill*, the other *Frances* the Wife of the Defendant *Filkins*, who was educated by her in the Popish Religion, the Grandmother by her Will made in the Year 1716. devised the Lands in Question to Trustees, in Trust to be sold for the Payment of her Debts and Legacies, and the Residue of the Money arising by such Sale she devised to her said Grand-daughter *Frances*, when she should attain her Age of twenty-one Years, or be married with the Consent of the said Trustees, and soon after died. The said *Frances*, at the Age of fifteen, was married to *Filkins* according to the Ceremony and Usage of the Church of *Rome*, and a Week afterward by a Minister of the Church of *England*; at the Age of eighteen she conformed according to the Directions of the Statute; it was held that she was within the first Clause; and that a Devise to a Papist under the Age of eighteen is good, if he conforms within six Months after he comes to that Age; and the Age of eighteen was a proper Period for them to make their Election, whether they would conform or not; and the Bill exhibited by the Protestant Heir was dismissed with Costs.

*J. S.* a Papist made a Settlement of his Estate to Trustees, to the Use of the Trustees and their Heirs, in Trust for *A.* for Life; Remainders to the said Trustees to preserve contingent Remainders; Remainder to the first and every other Son of *A.* and for Default of such Issue, then in Trust for *B.* and his Issue; *A.* was a Papist and *B.* a Protestant; *B.* exhibited his Bill in Chancery, suggesting that *A.* was a Papist and had no Son, and that therefore the Trustees might account to him for the Rents and Profits; he also made the Heir at Law Defendant; and on hearing this Cause before the Lord *Macclesfield*, and afterwards by the Lord King, they both held, that tho' the Trust to *A.* was void. 'A' being a Papist,

*Hill* ver. *Filkins*, Trin. 11 Geo. 1.

*Carrick* ver. *Errington*, Trin. 9 Geo. 1. in *Caus.*



yet that notwithstanding, the legal Estate was still in the Trustees, because they were Trustees not only for the Papist, but also for *B.* the Protestant, and for the Sons of *A.* who were yet unborn; and as they were Trustees to preserve contingent Remainders for such Sons who might be Protestants, they thought that the Estate should remain in the Trustees for that Purpose; and they held, that the Heir at Law was intitled to receive the Profits during the Life of *A.* as a Trust undisposed, but that *B.* the Remainder-Man could have no Right till the Death of *A.* without a Son capable of taking; and this Decree was affirmed in the House of Lords.

*Marswood*  
ver. *Dorrel*,  
Hill. 8 Geo. 2.  
in B. R.

The Case upon a Special Verdict in Ejectment was: *Thomas Dorrel* had one Brother and four Sisters, and being seised in Fee by Will 4 Decemb' 1703. devised the Lands in Question to Trustees, to the Use of them and their Heirs, in Trust for his first and every other Son in Tail Male; and for want of such Issue, Remainder to his Brother *Arthur* for Life, Remainder to his first and every other Son in Tail Male; and for want of such Issue, that then the Trustees shall stand and be seised for the sole and proper Use and Benefit of such eldest and first Son lawfully begotten or to be begotten of *John Dorrel*, and shall not be Heir at Law and Inheritor to the said *John Dorrel*, and the Heirs of his Body; and for Default of such Issue by him, Remainder to the third, fourth and fifth, and every other Son of the said *John Dorrel*, and the Heirs of their respective Bodies. The Trustees, by a Clause in the Will, were impowered, by the Rents and Profits of the Estate, or by Mortgage and Sale, to raise so much Money as would satisfy the Testator's Debts: *Thomas* and *Arthur* both died without Issue, *John Dorrel* is living and has seven Sons; *George* the Defendant is the second Son; all the Sons of *John* are Papists, and educated in the Popish Religion, except his younger Son, who is too young to be said, as yet, to be of any Religion; *George Dorrel* was under eighteen Years of Age when the Limitation by the Devise fell upon him, but is now above eighteen Years, and has not taken the Oaths directed by 11 & 12 W. 3. and is married, and has now two Sons very young, for whom, as well as for his Wife, he has made a Settlement of these Lands; the four Sisters of *Thomas Dorrel* are Lessors of the Plaintiff, as Heirs at Law; and the Question is, whether *George* the Son of *Arthur*, or the Heirs at Law, be intitled to the Lands. For the Plaintiffs the Heirs at Law it was urged, 1st, That *George* is a Papist, and that Papists who shall refuse, above six Months after they arrive at the Age of eighteen, to take the Oaths of Allegiance, &c. are by the said Statute expressly disabled from purchasing; and therefore as a Devise is a Purchase, and so held *Co. Lit.* 18. and by the Lords, in the Case of *Roper and Ratclyffe*, consequently *George Dorrel* takes nothing by it. 2dly, That the Devise was void for Uncertainty, being to such eldest and first Son of *J. D.* as shall not be Heir at Law to him; but as no one can say who will be Heir to *J. D.* so it is impossible to say who will not, for *Nemo est hæres viventis*; and he who is to be Heir is not to take, so that none but a Son who will not be Heir can take, for both Descriptions must coincide. *Hob.* 29. *Hardwick Ch. J.* in breaking the Case said, two Objections have been made to the Defendant's Title; 1st, That the Limitation, under which he claims, is void for the Uncertainty of the Description. 2dly, That supposing the Description to be certain enough, yet by 11 & 12 W. 3. the Defendant is disabled from taking the Estate, as being a Papist; there seems at present to be a good deal of Weight in the first Objection, and yet it may possibly be reduced to a Certainty, and if so, may be made good; and it seems natural to imagine, that by the Words of the Will the Testator intended the second Son of *John Dorrel* should take, and the rather, as the Testator has made the next Limitation to the third, fourth, and fifth Sons, &c. of the said *John Dorrel*; but if the second Son cannot take, yet if the third, &c. Sons are well described,



described, the Daughters of *Thomas* cannot recover, and at present they seem to be certainly described. As to the second Objection, I think my self bound by the Determination of the House of Lords in the Case of *Roper* and *Ratchiffe*, that the Word *Purchase* extends to a Devise, and therefore that a Papist is incapable of taking an Estate by Will; but yet, be the Defendant's Title as it will, the Plaintiff must recover on his own Strength, and not on the Weakness of the Defendant's Title; and my greatest Doubt is this, the Devise here is to Trustees to the Use of them and their Heirs, &c. I think this would clearly be a Devise to the Use of the Trustees, tho' the Clause of raising Money by Rents and Profits was omitted; so here is a Devise to Trustees, in Trust not only for the second Son of *John Dorrel*, but for all other his Sons now living, one of which is not found to be a Papist; it has been said indeed, that this Devise being for the Benefit of Papists, the Trust it self is void; but the Question is, if the intire Trust should not be for the Benefit of Papists, in the present Case, the youngest Son of *John Dorrel* may be able to take for ought appears to the contrary; and therefore I think that this latter Part of the Trust being lawful will support the legal Estate in the Trustees; and here he put the Case *supra* of *Carrick ver. Errington*, and said, that according to the Resolution in this Case, the Lands in Question cannot be in the Heirs at Law, but in the Trustees; because here is a Trust for a Son of *John Dorrel*, who was not a Papist, as well as for other Children yet unborn, so that the Plaintiffs have no Title to recover in this Action, but have mistaken their Remedy; for if they have any, it seems to be by Bill in Equity against the Trustees for an Account of the Profits; and it is certain, in the above-mentioned Case, that the Estate could not vest in the Remainder-man, because he being then in by Purchase, it could never be afterwards divested for the Benefit of such Child as *A.* should happen to have; but he said, that he did not give this as his absolute Opinion, but only to point out the Difficulties which stuck with the Court; it was adjourned, and no farther Proceedings was had therein.

A Mortgage was made to a Papist, who assigned to a Protestant for a full Consideration; an Ejectment was brought against the Assignee by a subsequent Mortgagee, who recovered by reason of the Disability of the first Mortgagee; all this appeared upon a Bill brought in Chancery; and my Lord chancellor was of Opinion, that a Mortgage to a Papist is void; but in this Case the Assignment to the Protestant, and the Trial in Ejectment, were both before the 3 *Geo. 1.* which, were it otherwise, would it seems have made an Alteration. *Polham ver. Fletcher, Nich. 1729.*

In a Case which came on before my Lord *King* in the Court of Chancery, it appeared that my Lord *Dover* was possessed of a long Term for Years, and made his Will, and his Lady who was a Papist Executrix thereof; it was resolved by my Lord Chancellor, that notwithstanding the disabling Act 11 & 12 *W. 3.* the Term vested absolutely in her, and that this was not a Purchase within that Act; and he said, that a Papist may be Tenant in Dower, or by the Curtesy; because in all these Cases it is by Operation of Law, and not by any Act of the Party, that the Estate comes to him. On Lord Dover's Will.

It hath been adjudged, that a Papist may devise to a Protestant; in which Case it was agreed, that where an Ancestor dies seised of an Estate of Inheritance, it descends upon and vests in his Heir, (tho' a Papist) for the Benefit of his Heirs, and that the next Protestant a-kin has only a Right to the Perception of the Profits during the Non-conformity of the Heir. *Atallom ver. Bringloe, Pasch. 1738. in C. B.*

Upon the Marriage of Mr. *Paine* with one Mrs. *Gage*, Lands in the County of *Surrey* were settled and conveyed to the Use of the Husband and Wife for their Lives, and the Life of the Survivour of them; then to the Use of the first and every other Son in Tail, Remainder to the right *Smith ver. Read, Trin. 12 Geo. 2.*

right Heirs of the Husband; the Marriage took Effect, but Mr. *Paine* the Husband died in the Life-time of Mrs. *Paine*, without leaving Issue, having first devised all his Lands to his Wife and her Heirs. In 1730. Mrs. *Paine* the Wife devised all her Real Estate to the Defendant, subject to a few Legacies mentioned in her Will, but lived and died a Papist; but that being difficult to prove at Law, the Plaintiff Mr. *Smith* who had married *Eliz. Paine*, Heir at Law to Mr. *Paine*, he and his Wife filed their Bill against the Defendant to set aside the Marriage-Settlement and Will of Mr. *Paine* the Husband, under which Mrs. *Paine* claimed; and in particular prayed, that the Defendant might discover whether Mrs. *Paine* the Wife, under whose Will he claimed, was a Papist or not. To which the Defendant pleaded the Statute of 11 & 12 W. 3. Upon arguing this Plea it was insisted upon for the Defendant, that it was a standing Rule in this Court, that no Person was bound to discover what might subject him to the Penalty of an Act of Parliament; that the Statute of 11 & 12 W. 3. was a penal Law, and the Party, who would take Advantage of such Law, would never be assisted in a Court of Equity, which never assists a Forfeiture; he, who would claim any Thing forfeited, must make out the Forfeiture himself; for no Person shall be obliged to discover a Fact that would be a Forfeiture of his own Estate. If a Copyholder commits Waste, it is a Forfeiture of his Estate to the Lord of the Manor; but if the Lord of the Manor comes into this Court for a Discovery, whether the Copyholder has been guilty of Waste or not, the Copyholder is not bound to answer; for no Law in the World obliges a Man to accuse himself; if an Estate is given to a Woman *durante viduitate*, she is not bound to discover whether she is married or not; because the Discovery of that Fact might be the Loss of her Estate. That Disabilities and Forfeitures were of the same Nature; that a total Incapacity or Disability to hold at all, (which is the Case of Papists) was certainly as much a Penalty, as a Forfeiture of an Estate which the Party before was capable of holding; that as Mrs. *Paine* would not have been obliged in her Life-time to discover whether she was a Papist or not, the Defendant who claims under her ought not to be obliged to discover it. On the other Hand it was insisted by the Counsel for the Plaintiff, that it was not their Business to examine, whether the Acts of Parliament made against Papists were hard Laws or not, they were Laws, and that was sufficient for their Purpose; that this was not the Case of a Forfeiture, but it was to discover a Fact, which if true, the Estate was never in Mrs. *Paine*, because the Act of Parliament makes all Papists absolutely incapable of being Purchasers; if she was a Papist, the Estate never vested in her; and as she was not capable of holding it, she could not give it away to the Defendant, therefore could never forfeit the Estate; for no Person can be said to forfeit an Estate he never had; an Alien is incapable of holding Lands at Common Law, yet he is obliged to discover whether he is an Alien or not; and his Discovery of that Fact, whether he is so or not, can never be a Forfeiture of his Estate, because he never had a Right to it; so in case of a Bastard who is *nullius filius*, and incapable of claiming Lands by Descent, he shall discover whether he is so or not, for the same Reason; so a Person claiming under a Bankrupt, whose Goods are vested in the Assignees of the Commission of Bankruptcy for the Benefit of Creditors, must discover whether the Person, under whom he claims, was a Bankrupt or not at the Time of the Conveyance: That all these Cases depend upon the same Reason, and were no Forfeitures, because the Estates were never in them; so if Mrs. *Paine* was a Papist, she was incapable of having the Estate herself, and could not give it away; and therefore the Defendant could never forfeit it, because the Estate was never in him. But my Lord *Hardwick* was of Opinion, that the Defendant was not obliged to discover whether Mrs. *Paine* was a Papist or not; that there is no Rule better esta-

blished

blished in this Court, than that a Man shall not be obliged to answer to what may subject him to the Penalty of an Act of Parliament; no Person can doubt whether this Act is not a Penal Law, and whether the Clauses relating to Papists are not Disabilities or Incapacities, imposed by way of Penalty upon all Persons exercising that Religion. It is objected, that this is not the Case of a Forfeiture, because the Estate was never vested, and therefore can never be devolved; yet it all falls under the same Reason; and an Incapacity or Disability to hold at all by Act of Parliament, is certainly as much a Penalty as the Forfeiture of an Estate by a Person who had a Right to enjoy it before the Forfeiture. That if a Bill is brought against the Person for a Discovery, whether he is a Papist or not, he is not bound to discover; and where is the Difference between him and the Person claiming under him? Here is a Disability imposed by Parliament, by way of Penalty, upon a particular Set of Men upon the Account of their Religion, the Discovery of that Fact subjects them to a Penalty; and this is not like the Case of an Alien or Bastard, who are incapable by the general Laws of the Land to inherit; besides, what sways with me much, is the great Inconvenience that would follow, should this Plea be disallowed; we should have nothing in this Court but Bills of Discovery, whether such and such Persons were Papists or not, and no Body knows what Confusion would follow; therefore the Plea must be allowed.

## Pardon.

- (A) By whom to be granted.
- (B) In what Cases and for what Offences it may be granted.
- (C) Where a Pardon is grantable of common Right.
- (D) Of the Validity of a Pardon; and therein by what Words Treason, Murder, Felony and other Offences may be pardoned; and herein of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.
- (E) Whether a Pardon may be conditional.
- (F) Who may take Advantage of a Pardon, and to whom it shall be said to extend.
- (G) In what Manner a Pardon is to be taken Advantage of: And herein,
  1. In what Manner a general Pardon by Parliament is to be taken Advantage of.
  2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.
- (H) The Effects and Consequences of a Pardon, and to what the Party shall be restored.

## (A) By Whom to be granted.

<sup>1</sup> *Show.* 284. **T**HE Power of pardoning Offences is inseparably incident to the Crown; and this High Prerogative the King is intrusted with upon a special Confidence, that he will spare those only whose Case, could it have been foreseen, the Law it self may be presumed willing to have excepted out of its general Rules, which the Wisdom of Man cannot possibly make so perfect as to Suit every particular Case.

<sup>Co. Lit.</sup> 114. <sup>3</sup> *Inst.* 233. But it seems, that anciently the Right of pardoning Offences within certain Districts was claimed by the Lords of Marchers and others, who had *Jura regalia* by ancient Grants from the Crown, or by Prescription. But now by the 27 *H. 8. cap.* 24. *sect.* 1. it is enacted, ' That no Person or ' Persons, of what Estate or Degree soever they be, shall have Power to ' pardon or remit any Treasons or Felonies whatsoever, nor any Accessories to the same, nor any Outlawries for such Offences, whether committed in *England* or *Wales*, or the Marches of the same, but that the ' King shall have the whole and sole Power and Authority thereof united ' and knit to the Imperial Crown of this Realm, as of good Right and ' Equity it appertaineth.

## (B) In what Cases and for what Offences it may be granted.

<sup>Flow.</sup> 487. <sup>Keilw.</sup> 134. <sup>12</sup> *Co.* 29, 30. <sup>3</sup> *Inst.* 237. <sup>Vaugh.</sup> 333. **I**T is laid down in general, that the King may pardon any Offence whatever, whether against the Common or Statute Law, so far as the Publick is concerned in it, after it is over, and consequently may prevent a popular Action on a Statute, by pardoning the Offence before the Suit is commenced; but it seems, that he cannot wholly pardon a Publick Nuisance while it continues such, because such Pardon would take away the only Means of compelling a Redress of it; yet it is said, that such a Pardon will save the Party from any Fine to the Time of the Pardon.

<sup>Dav.</sup> 75. <sup>5</sup> *Co.* 35. <sup>12</sup> *Co.* 29. But it seems agreed, that the King can by no previous Licence, Pardon or Dispensation, make an Offence dispensable which is *Malum in se*; as being either against the Law of Nature, or so far against the Publick Good as to be indictable at Common Law; and that a Grant of this Kind, tending to encourage the doing of Evil, which it is the chief End of Government to prevent, is plainly against Reason and the common Good, and therefore void.

<sup>2</sup> *Hawk. P. C.* 389. And hence it hath been insisted, that the King's Grant to the Bishop of *Salisbury* and his Successors, having the Custody of a Prison, that they shall be quiet from all Escapes, which hath been (a) adjudged to be a good Grant, is not Law; as being but a single Instance, and contrary to this Rule; because a Grant of this Kind, tending to make a Gaoler less diligent in his Duty, by taking off the legal Punishment of his Negligence, is plainly against the common Good.

<sup>2</sup> *Hawk. P. C.* 389, 390. and several Authorities there cited. But where a Thing in its own Nature lawful, is made unlawful by Parliament, as the Carrying Bell-metal, &c. out of the Realm, Importing Merchandizes in foreign Ships, Selling Wines beyond a certain Price, or without a Licence, Multiplying Gold, &c. Coining Money of a base Alloy, &c. it was formerly taken as a general Rule, that the King might dispense with it, as to a particular Time or Place, or Person, so far as the

Publick

Publick was concerned it; unless such Dispensation could not but be attended with an Inconvenience, as the Introducing a Monopoly; or Frustrating the End for which the Law was made, as the Licensing a particular Person to import foreign Cards or Wines, &c. in which Cases it was commonly taken to be void; also, where a Statute gives a particular Interest or Right of Action to the Party grieved, as the Statutes of Mortmain, those against Maintenance, Forcible Entries, Carrying Distresses out of the Hundred, Escapes, &c. it has been always agreed, that no Charter from the King can bar the Right of the Party grounded on such Statute; also where a Statute is express, that the King's Charter against the Purport of it, tho' with the Clause of *Non obstante*, shall be void; it seems to have been always generally agreed, that regularly no such Clause could dispense with it.

Also it seems to be agreed, that no Dispensation of any Statute, except the Statutes of Mortmain, was of any Force, without a Clause of *Non obstante*; neither is such Clause of any Effect at this Day; for it is declared and enacted by 1 H. 8. M. sess. 2. cap. 2. that no Dispensation by *Non obstante* of or to any Statute, or any Part thereof, be allowed; but that the same shall be held void, except a Dispensation be allowed in such Statute; but it is provided, that no Charter, Grant or Pardon, granted before 23d of October 1699. shall be any Ways invalidated by that Act, but that the same shall be and remain of the same Force, and no other, as if the said Act had never been made.

The King can by no Charter whatsoever bar any Right of Entry or Action, or any legal Interest or Benefit before vested in the Subject; and therefore it seems clear, that he cannot bar any Action on a Statute by the Party grieved, nor even a popular Action commenced before his Pardon, nor a Recognizance for the Peace before it is forfeited.

Neither can the King pardon an Appeal, except only where it is carried on at his Suit, after a Nonsuit; and therefore if a Person attainted, on an Appeal carried on at the Suit of the Party, get the King's Pardon, he must sue a *Scire facias* against the Appellant before the Pardon shall be allowed.

And if the Appellant appear on the *Scire facias*, he may pray Execution notwithstanding the Pardon; but if the Sheriff return a *Scire facias*, or two *Nibils*, and the Appellant appear not on Demand; or if he return the Appellant dead, the Appellee shall be discharged; but some have holden, that in this last Case a *Scire facias* shall go against the Heirs of the Deceased.

But there is no need of any *Scire facias* against the Lord by Escheat, because the Pardon no way tends to reverse the Attainder wheron the Title of Escheat is founded.

If several Persons be outlawed on an Appeal, and one get his Pardon allowed on the Non-appearance of the Appellant, on a *Scire facias*, it seems that the Rest can take no Advantage thereof, but must sue their *Scire facias*, &c. in the same Manner as if there had been no such Default.

It hath been strongly holden, that the King may pardon the Burning of the Hand on a Conviction of Manslaughter on an Appeal, as being no Part of the Judgment at the Suit of the Party, but a collateral and exemplary Punishment inflicted by Statute, and intended only by way of Satisfaction to the Publick Justice, like the finding of Sureties by one convicted on the Statute against Trespassers in Parks.

A Pardon will not only discharge any Suit in the Spiritual Court *ex officio*, but also any Suit in such Court *ad instantiam partis pro reformatione morum*, or *salute anime*, as for Defamation or laying violent Hands on a Clerk, &c. and if the Time, to which the Pardon has Relation, be prior to the Award of the Costs to the Party, or as it is generally holden, if it be subsequent to the Award, but prior to the Taxation, it shall discharge them, but not if it be subsequent to the Taxation; and the

same

Plow. 487.  
2 Rol. Abr. 178.  
Cro. Car. 199.  
Keilw. 134.

2 Hawk. P. C.  
392.

2 Hawk. P. C.  
392.

2 Hawk. P. C.  
392.

2 Hawk. P. C.  
393.

But for this,  
vide 2 Hawk.  
P. C. 393.

5 Co. 51.  
Litch 190.  
Cro. Eliz 684.  
Hob. 81.  
Cro Jac. 335.  
2 Hawk. P. C.  
394.

same Rule holds as to Costs taxed to the Party grieved on a Contempt in a Court of Equity; but *quare* as to Costs taxed by the Prothonotary on an Attachment; for they are not given by the Court of Course, but the Offender submits only to pay them by way of Composition.

1 *Jon.* 227.  
2 *Rel. Abr.*  
178.  
*Cro. Jac.* 159.  
3 *Co.* 68, 69. If a Person be imprisoned on an *Excommunicato capiendo* for Non-payment of Costs, and the King pardons all Contempts, it is said, that he shall be discharged without any *Scire facias* against the Party, and that the Party must begin a-new to compel a Payment of the Costs; because the Imprisonment was grounded on the Contempt, which is wholly pardoned.

5 *Co.* 51.  
*Lutch* 190.  
*Cro. Car.* 46 7. But no Pardon will discharge a Suit in the Spiritual Court, any more than in a Temporal, for a Matter of Interest or Property in the Plaintiff; as for Tithes, Legacies, Matrimonial Contracts and such like; also it is agreed, that after Costs are taxed in a Suit in such Court at the Prosecution of the Party, whether for a Matter of private Interest, or *pro reformatione morum*, or *pro salute anime*, or for Defamation, &c. they shall not be discharged by a subsequent Pardon.

2 *Rel. Abr.*  
304.  
*Noy* 85.  
*Lutch* 155. If the Offence be pardoned after Costs taxed, and then the Defendant appeal, and the Superior Court give new Costs for or against him, such Costs shall not be avoided; because the Costs in the first Suit being taxed before the Pardon, and therefore not avoided by it, the Appeal was proper for determining whether they were well given or not, and consequently Costs were as properly given on such Appeal as in any other Case; but if the Offence be pardoned, hanging an Appeal, and the Pardon relate to a Time precedent to the Award of the Costs, and then the Appellant desert his Appeal, and the Court award Costs against him in respect of such Desertion, it seems that he may have a Prohibition; because the Pardon, having discharged the Costs of the first Suit, made the Appeal to be of no Purpose.

By the 12 & 13 *H. 3. cap. 2.* 'No Pardon under the Great Seal shall be pleaded to an Impeachment by the Commons in Parliament.

### (C) Where a Pardon is grantable of common Right.

2 *Inst.* 316. BY the Statute of *Gloucester, cap. 9.* it is enacted, 'That if it be found by the Country, that a Person tried for the Death of a Man did it in his Defence, or by Misfortune, then, by the Report of the Justices to the King, the King shall take him to his Grace, if it please him.

2 *Hawk. P.C.*  
330, 331. But it seems to be settled at this Day agreeably to the antient Common Law, in Affirmance whereof this Statute was made, that in such a Case, or where one indicted of *Homicide se defendendo* confesses the Indictment, if the Party cause the Record to come into Chancery, the Chancellor will of Course make him a Pardon without speaking to the King, and that by such Pardon the Forfeiture of Goods may be saved; for these Words, *if it shall please the King*, shall be taken as spoken only by way of Reverence to him, and not intended to make such a Pardon discretionary. But if the Party be found to have fled, it is made a *Quere*, if the Pardon save the Forfeiture for the Flight, for that is not grounded on the Homicide, but on the Contempt of the Law.

3 *Inst.* 129.  
2 *Hawk. P.C.*  
209.  
2 *Hale's, Hist. P.C.* 233. If an Approver convict all the Appellees, whether by Battle or Verdict, the King *ex merito justitiae* ought to pardon him as to his Life, and also give him his Wages from the Time of the Appeal to the Time of the Conviction.

By the 4 & 5 *H. 8. M. cap. 8.* it is enacted, ‘ That if any Person or Persons out of Prison shall commit any Robbery, and afterwards discover two or more who then had or afterwards shall commit any Robbery, so as two or more of them shall be convicted, any such Discoverer shall be intitled to a Pardon for all Robberies committed before the Discovery, which also shall bar an Appeal.

And by the 6 & 7 *H. 8. M. cap. 17.* it is enacted, ‘ That if any Person or Persons out of Prison shall be guilty of clipping, coining, counterfeiting, washing, filing or otherwise diminishing the Coin of this Realm, and afterwards discover two or more who then had or afterwards shall commit any of the said Crimes, so as two or more of them shall be convicted, any such Discoverer shall be intitled to a Pardon for all his Crimes committed before the Discovery.

By the 10 & 11 *H. 3. cap. 23.* (which excludes Clergy from those who shall in any Shop, Whare-house, Coach-house or Stable, privately steal any Goods, &c. of the Value of 5 s. tho’ such Shop, &c. be not broken open, and tho’ no Person be therein, or shall assist, hire or command any Person to commit such Offence,) ‘ If any Person or Persons shall commit any Burglary, House-breaking or Felony, in stealing of any Horse or Horses, or any Money, Wares or Goods from whom Clergy is by that Act taken away, and being out of Prison shall discover two or more who then had or after shall commit any such Felony, and shall be convicted thereof, or cause to be discovered and apprehended two or more, who shall be convicted as aforesaid, every such Discoverer shall be intitled to a Pardon for the Felonies aforesaid committed before such Discovery, &c.

And by the 5 *Ann. cap. 31.* it is enacted, ‘ That every Person who shall be guilty of Burglary, or of the felonious Breaking and Entering a House in the Day-time, and after shall discover two who shall have committed such Felony, so as they be convicted, &c. shall have 40 l. and a Pardon of all Felonies, except Murder, &c.

(D) Of the Validity of a Pardon; and therein by what Words Treason, Murder, Felony and other Offences, may be pardoned; and herein of Pardons by Implication, and where the King shall be said to be deceived in his Grant thereof.

IT is laid down as a general Rule, that wherever it appears by the Recital of the Pardon, that the King was mis-informed, or not rightly apprized, both of the Heinousness of the Crime, and also how far the Party stands convicted upon Record, the Pardon is void, upon a Presumption that it was gained from the King by Imposition.

*Yelv. 43, 47, Cro. Jac. 18, 54, 548, 2 Rol. Abr. 188. Dyer 352. pl. 26. Raym. 13. 1 Sid. 41. 3 Inst. 238.*

And upon this Ground it seems agreed, that if a Man attainted of Felony get a Pardon, which doth not mention the Attainders, the Pardon will be ineffectual; also it hath been holden, that the Pardon of a Person convicted by Verdict of Felony is void, unless it recite the Indictment and Conviction; also it hath been questioned, if the Pardon of a Person barely indicted of Felony be good, without mentioning the Indictment;

*2 Hawk. P. C. 382-3.*



dictment; but it hath been adjudged, that such a Defect is salved by the Words *five indictatus five non*.

<sup>2 Hawk. P. C. 583-4.</sup> It hath been holden, that antiently a Pardon of all Felonies, included all Treasons as well as Felonies; and it seems to be taken for granted in many Books, that such a general Pardon is even at this Day pleadable to any Felony, except Murder and Rape, and Piracy; and that the only Reason why it may not also be pleaded to Murder and Rape is, because <sup>1 Hale's Hist. P. C. 466.</sup> 13 R. 2. requires an exprefs Mention of them; and that the only Reason why it is not pleadable to Piracy is, because it is a Felony by the Civil Law only.

By the 27 E. 3. cap. 2. it is enacted, ' That in every Pardon of Felony granted at any Man's Suggestion, the Suggestion and the Name of him that makes it shall be comprised; and if it be found untrue, the Charter shall be disallowed; and the Justices, before whom the Charter shall be alledged, shall inquire of the same Suggestion, and, if they find it untrue, shall disallow the Charter.

<sup>6 Co. 13.</sup> No Pardon of Felony shall be carried beyond the exprefs Purport of it; and therefore if the King, reciting an Attainder of Robbery, pardon the Execution, he thereby neither pardons the Felony it self, nor any other Consequence of it besides the Execution.

<sup>2 Hawk. P. C. 585-6. and several Authorities there cited.</sup> It is enacted by 2 E. 3. cap. 2. *That Charters of Pardon of Manslaughters shall not be granted but where the King may do it by his Oath, that is to say, where a Man slayeth another in his own Defence, or by Misfortune; neither is there any Precedent in the Register of the Pardon of any other Homicide, but such as is done either in Self-defence or by Mis-adventure, or by Infants or Madmen; and from hence some have disputed the King's Power of pardoning any other Homicide; but this is contrary not only to the general Tenor of the Books, but also to the plain Purport of 13 Rich. 2. cap. 1. which reciting that Treasons, Murders and Rapes, had been frequently committed, because Pardons had been easily granted in such Cases, enacteth, ' That no Pardon shall be allowed for Murder, or for the Death of a Man slain by Await, Assault or Malice pre-pensed, Treason or Rape of a Woman, unless the same Murder, &c. be specified in the same Charter; and if the Charter of the Death of a Man be alledged before any Justices, in which it is not specified that the Party was murdered or slain by Await, Assault or Malice pre-pensed, the same Justices shall inquire by a good Inquest of the *Vifne* where the Dead was slain, if he were murdered or slain by Await, &c. and if they find that he was murdered or slain by Await, &c. the Charter shall be disallowed.*

<sup>1 Sid. 366.</sup> It hath been formerly often adjudged, that Murder might be pardoned under the general Description of a felonious Killing, with a Clause of *Non obstante*; but by 1 W. & M. sess. 2. cap. 2. it is declared, *That no Dispensation by Non obstante of or to any Statute shall be allowed.*

<sup>2 Keb. 563, 415. Keeling 24. 2 Fen. 56.</sup> But Pardons of Manslaughter remain as they were at Common Law; and therefore the Pardon of the felonious Killing of *7. S.* may be pleaded to an Indictment of Manslaughter in killing him; but where such a Pardon is pleaded to a Coroner's Inquest of Manslaughter, the Court may refuse to allow it, till the Fact be found Manslaughter by a Jury directed by a higher Court.

<sup>Dyer 50. pl. 4. 235. pl. 19. 6 Co. 13.</sup> If a general Act expressly pardon Petit Treasons, and except Murders, it cannot be avoided by indicting a Person guilty of Petit Treason for Murder only, omitting the Word *Proditorie*; for the less Offence being included in the greater is pardoned by the Pardon of it; and therefore such an Exception of Murder is to be intended of such Murder only as is specially so called, and doth not amount to Petit Treason.

<sup>1 Lev. 8, 120. 1 Sid. 150. 1 Keb. 66, 548.</sup> Neither doth the Exception of Murder in a general Act of Pardon of all Felonies extend to a *Felo de se*; for tho' his Offence be in Strictness Murder, yet in common Speech, according to which Statutes are com-

monly



monly expounded, it is generally understood as a distinct Offence, the Word *Murder* seeming *prima facie* to import the Murder of another.

It is said, that a general Act of Pardon of all Felonies, Misdemeanors and other Things done before such a Day, pardons a Homicide from a Wound before the Day, whereof the Party died not till after; because the Stroke being pardoned, the Effects of it are consequently pardoned. *Plew 401. Cole's Case. 1 Hale's Hist. P. C. 426. Dyer 99. pl. 65.*

It is said, that a Pardon of all Misprisions, Trespasses, Offences and Contempts, will pardon a Contempt in making a false Return, and a Striking in *Westminster-Hall*, and Barratry, and even a *Præmunire*; also it is laid down in general, that it will pardon any Crime which is not Capital. *1 Lev. 106. 1 Sid. 211. 2 Mod. 52.*

If *A.* be indicted of Piracy, and refusing to plead hath Judgment of *Paine fort & dure*, and by the General Pardon Piracies are excepted, but the Judgment of *Paine fort & dure* is pardoned by the general Words of all Contempts; *quære* whether he may be arraigned for the same Piracy; but by the better Opinion, he may be arraigned of any other Piracy committed before that Award. *2 Hale's Hist. P. C. 252. cited from Dyer 308. a.*

### (E) Whether a Pardon may be conditional.

IT seems agreed, that the King may extend his Mercy on what Terms he pleases, and consequently may annex to his Pardon any Condition that he thinks fit, whether precedent or subsequent, on the Performance whereof the Validity of the Pardon will depend. *Co. Lit. 274 b. 2 Hawk. P. C. 394.*

Also it hath been held, that in every Pardon for a Capital Offence, where the Party was obliged to give Security, there is a Condition in Law annexed to such Pardon, so that if he forfeits such Recognizance, his Pardon becomes void, and he may be taken and executed on the first Judgment. *Moor pl. 662.*

### (F) Who may take Advantage of a Pardon, and to Whom it shall be said to extend.

NOTwithstanding all Felonies are several, yet the Felony of one Man may be so far dependant on that of another, that the Pardon of the one will necessarily enure to the Benefit of the other; as where the Principal is allowed his Pardon before his Conviction, in which Case the Accessory may by a necessary Consequence take Benefit of it; because he cannot be arraigned till the Principal is convicted. *Cro Eliz. 30. 31. Dyer 34 pl. 21. 2 Hawk. P. C. 387.*

Where a Man is bound to the King as Surety for another's Debt, it is clear, that the Discharge of the Principal is a Discharge of the Surety; but where a Man is bound to the King for another's Performance of a future Act, the Discharging of the other from such future Act will not discharge the Surety; but *quære* if both had been bound, and the Subject no Way interested in the Matter. *2 Hawk. P. C. 387.*

The Pardon of *A. B.* and *C.* of all Felonies by them done, without adding or any of them, is void; for it supposes them jointly guilty, and extends to none but joint Felonies, whereas all Felony is several in each Offender, and cannot be joint. *Dyer 34 pl. 21. 2 Hawk. P. C. 388.*

### (G) In

(G) In what Manner a Pardon is to be taken Advantage of: And herein,

1. In what Manner a General Pardon by Parliament is to be taken Advantage of.

<sup>2 Hawk. P. C. 396.</sup> <sup>(a) That a Coronation Pardon cannot be taken Advantage of, unless it be taken out</sup> **H**EREIN we must first observe a Difference between a Pardon by Parliament and that under the Great Seal; that as to a Pardon by (a) Parliament, the same cannot be waived, because no one by his Admittance can give the Court a Power to punish him, where it judicially appears there is no Law to do it; but a Man may waive a Pardon under the Great Seal, by pleading other Matter, without taking any Notice of it. and pleaded under the Great Seal. 1 Keb. 707.

<sup>2 Hawk. P. C. 396 7. and several Authorities there cited.</sup> If the Body of a General Act of Pardon either except divers Persons by Name, or except all who come under a general Description, as all who adhered to J. S. the Court is not bound (neither ought it, as some say,) to give any one the Advantage of it, unless he plead it, and shew, in the first Case, that he is not one of the Persons excepted, and in the other, that he is not included in such Description; neither will it be safe for him, if he be of the same Name with one of those excepted by Name, to aver, that he is not one of the Persons excepted by Name, without adding, that he is a different Person from such other of the same Name. But if the Body of the Statute except one Person only, or if it be general as to all, and afterwards some be excepted in the Proviso's, it may be pleaded, as some say, without any Averment that he who pleads it is not one of the Persons excepted, &c. and the Exceptions ought to be shewn of the other Side.

<sup>Noy 100. Black ver. Allen. Cro. Car. 449. Moor 620.</sup> Also where a General Act of Pardon excepts certain Kinds of Crimes, there is no need to aver, that the Crime whereof a Person is indicted is not one of such excepted Crimes, but the Court ought judicially to take Notice whether it be excepted or not.

<sup>Cro. Eliz. 125 2 Jon. 26.</sup> Also where such a Statute excepts only one particular Person, it hath been said, that there is no need of an Averment that a Person indicted is not such Person, but that the Court is to take Notice whether he be or not.

2. In what Manner a particular Pardon under the Great Seal is to be taken Advantage of.

<sup>Cro. Eliz. 153.</sup> The Party, as has been observed, must insist on the Benefit of this Kind of Pardon; and therefore it hath been held to be Error, to allow a Man the Benefit of a Pardon under the Great Seal, unless he plead it.

<sup>2 Hawk. P. C. 397.</sup> <sup>(b) That it is sufficient to plead and shew the Exemplification of the Pardon, &c. because such Exemplification is expressly within the 13 Eliz. cap. 6. 5 Co. 55. Carth. 138. cited.</sup> He who pleads such a Pardon ought to produce it (b) *Sub pede sigilli*; because it is presumed to be in his Custody, and the Property of it belongs to him; yet if a Man pleads such Pardon without producing it, it seems, that the Court may indulge him a farther Day to put in a better Plea.

<sup>3 Inst. 240. Kilk. 58. 1 Rol. Rep. 368. 1 yer 34.</sup> If there be a Variance between the Pardon and Record of Conviction, &c. yet if there be no Repugnancy to intend that the same Person is meant in both, it may be supplied by a proper Averment; as if he be called J. S. Gentleman in the one, and J. S. Yeoman in the other; or B. the Father in the one, and B. the Son of H. in the other; or if the

Stroke which caused the Death of *J. S. &c.* be supposed to have been given on the second of *August* in the one, and on the third in the other; also if such variant Pardon be pleaded without such Averment, the Court may give the Party a farther Day to perfect his Plea.

It seems that such Pardon cannot be pleaded after the General Issue, <sup>2 Hawk. P. C. 398.</sup> unless it be of a Date subsequent to the Pleading of it; because the making Defence, without taking any Notice of the Pardon, seems to amount to a Waiver of it; and *quære* if a Pardon can be pleaded at the same Time with the General Issue.

The Party is not bound to lay the Strefs of his Case on any particular Clause of the Pardon, but may take Advantage of the whole. <sup>2 Hawk. P. C. 398.</sup>

After an Amerciament in the King's Bench is estreated into the Exchequer, and the Party hath insisted on a Pardon there, and being denied any Benefit of it, he may be brought by *Habeas Corpus cum causa* to the King's Bench, because the Record remains there, and plead his Pardon; and if it be adjudged sufficient, have a *Superfedeas* to the Barons.

While the Statute 10 E. 3. cap. 2. stood in Force, no Pardon of (a) Felony could be allowed, without a Writ of Allowance, testifying that the Party had found Sureties according to that Statute; but this is now repealed by 5 & 6 H. 3. cap. 13. which provides, ' That the Justices, before whom a Pardon of Felony shall be pleaded, may in Discretion remand or commit the Party to Prison till he shall enter into a Recognizance, with two sufficient Sureties, for the Good Behaviour for any Time not exceeding seven Years; provided that if such Person be an Infant or Feme Covert, it shall be sufficient to find two Sureties, who shall enter into a Recognizance for his or her being of the Good Behaviour as aforesaid. <sup>Plow. 502. 1 Sid. 41. Raym. 13. Carth. 121. (b) But there never was any Necessity for such Writ upon a Pardon of Treason. Cro. Eliz. 814. Noy 31.</sup>

The Judges may insist on the usual Fee of Gloves to themselves and Officers, before they allow a Pardon. <sup>2 Fen. 56. 1 Sid. 452. Keilw. 25.</sup>

Where a Prisoner hath a Pardon to plead, and any Difficulty arise thereon, the Court will of Course assign him Counsel. <sup>3 Inst. 29.</sup>

## (H) The Effects and Consequences of a Pardon, and to What the Party shall be restored.

IT seems agreed, that a Pardon of Treason or Felony, even after an Attainder, so far clears the Party from the Infamy and all other Consequences thereof, that he may have an Action against any one who shall afterwards call him Traitor or Felon, for the Pardon makes him as it were a new Man. <sup>Hob. 67, 81. Moor 863. 1 Rol. Abr. 87. Raym. 23.</sup>

Also a Pardon restores a Man to his Credit, so as to enable him to be a Witness; but yet his Credit must be left to the Jury. <sup>2 Hale's Hist. 278, & vide Tit. Evidence.</sup>

And it hath been admitted, that the King's Pardon of the Burning of the Hand on a Conviction of Manslaughter hath the same Effect, as to this Purpose, as the Burning would have had, which is agreed to restore the Party to his Credit. <sup>2 Hawk. P. C. 395.</sup>

But it hath been adjudged, that a Pardon is of no Manner of Force, as to this Purpose, till it have passed the Great Seal. <sup>2 Hawk. P. C. 395.</sup>

It is said, that the Pardon of a Felony will not make an Arrest for it by one who did not know of the Pardon unlawful; because such Arrests, being for the Publick Good, are to be favoured, and therefore shall not be actionable by Reason of such a Pardon, as scandalous Words shall be, because they deserve no Favour. <sup>Hob. 67, 82.</sup>

2 Hawk. P. C.  
395.

If a Man be convicted or deprived, or otherwise punished for an Offence during a Session of Parliament, and at the same Session an Act passeth which pardons the Offence, it seems agreed, that the Conviction or Deprivation, &c. are *ipso facto* avoided; because the Act taking Effect from the first Day of the Session, it now appears, that the Offence was pardoned at the Time of the Conviction, &c. Also it hath been adjudged, that where an Act of Parliament expressly pardons such and such Crimes from a certain Day before the Sessions, it thereby avoids all Convictions and Deprivations, and Awards of Costs and Amerciaments, &c. for such Crimes, whether such Convictions, &c. were before or after the Session; because it appears to be the Intent of the Parliament that such Crimes shall no Way be punished, which cannot take Effect, if such Convictions, &c. continue in Force.

1 Lev. 8, 120.  
2 Mod. 53.  
1 Saund. 362.  
3 Mod. 101.

But as no Pardon from the King shall divest any Interest vested in the Subject; so neither shall it, without Words of Restitution, even divest any Thing from the King; yet a Pardon prior to a Conviction shall prevent all Forfeitures of Lands or Goods.

1 Sid. 167.  
1 Saund. 362.  
1 Lev. 120.

It hath been adjudged, that the Release of all Judgments and Executions in a General Pardon extends to Debts due to the King by Assignment or Forfeiture; and that it doth not restore them to him who assigned or forfeited them, but extinguishes them in the Hands of the Debtor.

Owen 87.  
Hett. 104.  
Co. Lit. 120.  
3 Bulst. 90, 91.  
3 Inst. 154.

It seems agreed, that notwithstanding the King's Pardon to a Simonist coming into Church contrary to the Purport of 31 Eliz. cap. 6. or to an Officer coming into his Office by a corrupt Bargain contrary to the Purport of 5 & 6 E. 6. cap. 16. may save such Clerk or Officer from any Criminal Prosecution in respect of the corrupt Bargain; yet shall it not enable the Clerk to hold the Church, nor the Officer to retain the Office, because they are absolutely disabled by Statute.

Co. Lit. 8.  
1 Hale's Hist.  
P. C. 358.

A Restitution of Blood, in its true Nature and Extent, can only be by Act of Parliament; and therefore if a Man attainted be pardoned by Act of Parliament, he is totally restored and inheritable to all Persons; but if he be pardoned by Charter, he may thenceforth purchase Lands, but cannot inherit his former Relations; for the King's Charter cannot alter or take away the Right of others, or restore the Relation that was lost.

Noy 170.  
Co. Lit. 391.  
1 Hale's Hist.  
P. C. 358.

If a Man be attainted, and after pardoned by Charter, the Children born before such Pardon shall not inherit; but if they fail, the Children born after such Pardon may inherit him; for the Pardon makes him capable of new Relations as well as of new Purchases, tho' all the old legal Benefits and Relations are lost.

1 Hale's Hist.  
P. C. 358.

Restitutions by Parliament are of two Kinds; one a Restitution only in Blood, which only removes the Corruption thereof, but restores not to the Party attain, or his Heirs, the Manors or Honours lost by the Attainder, unless it specially extend to it; the other is a general Restitution, not only in Blood but to the Lands, &c. of the Party attain.

1 Hale's Hist.  
P. C. 358.

A Restitution in Blood may be special and qualified; but generally a Restitution in Blood, is construed liberally and extensively.

3 Inst. 233.  
1 Hale's Hist.  
358-9.

*A.* hath Issue *B.* a Son, and is attain of Treason and dies, *B.* purchaseth Lands in Fee-simple, *B.* by Parliament is restored only in Blood, and enabled as well as Heir to *A.* as to all other Collateral and Lineal Ancestors, provided it shall not restore *B.* to any of the Lands of *A.* forfeited by the Attainder; *B.* dies without Issue; it was ruled, that the Lands of *B.* shall descend to the Sisters of *A.* as Aunts and collateral Heirs of *B.* 1<sup>st</sup>, Because the Corruption of Blood by the Attainder is removed by the Restitution. 2<sup>dly</sup>, Altho' the Words of the Act of Restitution be to restore *B.* only as Heir to *A.* &c. yet this doth not only remove the Corruption, and restore him and his Lineal Heirs in Blood, but also his Collateral Heirs, and removes that Impediment which would have hindered the Descent to them.

## Pauper.

- (A) Of the Right to sue in forma Pauperis, and the Manner of Admittance.
- (B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue, in forma Pauperis.
- (C) In what Cases to be so admitted.
- (D) In what Cases to be dispaupered and to pay Costs.

### (A) Of the Right to sue in forma Pauperis, and the Manner of Admittance.

**B**Y the 11 Hen. 7. cap. 12. it is enacted in the Words following,  
 ‘ Prayen the Commons in this present Parliament assembled,  
 ‘ that where the King our Sovereign Lord, of his most gracious  
 ‘ Disposition, willeth and intendeth indifferent Justice to be had  
 ‘ and ministred according to his Common Laws to all his true Subjects,  
 ‘ as well to the Poor as Rich, which poor Subjects be not of Ability ne  
 ‘ Power to sue according to the Laws of this Land, for the Redress of  
 ‘ Injuries and Wrongs to them daily done, as well concerning their  
 ‘ Persons and their Inheritance as other Causes; for Remedy whereof,  
 ‘ in the Behalf of the poor Persons of this Land not able to sue for  
 ‘ their Remedy after the Course of the Common Law, be it ordained  
 ‘ and enacted, that every poor Person or Persons, which have or here-  
 ‘ after shall have Cause of Action or Actions against any Person or Per-  
 ‘ sons within this Realm, shall have, by the Discretion of the Chancellor  
 ‘ of this Realm for the Time being, Writ or Writs original and Writs  
 ‘ of *Subpoena*, according to the Nature of their Causes, therefore no-  
 ‘ thing paying to your Highness for the Seals of the same, nor to any  
 ‘ Person for the Writing of the same Writs to be hereafter sued; and  
 ‘ that the said Chancellor for the Time being shall assign such of the  
 ‘ Clerks, which shall do and use the Making and Writing of the same  
 ‘ Writs, to write the same ready to be sealed; and also learned Counsel  
 ‘ and Attornies for the same, without any Reward taking therefore; and  
 ‘ after the said Writ or Writs be returned, if it be before the King in his  
 ‘ Bench, the Justices there shall assign to the same poor Person or Persons  
 ‘ Counsel learned, by their Discretions, which shall give their Counsel, no-  
 ‘ thing taking for the same; and likewise the Justices shall appoint Attorney  
 ‘ and Attornies for the same poor Person or Persons, and all other Of-  
 ‘ ficers requisite and necessary to be had for the Speed of the said Suits to  
 ‘ be had and made, which shall do their Duties without any Reward for  
 ‘ their Counsels, Help and Business in the same; and the same Law  
 ‘ and Order shall be observed and kept of all such Suits to be made afore  
 ‘ the King’s Justice of his Common Place and Barons of his Exchequer,  
 ‘ and all other Justices in the Court of Record where any such Suit  
 ‘ shall be.

Before

- Lil. Reg.* 633. Before a Person is admitted to sue *in forma Pauperis*, he must have a Counsel's Hand to his Petition, certifying the Judge to whom the Petition is directed, that he conceives the Petitioner hath good Cause of Action; he must also annex an Affidavit to his Petition, that he is not worth 5*l.* all his Debts paid, except wearing Apparel and his Right to the Matter in Question.
- 2 *Salk.* 507. On a Motion to dispauper a Person who was Plaintiff in an Action, because he had a Living of 40*l. per Annum*; *Turton* and *Gould* Justices were against it, because he swore he was in Debt more than it was worth; but *Holt* C. J. differed from them; for his being indebted, or his Estate being mortgaged, is no Reason, it is enough that he has a considerable Estate in Possession.
- Lil. Reg.* 633. A Person admitted to sue *in forma Pauperis* can only sue in that Cause for which he is admitted, so that if any other Cause arises, he must sue *de novo* to be admitted, & *sic toties quoties*.

### (B) Whether a Defendant may be allowed to defend, as well as a Plaintiff to sue, in forma Pauperis.

IT seems that, after the Statutes which introduced Costs, neither Plaintiffs nor Defendants could sue or defend *in forma Pauperis*, for that would be a Means of depriving the other Party of the Costs given him by Statute; and as the above mentioned Statute 11 *H.* 7. enables Persons only to sue as Paupers; and as the Statute 23 *H.* 8. hereafter set forth, excepts only Plaintiffs who are Paupers from paying of Costs, it seems that a Defendant cannot be admitted in a Civil Action to defend as a Pauper. But it hath been (a) adjudged, that a Person may be admitted to defend an Indictment *in forma Pauperis* for a Misdemeanor, such as a Conspiracy, keeping a disorderly House, &c. for in such Proceedings there being no Costs, the Judges have a discretionary Power of admitting or refusing them by the Common Law.

(a) *Pasch.* 9  
*Geo. 2. The*  
*King ver.*  
*Wright.*

Also by the 2 *Geo. 2. cap. 28. sect. 8.* it is enacted, ' That in case any Person, arrested and imprisoned by Virtue of any Writ of *Capias* or Information relating to the Customs, shall make Affidavit before the Judge or Judges of such Court where such Action or Information shall be brought, or before any other Person commissioned by such Court to take Affidavits, that he is is not worth, over and above his wearing Apparel, the Sum of 5*l.* (which Affidavit the said Judge or Judges of such Court, and such Person so commissioned, is and are hereby authorised and required to take) and such Person shall thereupon Petition such Court to be admitted to defend himself against such Action or Information *in forma Pauperis*, that then the Judges of such Court shall according to their Discretions admit such Person to defend himself against such Action or Information in the same Manner, and with the same Privileges, as the Judges of such Court are by Law directed and authorised to admit poor Subjects to commence Actions for the Recovery of their Right; and for that End and Purpose it shall be lawful for the Judges of such Courts to assign Counsel learned in the Law, and to appoint an Attorney and Clerk of such Court to advise and carry on any legal Defence that such Person can make against such Action or Information; which said Counsel, Attorney and Clerk so assigned and appointed, is and are hereby required to give his and their Advice and Assistance to such Person, and to do their Duties, without Fee or Reward.

(C) In what Cases to be so admitted.

IT is said, that none ought to be admitted to sue *in forma Pauperis* in an Action on the Case for Words. *Lil. Reg. 633. per Wild.*

Also it is said, that a Person who sues *in forma Pauperis* ought not to have a new Trial granted him; because having had once the Benefit of the King's Justice he ought to acquiesce in it. *1 Mod. 263. per North.*

And it is said, that Paupers ought not to be admitted to remove Causes out of Inferior Courts, but ought to satisfy themselves with the Jurisdiction within which their Actions properly lie. *1 Mod. 263. per North.*

(D) In what Cases to be dispaupered and to pay Costs.

BY the Orders of the Courts, if the Party admitted to sue *in forma Pauperis* give any Fee or Reward to his Counsel or Attorney, or make any Contract or Agreement with them, he shall from thenceforth be dispaupered, and not be afterwards admitted again in that Suit to prosecute *in forma Pauperis*. *Ord. Cur. 94.*

Also, if it shall be made appear to the Court, that any Person prosecuting *in forma Pauperis* hath sold or contracted for the Benefit of the Suit, or any Part thereof, while the same depends, such Cause shall be from thenceforth totally dismissed the Court. *Ord. Cur. 95.*

It is said, that if a Pauper gives Notice of Trial, and does not proceed, he shall be dispaupered. *1 Salk. 506.*

In the Statute 23 H. 8. cap. 15. there is a Provision, 'That whoever sues *in forma Pauperis* shall (a) not pay Costs, but shall suffer such other Punishment as the Judge of the Court shall think fit. (a) Tho' Lands descend to him after Cause tried, yet shall not pay Costs. *1 Mod. Rep. in Law & Eq. 344.*

But notwithstanding this Statute, if he be dispaupered or nonsuited, the (b) usual Practice is to tax the Costs, and for Non-payment to order him to be whipped. *1 Rol. Rep. 2 Salk. 506. Stile 386.*

The usual Course in such Cases is to tax the Costs, and if not paid to whip the Plaintiff, yet upon Consideration of the Circumstances of the Case, it is in the Discretion of the Court to spare both. (b) But tho' *1 Sid. 261. And per Holt C. J. on Motion to whip a Pauper who had been nonsuited, there is no Officer for that Purpose, nor did he ever know it done. 1 Salk. 506.*

A. brought a Bill *in forma Pauperis*, to which the Defendant put in a Plea and Demurrer, which were both over-ruled; and it was insisted upon, that he should have no Costs, being at none; but my Lord Somers, after long Debate and Inquiry of all the antient Counsel and Clerks, who agreed that he should have Costs, ordered him his Costs (c) like other Suitors; for tho' he is at no Costs, or but small Costs, yet the Counsel and Clerks do not give their Labour to the Defendant, but to the Pauper. (c) But vide *Abr. Eq. 125. Peced. Chan. 219. where a Pauper having a Decree to recover with Costs, it was held on Motion per Curiam to be unreasonable, that any one should have more Costs than he was out of Pocket; and thereupon ordered the Plaintiff and his Solicitor to make Oath before the Master, and what they swore they had paid, or were to pay, was to be allowed, but no farther.*

## Perjury.

<sup>1</sup> Hawk. P.C.  
172.

**P**ERJURY by the Common Law is defined a wilful false Oath by one who, being lawfully required to depose the Truth in any Proceeding in a Court of Justice, swears absolutely in a Matter of some Consequence to the Point in Question, whether he be believed or not.

<sup>1</sup> Rol. Abr. 41,  
57.  
Yelw. 72.  
Cro. Jac. 158.  
<sup>2</sup> Keb. 399.  
<sup>3</sup> Mod. 122.  
<sup>1</sup> Hawk. P.C.  
177.

Subornation of Perjury by the Common Law is an Offence in procuring a Man to take a false Oath amounting to Perjury, who actually takes such Oath; but it seemeth clear, that if the Person, incited to take such an Oath, do not actually take it, the Person by whom he was so incited is not guilty of Subornation of Perjury; yet it is certain, that he is liable to be punished, not only by Fine, but also by infamous Corporal Punishment.

For the better Understanding the Nature of Perjury, we shall consider,

(A) What it is by the Common Law, and how restrained and punished.

(B) How restrained and punished by Statute.

(A) What it is by the Common Law, and how restrained and punished.

<sup>5</sup> Mod. 350.

<sup>1</sup><sup>st</sup>, **I**T is necessary, to constitute the Offence Perjury, that the false Oath be taken wilfully, viz. with some Degree of Deliberation, and not merely owing to Surprize or Inadvertency, or a Mistake of a true State of the Question.

<sup>1</sup> Hawk. P.C.  
173. and several Authorities there cited.

<sup>2</sup><sup>dly</sup>, The Oath must be taken either in a Judicial Proceeding, or in some other Publick Proceeding of the like Nature, wherein the King's Honour or Interest are concerned; as before Commissioners appointed by the King to inquire of the Forfeitures of his Tenants, or of defective Titles wanting the Supply of the King's Patents; but it is not material whether the Court, in which a false Oath is taken, be a Court of Record or not, or whether it be a Court of Common Law or a Court of Equity, or Civil Law, &c. or whether the Oath be taken in the Face of the Court, or out of it before Persons authorised to examine a Matter depending in it; as before the Sheriff on a Writ of Inquiry, &c. or whether it be taken in Relation to the Merits of a Cause or in a collateral Matter; as where one, who offers himself to be Bail for another, swears that his Substance is greater than it is, &c. but neither a false Oath in a meer private Matter, as in making a Bargain, &c. nor the Breach of a promissory Oath, whether publick or private, are punishable as Perjury.

<sup>1</sup> Hawk. P.C.  
173. 4.

<sup>3</sup><sup>dly</sup>, The Oath ought to be taken before Persons lawfully authorised to administer it; for if it be taken before Persons acting merely in a private



vate Capacity, or before Persons pretending to a legal Authority of administering such Oath, but having in Truth no such Authority, it is not punishable as Perjury; yet a false Oath taken before Commissioners, whose Commission at the Time is in Strictness determined by the Demise of the King, is Perjury, if taken before such Time as the Commissioners had Notice of such Demise; for it would be of the utmost ill Consequence in such Case to make their Proceedings wholly void.

4<sup>thly</sup>, The Oath ought to be taken by a Person sworn to depose the Truth; and therefore a false Verdict comes not under the Notion of Perjury, because the Jurors swear not to depose the Truth, but only to judge truly of the Depositions of others; but a Man may be as well perjured by an Oath in his own Cause, as in an Answer in Chancery, or in an Answer to Interrogatories concerning a Contempt, or in an Affidavit, &c. as by an Oath taken by him as Witness in another Cause. <sup>1 Hawk. P. C. 174.</sup>

5<sup>thly</sup>, It is not material, whether the Thing sworn be in it self true or false, where the Person who swears it in Truth knows nothing of it. <sup>1 Hawk. P. C. 175.</sup>

6<sup>thly</sup>, The Oath must be taken absolutely and directly; and therefore if a Man only swears as he thinks, remembers or believes, he cannot be guilty of Perjury. <sup>1 Hawk. P. C. 175.</sup>

7<sup>thly</sup>, The Thing sworn ought to be some Way material; for if it be wholly foreign from the Purpose, or altogether immaterial, and neither any Way pertinent to the Matter in Question, nor tending to aggravate or extenuate the Damages, nor likely to induce the Jury to give the readier Credit to the substantial Part of the Evidence, it cannot amount to Perjury, because it is wholly idle and insignificant; as where a Witness introduces his Evidence, with an impertinant Preamble of a Story concerning previous Facts, no way relating to what is material, and is guilty of a Falstity as to such Facts; but it seems a reasonable Opinion, that a Witness may be guilty of Perjury in respect to a false Oath concerning a meer Circumstance, if such Oath have a plain Tendency to corroborate the more material Part of the Evidence; as if in Trespass for spoiling the Plaintiff's Close with the Defendant's Sheep, a Witness swears that he saw such a Number of the Defendant's Sheep in the Close; and being asked how he knew them to be the Defendant's, swears that he knew them by such a Mark, which he knew to be the Defendant's, where in Truth the Defendant never used any such Mark. <sup>1 Hawk. P. C. 175.</sup>

8<sup>thly</sup>, It does not seem material, whether the false Oath were credited or not, or whether the Party, in whose Prejudice it was taken, were in the Event any ways damaged by it; for the Prosecution is not grounded on the Damage to the Party, but on the Abuse of Publick Justice. <sup>1 Hawk. P. C. 177.</sup>

## (B) How restrained and punished by Statute.

BY the 5 *Eliz. cap. 9.* it is enacted, ' That whoever shall unlawfully and corruptly procure any Witness or Witnesses by Letters, Rewards, Promises, or by any other sinister and unlawful Labour or Means whatsoever, to commit any wilful and corrupt Perjury in any Matter or Cause whatsoever depending in Suit or Variance by any Writ, Action, Bill Complaint or Information in any wise concerning any Lands, Tenements or Hereditaments, or Goods, Chattels, Debts or Damages in any of the King's Courts of Chancery, *White-hall* or elsewhere, within any of the King's Dominions of *England* or *Wales*, or the Marches of the same, where any Person or Persons shall have

' Autho-

‘ Authority by Virtue of the King’s Commission, Patent or Writ, to hold Plea of Land, or to examine, hear or determine any Title of Lands, or any Matter or Witnesses concerning the Title, Right or Interest of any Lands or Tenements, or Hereditaments, or in any of the King’s Courts of Record, or in any Leet, View of Frankpledge or Law, Antient Demefne Court, Hundred-Court, Court-Baron, or in the Court or Courts of the Stannary in the Counties of *Devon* or *Cornwall*; or shall unlawfully and corruptly procure or suborn any Witness or Witnesses, who shall be sworn to testify *in perpetuam rei memoriam*, shall for such Offence, being thereof lawfully convicted or attainted, forfeit the Sum of 40*l.* And if any such Offender, so being convicted or attained, shall not have any Goods or Chattels, Lands or Tenements, to the Value of 40*l.* that then every such Person shall suffer Imprisonment by the Space of one Half Year, without Bail or Mainprize, and stand upon the Pillory the Space of one whole Hour in some Market-Town next adjoining to the Place where the Offence was committed, in open Market there, or in the Market-Town itself where the Offence was committed.

And *Seç. 5.* it is farther enacted, ‘ That no Person, being so convicted or attainted, shall from thenceforth be received as a Witness in any Court of Record in any of the King’s Dominions of *England*, *Wales* or the Marches of the same, till such Judgment against him shall be reversed by Attaint, or otherwise, and that upon every such Reversal the Party grieved shall recover Damages against the Party who did procure the said Judgment so reversed to be first given.

And *Seç. 6.* it is farther enacted, ‘ That if any Person or Persons shall either by the Subornation, unlawful Procurement, sinister Perswasion, or Means of any other or by their own Act, Consent or Agreement, wilfully and corruptly commit any Manner of wilful Perjury by his or their Deposition in any of the Courts before-mentioned, or being examined *in perpetuam rei memoriam*, that then every such Offender being duly convicted or attainted shall forfeit 20*l.* and have Imprisonment by the Space of six Months, without Bail or Mainprize, and the Oath of such Offender shall not from thenceforth be received in any Court of Record in *England* or *Wales*, until such Judgment shall be reversed, &c. on which Reversal the Party grieved shall recover Damages in the Manner before-mentioned.

And *Seç. 7.* it is farther enacted, ‘ That if such Offender shall not have Goods or Chattels to the Value of 20*l.* that then such Person shall be set on the Pillory in some Market Place within the Shire, City or Borough where the Offence shall be committed by the Sheriff or his Ministers, if it shall fortune to be without any City or Town Corporate; and if it happen to be within any such City or Town Corporate, then by the Head Officer of such City, &c. where he shall have both Ears nailed.

And *Seç. 8 & 9.* it is farther enacted, ‘ That one Moiety of the said Forfeitures shall be to the King, and the other Moiety to such Person as shall be grieved, hindered or molested by Reason of any of the Offences before-mentioned, that will sue for the same, &c. and that as well the Judge and Judges of every such of the said Courts where any such Suit shall be, and whereupon any such Perjury shall be committed, as also the Justices of Assise and Gaol-Delivery, and Justices of Peace at their Quarter-Sessions both within the Liberties and without, may inquire of, hear and determine all Offences against the said Act.

But it is provided *Seç. 11.* ‘ That the said Act shall no way extend to any Spiritual or Ecclesiastical Court, but that every such Offender, as shall offend in Term as aforesaid, shall be punished by such usual and ordinary Laws as are used in the said Courts.

‘ Provided also *Seck. 13.* that the said Statute shall not restrain the  
 ‘ Authority of any Judge having (a) absolute Power to punish Perjury (a) And there  
 ‘ before the making thereof, but that every such Judge may proceed in the Court  
 ‘ the Punishment of all Offences punishable before the making of the said of King’s  
 ‘ Statute, in such wise as they might have done and used to do to all Bench, &c.  
 ‘ Purposes, so that they set not on the Offender less Punishment than is proceeding  
 ‘ contained in the said Act. upon an In-  
 ‘ dictment or  
 ‘ Information

of Perjury, or Subornation of Perjury at Common Law, may not only set a discretionary Fine on the Offender, but also condemn him to the Pillory, without making any Inquiry concerning the Value of his Lands or Goods. 1 Hawk P. C. 178.

In the Construction of this Statute the following Opinions have been holden :

That every Indictment or Action on this Statute must exactly pursue the Words of it; and therefore if it alledge, that the Defendant deposed such a Matter *falso & deceptivo*, or *falso & corrupte*, or *falso & voluntarie*, without saying *voluntarie & corrupte*, it is not good, tho’ it conclude, that *sic Voluntarium & corruptum commisit perjurium contra formam Statuti, &c.* Also it is (b) said to be necessary expressly to shew, that the Defendant was sworn; and that it is not sufficient to say, that *testis per se sacro Evangelio deposuit.* *Cro. Eliz. 147. Hest. 12. Savil 43. 2 Leon. 211. 3 Leon. 230. 1 Show. 190. (b) Cro. Eliz. 105.*

But there is no need to shew, whether the Party took the false Oath through the Subornation of another, or of his own Act, tho’ the Words of the Statute are, *If Persons by Subornation, &c. or their own Act, &c. shall commit wilful Perjury*; for their being no Medium between the Branches of this Distinction, they seem to be put in *ex abundanti*, and to express no more than the Law would have implied, and therefore operate nothing. *5 Bult. 147.*

It hath been adjudged, that a Man cannot be guilty of Perjury within this Statute, in any Case wherein he may not possibly be guilty of Subornation of Perjury within it; for it is reasonable to give the whole Statute the same Construction; neither can it be well intended, that the Makers of the Statute meant to extend its Purview farther as to Perjury, which they seem to esteem the lesser Crime, than to Subornation of Perjury, which they seem to esteem the greater; and therefore since the Clause concerning Subornation of Perjury mentioning only Matters depending by Writ, Bill, Plaint or Information, concerning Hereditaments, Goods, Debts or Damages, &c. extends not to Perjury on an Indictment or Criminal Information; the Clause concerning Perjury, tho’ penned in more general Words, have been adjudged to come under the like Restriction: Also since the Clause concerning Subornation of Perjury relates only to Perjury by Witnesses, that concerning Perjury shall extend only to the like Perjury; and therefore not to Perjury in an Answer in Chancery; or in Swearing the Peace against a Man; or in a Presentment by a Homager in a Court-Baron; or in a Wager of Law, or in Swearing before Commissioners of Inquiry of the King’s Title to Lands; and by the Opinions of some, a false Affidavit against a Man in a Court of Justice is not within the Statute; but if such Affidavit be by a third Person, and relate to a Cause depending in Suit before the Court, and either of the Parties in Variance be grieved, hindered or molested, in Respect of such Cause, by Reason of the Perjury, it may strongly be argued that it is within the Purview of the Statute; also it seems the better Opinion, that a false Oath before the Sheriff on a Writ of Inquiry of Damages is within the Statute. *5 Co. 99. Cro. Jac. 120. 3 Inst. 164. 2 Leon. 201. Yelv. 120. Cro. Eliz. 148. 2 Rol. Abr. 71.*

It hath been collected from the Clause which gives an Action to the Party grieved, that no false Oath is within the Statute, which doth not give some Person a just Cause of Complaint; and therefore, that if the Thing sworn be true, tho’ it be not known by him that swears it to be

so, the Oath is not within the Statute, because it gives no just Cause of Complaint to the other Party, who would take Advantage of another's want of Evidence to prove the Truth; also from the same Ground no false Oath can be within the Statute, unless the Party against whom it was sworn suffered some Disadvantage by it; and therefore in every Prosecution on the Statute, you must set forth the Record wherein you suppose the Perjury to have been committed, and must prove at the Trial, that there is such a Record, either by actually producing it, or an attested Copy; also in the Pleadings you must not only set forth the Point wherein the false Oath was taken, but must also shew how it conduced to the Proof or Disproof of the Matter in Question; and if an Action on the Statute be brought by more than one, you must shew how the Perjury was prejudicial to each of the Plaintiffs; but it seems that a Perjury, which tends only to aggravate or extenuate the Damages, is as much within the Statute as a Perjury that goes directly to the Point in Issue; and a Perjury, in a Cause wherein an erroneous Judgment is given, is a good Ground of a Prosecution upon the Statute till the Judgment be reversed.

2. *Hale's Hist. P. C.* 191-2. If Perjury be committed, that is within this Statute, but concludes not *contra formam Statuti*; yet it is a good Indictment at Common Law, but not to bring him within the Corporal Punishment of the Statute.

By the 2 *Geo. 2. cap. 25. sect. 2.* the more effectually to deter Persons from committing wilful and corrupt Perjury, or Subornation of Perjury, it is enacted, ' That besides the Punishment already to be inflicted by Law for so great Crimes, it shall and may be lawful for the Court or Judge before whom any Person shall be convicted of wilful and corrupt Perjury, or Subornation of Perjury, according to the Laws now in Being, to order such Person to be sent to some House of Correction within the same County, for a Time not exceeding seven Years, there to be kept to hard Labour during all the said Time, or otherwise to be transported to some of his Majesty's Plantations beyond the Seas, for a Term not exceeding seven Years, as the Court shall think most proper; and therefore Judgment shall be given, that the Person convicted shall be committed or transported accordingly, over and beside such Punishment as shall be adjudged to be inflicted on such Person agreeable to the Laws now in Being; and if Transportation be directed, the same shall be executed in such Manner as is or shall be provided by Law for the Transportation of Felons; and if any Person so committed or transported shall voluntarily escape or break Prison, or return from Transportation before the Expiration of the Time for which he shall be ordered to be transported, as aforesaid, such Person being lawfully convicted shall suffer Death as a Felon without Benefit of Clergy, and shall be tried for such Felony in the County where he so escaped, or where he shall be apprehended.

## Piracy.

**P**IRACIES and Depredations at Sea are Capital Offences by *Statut. P. C.* the Civil Law; also Piracy is said to have been punishable at <sup>10.</sup> Common Law, before the 25 *E. 3.* as Petit Treason, if committed by a Subject, and as Felony if committed by a Foreigner; <sup>3 Inst. 112.</sup> but it seems agreed, that after that Statute, by which all Treason is con- <sup>2 Hale's Hist. P. C. 369,</sup> fined to the Particulars therein set down, it was cognizable only by the <sup>370.</sup> Civil Law. <sup>1 Hawk. P. C. 98.</sup>

But this proving very inconvenient, because by that Law no Offender <sup>28 H. 8. cap. 15.</sup> shall have Judgment of Death without his own Confession, or direct Proof <sup>15.</sup> by Eye Witnesses, it was enacted by 28 *H. 8. cap. 15.* ‘ That all Felonies and Robberies, &c. upon the Sea, or in any Haven, River, Creek or Place where the Admiral or Admirals have or pretend to have Power, Authority or Jurisdiction, shall be inquired, tried, heard, determined and judged in such Shires and Places in the Realm as shall be limited by the King’s Commission or Commissions to be directed for the same, in like Form and Condition as if any such Offence or Offences had been committed or done in or upon the Land, and such Commissions shall be had under the King’s Great Seal, directed to the Admiral or Admirals, or to his or their Lieutenant Deputy and Deputies, and to three or four such other substantial Persons as shall be named or appointed by the Lord Chancellor of *England* for the Time being, from Time to Time and as oft as need shall require, to hear and determine such Offences after the common Course of the Laws of this Land used for Felonies, and Robberies, &c. done and committed upon the Land within this Realm.

And it is further enacted by the said Statute, ‘ That if any Person or Persons happen to be indicted for any such Offence done or hereafter to be done upon the Seas, or in any other Place above limited, that then such Order, Process, Judgment and Execution shall be used, had, done and made to and against every such Person and Persons, so being indicted, as against Felons, &c. for any Felony, &c. upon the Land, by the Laws of the Land is accustomed.

And it is farther enacted by the said Statute, ‘ That such as shall be convicted of any such Offence by Verdict, Confession, or Process by Authority of any such Commission, shall have and suffer such Pains of Death, Losses of Lands, Goods and Chattels, as if they had been attainted and convicted of such Offence done upon the Land, and also that they shall be excluded from the Benefit of the Clergy.

In the Construction of this Act the following Opinions have been holden:

That it does not alter the Nature of the Offence, so as to make that, <sup>3 Inst. 112.</sup> which was before a Felony only by the Civil Law, now become a Felony <sup>2 Hale's Hist. P. C. 370.</sup> by the Common Law; for the Offence must still be alledged as done upon the Sea, and is no way cognizable by the Common Law, but only by Virtue of this Statute; which, by ordaining that in some Respects it shall have the like Trial and Punishment as are used for Felony at Common Law, shall not be carried so far as to make it also agree with it in other Particulars which are not mentioned; and from hence (a) it follows (a) *Moor* 756. that this Offence remains as before, of a special Nature, and that it shall <sup>3 Inst. 112.</sup> not be included in a General Pardon of all Felonies. <sup>Co. Inst. 391.</sup>

From <sup>2 Hale's Hist. P. C. 370.</sup>

3 *Inst.* 112. From the same Ground also it follows, That no Persons shall in respect  
 1 *Hawk. P. C.* of this Statute be construed to be or punished as Accessories to Piracy be-  
 99. fore or after, as they might have been, if it had been made a Felony by  
 the Statute, whereby all those would incidentally have been made Acces-  
 sories in the like Cases in which they would have been Accessories to a  
 Felony at Common Law; and from hence it follows, that Accessories to  
 Piracy, being neither expressly named in the Statute, nor by Construction  
 included in it, remain as they were before, and were triable by the Civil  
 Law, if their Offence were committed on the Sea; but if on the Land,  
 by no Law, until 11 & 12 *H. 3. cap. 7.* for 2 & 3 *E. 6. cap. 24.* which  
 provides against Accessories in one County to a Felony in another, ex-  
 tends not to Accessories to an Offence committed in no County, but on  
 the Sea; but by the said Statute of 11 & 12 *H. 3.* they are triable in  
 like Manner as the Principals are by the Statute of 28 *H. 8.*

3 *Inst.* 112. From the same Ground also it follows, that an Attainder for this Of-  
 1 *Hawk. P. C.* fence corrupts not the Blood, in as much as the Statute only says, that  
 99. the Offender shall suffer such Pains of Death, &c. as if he were attainted  
 of a Felony at Common Law, but says not that the Blood shall be cor-  
 rupted.

3 *Inst.* 114. Yet it has been resolved, that an Offender standing Mute on an Ar-  
 1 *Dyer* 241. *pl.* raignment, by Force of this Statute, shall have Judgment of *Paine fort*  
 49. 308 *pl.* 73. & *dwe*; for the Words of the Statute are, *That a Commission shall be di-*  
*rected, &c. to hear and determine such Offences after the common Course of*  
*the Laws of the Land.*

3 *Inst.* 112. It has been holden, that the Indictment for this Offence must alledge  
 1 *Rot. Rep.* the Fact to be done on the Sea, and must have both the Words *Feloucie*  
 175. and *Piratie*; and that no Offence is punishable by Virtue of this Act as  
 1 *Hawk. P. C.* Piracy, which would not have been Felony if done on the Land, and  
 100. consequently that the Taking of an Enemy's Ship by an Enemy is not  
 within the Statute.

*Moore* 756. It is agreed, that this Statute extends not to Offences done in Creeks  
 1 *Rot. Rep.* or Ports within the Body of a County, because they are and always were  
 175. cognizable by the Common Law.  
 1 *Hawk. P. C.*  
 100.

11 & 12 *H. 3. cap. 7.* By the 11 & 12 *H. 3. cap. 7.* it is enacted, That all Piracies, Felonies  
 3. *cap. 7.* con- and Robberies committed in or upon the Sea, or in any Place where  
 1 *Geo. 1.* for the Admiral has Jurisdiction, may be tried and determined at Sea or  
 1 *Geo. 1.* for five Years, upon the Land, in any of his Majesty's Islands or Plantations, &c. to  
 1. made per- be appointed by the King's Commission under the Great Seal or the  
 petual. Seal of the Admiralty, directed to any of the Admirals, &c. and such  
 Persons and Officers by Name or for the Time being, as his Majesty shall  
 think fit, who shall have Power jointly or severally, by Warrant under  
 Hand and Seal of any of them, to commit any Person against whom  
 Information of any such Offences shall be given upon Oath, and to  
 call a Court of Admiralty, which shall consist of seven Persons at the  
 least, and shall proceed in the Trial of the said Offenders according to  
 such Directions as are set forth at large in the said Statute.

And it is farther enacted by the said Statute, *Sec. 8.* ' That if  
 ' any of his Majesty's natural-born Subjects or Denizens of this King-  
 ' dom shall commit any Piracy or Robbery, or any Act of Hostility,  
 ' against other his Majesty's Subjects upon the Sea, under Colour of any  
 ' Commission from any Foreign Prince or State, or Pretence of Autho-  
 ' rity from any Person whatsoever, such Offender and Offenders, and  
 ' every of them, shall be deemed, adjudged and taken to be Pirates, Fe-  
 ' lons and Robbers, and they and every of them, being duly convicted  
 ' thereof according to this Act, or the afore said Act of *H. 8.* shall have  
 ' and suffer such Pains of Death, Loss of Lands, Goods and Chattels,  
 ' as Pirates, Felons and Robbers upon the Seas ought to have and suffer.

And it is farther enacted by the said Statute, ‘ That if any Commander or Master of any Ship, or any Seaman or Mariner, shall in any Place, where the Admiral hath Jurisdiction, betray his Trust and turn Pirate, Enemy or Rebel, and piratically and feloniously run away with his or their Ship or Ships, or any Barge, Boat, Ordnance, Ammunition, Goods or Merchandize, or yield them up voluntarily to any Pirate, or bring any seducing Messuage from any Pirate, Enemy or Rebel, or consult, combine or confederate with or attempt, or endeavour to corrupt any Commander, Master, Officer or Mariner, to yield up or run away with any Ship, Goods or Merchandize, or turn Pirate, or go over with Pirates, or if any Person shall lay violent Hands on his Commander, whereby to hinder him from fighting in Defence of his Ship and Goods committed to his Trust, or that shall confine his Master, or make, or endeavour to make, a Revolt in his Ship, shall be adjudged to be a Pirate, Felon and Robber, and being convicted thereof according to the Directions of this Act, shall have and suffer Pains of Death, Loss of Lands, Goods and Chattels, as Pirates, Felons and Robbers upon the Seas ought to have and suffer.

And it is farther enacted by the said Statute, ‘ That all and every Person and Persons whatsoever, who shall either on the Land or upon the Seas wittingly or knowingly set forth any Pirate, or aid and assist, or maintain, procure, command, counsel or advise any Person or Persons whatsoever to do or commit any Piracies or Robberies upon the Seas, and such Person or Persons shall thereupon do or commit any such Piracy or Robbery, then all and every such Person or Persons whatsoever so as aforesaid setting forth any Pirate, or aiding or assisting, maintaining, procuring, commanding, counselling or advising the same, either on the Land or upon the Sea, shall be adjudged to be Accessory to such Piracy and Robbery done and committed. *And farther*, that after any Piracy or Robbery is or shall be committed by any Pirate or Robber whatsoever, every Person or Persons, who, knowing that such Pirate or Robber has done or committed such Piracy and Robbery, shall upon the Land or upon the Sea receive, entertain or conceal any such Pirate or Robber, or receive or take into his Custody any Ship, Vessel, Goods or Chattels which have been by any such Pirate or Robber piratically and feloniously taken, shall be by this Statute likewise adjudged to be Accessory to such Piracy and Robbery, and that all such Accessories to such Piracies and Robberies shall be inquired of, heard and determined, and adjudged according to the common Course of the Law, according to the said Statute of 28 H. 8. as the Principals of such Piracies and Robberies may be, and no otherwise, and being thereupon attainted shall suffer such Pains of Death, Loss of Lands, Goods and Chattels, and in like Manner as the Principals of such Piracies, Robberies and Felonies ought to suffer according to the said Statute of H. 8. which is declared to be in full Force; any Thing in this Act to the contrary notwithstanding.

And by 4 Geo. 1. cap. 11. ‘ All Persons, who shall commit any Offence for which they ought to be adjudged Pirates, Felons or Robbers by 11 11. 4 Geo. 1. cap. 11. and 12 H. 3. may be tried and judged for every such Offence, according to the Form of 28 H. 8. and shall be excluded from their Clergy.

By the 8 Geo. 1. cap. 24. for the more effectual Suppressing of Piracy, 8 Geo. 1. cap. 24. it is declared and enacted, ‘ That if any Commander or Master of any

Ship or Vessel, or any other Person or Persons, shall any wise trade with any Pirate by Truck, Barter, Exchange or in any other Manner, or shall furnish any Pirate, Felon or Robber upon the Seas with any Ammunition, Provision or Stores of any Kind, or shall fit out any Ship or Vessel knowingly, and with a Design to trade with or supply, or correspond with any Pirate, Felon or Robber upon the Seas; or if

‘ any Person or Persons shall any ways consult, combine, confederate or  
 ‘ correspond with any Pirate, Felon or Robber on the Seas, knowing him  
 ‘ to be guilty of any such Piracy, Felony or Robbery; such Offender  
 ‘ and Offenders, and every of them, shall in each and every of the said  
 ‘ Cases be deemed, adjudged and taken to be guilty of Piracy, Felony  
 ‘ and Robbery, and he and they shall and may be inquired of, tried, heard  
 ‘ and adjudged of and for all or any of the Matters aforesaid, according to  
 ‘ the Statute made 28 H. 8. for Pirates, and the Statute made 11 & 12  
 ‘ W. 3. and he and they being convicted of all or any of the Matters  
 ‘ aforesaid, shall suffer such Pains of Death, Loss of Lands, Goods and  
 ‘ Chattels, as Pirates, Felons and Robbers upon the Seas ought to suffer;  
 ‘ and in case any Person or Persons belonging to any Ship or Vessel what-  
 ‘ soever, upon meeting any Merchant Ship or Vessel on the High Seas,  
 ‘ or in any Port, Haven or Creek whatsoever, shall forcibly board or  
 ‘ enter into such Ship or Vessel, and, tho’ they do not seize and carry off  
 ‘ such Ship or Vessel, shall throw over board or destroy any Part of the  
 ‘ Goods or Merchandizes belonging to such Ship or Vessel, the Person  
 ‘ and Persons, who shall be guilty thereof, shall in all Respects be deemed  
 ‘ and punished as Pirates, as aforesaid.

And *Seet. 2.* it is farther enacted, ‘ That every Ship or Vessel, which  
 ‘ shall be fitted out with a Design to trade with, or supply or correspond  
 ‘ with any Pirate, and all and every Goods and Merchandizes put on  
 ‘ Board the same for any Intent or Purpose to trade with any Pirate,  
 ‘ Felon or Robber on the Seas, shall be *ipso facto* forfeited, one Moiety  
 ‘ thereof to the Use of the King’s Majesty, his Heirs and Successors,  
 ‘ the other Moiety to the Person or Persons who shall first make Disco-  
 ‘ very, and give Information of such Intent or Design; and such Person  
 ‘ or Persons, who shall first make such Discovery, shall and may sue for  
 ‘ and recover the said Ship or Vessel, and all and every the Goods and  
 ‘ Merchandizes on board the same, in the High Court of Admiralty.

And *Seet. 3.* ‘ Whereas there are some Defects in Laws for bringing  
 ‘ Persons who are Accessories to Piracy and Robbery upon the Seas to  
 ‘ condign Punishment, if the Principal who committed such Piracy and  
 ‘ Robbery is not or cannot be apprehended and brought to Justice, be it  
 ‘ therefore enacted, That all and every Person and Persons whatsoever,  
 ‘ who by the said Statute made 11 & 12 W. 3. are declared to be Acces-  
 ‘ sory or Accessories to any Piracy or Robbery therein mentioned, are  
 ‘ hereby declared and shall be deemed and taken to be Principal Pi-  
 ‘ rates, Felons and Robbers, and shall and may be inquired of, heard,  
 ‘ determined and adjudged in the same Manner, as Persons guilty of Pi-  
 ‘ racy and Robbery may and ought to be inquired of, tried, heard, deter-  
 ‘ mined and adjudged by the said Statute 11 & 12 W. 3. and being there-  
 ‘ upon attainted and convicted shall suffer such Pains of Death, Loss of  
 ‘ Lands, Goods and Chattels, and in like Manner, as Pirates and Rob-  
 ‘ bers ought by the said Act to suffer.

And *Seet. 4.* it is farther enacted, ‘ That all and every Offender or  
 ‘ Offenders convicted of Piracy, Felony or Robbery, by Virtue of this  
 ‘ Act, shall not be admitted to have the Benefit of Clergy, but be ut-  
 ‘ terly excluded of and from the same.

And *Seet. 5.* ‘ To the End that a farther Encouragement may be given to  
 ‘ all Seamen and Mariners to fight and defend their Ships from Pirates, it  
 ‘ is farther enacted, That in case any Seaman or Mariner on Board any  
 ‘ Merchant Ship or Vessel, or any other Ship or Vessel, shall be maimed in  
 ‘ Fight against any Pirate, every such Seaman and Mariner, upon due Proof  
 ‘ of his being maimed in such Fight, shall not only have and receive the  
 ‘ Rewards already appointed by a Statute made the 23 Car. 2. intituled,  
 ‘ *An Act to prevent the Delivering up of Merchant Ships, and for the Increase*  
 ‘ *of good and serviceable Seamen,* but shall also be admitted into, and pro-



vided for in *Greenwich Hospital*, preferable to any other Seaman or Mariner, who is disabled from Service or getting a Livelihood merely by his Age.

And *Secl. 6.* it is farther enacted, ' That in case any Commander, Master or other Officer, or any Seaman or Mariner of any Merchant Ship or Vessel, which carries Guns and Arms, shall not, when they are attacked by any Pirate, or by any Ship or Vessel on which any such Pirate is on Board, fight and endeavour to defend themselves and their said Ship or Vessel from being taken by the said Pirate, or shall utter any Words to discourage the other Mariners from defending the Ship, and by reason thereof the said Ship or Vessel shall fall into the Hands of such Pirate, then, and in every such Case, every such Commander or Master, or other Officer, and every Seaman or Mariner who shall not fight and endeavour to defend and save the said Ship or Vessel, or who shall utter any such Words as aforesaid, shall lose and forfeit all and every Part of the Wages due to him and them respectively to the Owner and Owners of the said Ship or Vessel, and shall not be permitted to sue for or recover the same, or any Part thereof, in any Court either of Law or Equity, and as a farther Punishment shall suffer six Months Imprisonment.

And *Secl. 7.* ' For Prevention of Seamen or Mariners deserting Merchant Ships or Vessels abroad in the Plantations, or in any other Parts beyond the Seas, which is the chief Occasion of their turning Pirates, and of great Detriment to Trade and Navigation, and is chiefly occasioned by the Owner or Owners of Ships or Vessels paying Wages to the Seamen or Mariners when abroad, it is enacted, That no Master or Owner of any Merchant Ship or Vessel shall pay or advance, or cause to be paid or advanced to any Seaman or Mariner, during the Time he shall be in Parts beyond the Seas, any Money or Effects upon Account of Wages, exceeding one Moiety of the Wages which shall be due at the Time of such Payment, until such Ship or Vessel shall return to *Great Britain or Ireland*, or the Plantations, or to some other of his Majesty's Dominions whereto they belong, and from whence they were first fitted out; and if any such Master or Owner of such Merchant Ship or Vessel shall pay or advance, or cause to be paid or advanced any Wages to any Seaman or Mariner above the said Moiety, such Master or Owner shall forfeit and pay double the Money he shall so pay or advance, to be recovered in the High Court of Admiralty by any Person who shall first discover and inform for the same.

*The End of the Third VOLUME.*

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